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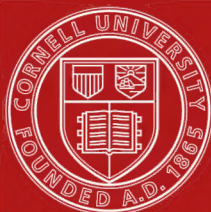
A. M. BOARDMAN and ELLEN D. WILLIAMS

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A practical treatise on the law relating



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A

PRACTICAL TREATISE

ON THE LAW

RELATING TO

TRUSTEES,

THEIR

POWERS, DUTIES, PRIVILEGES,
AND LIABILITIES.

BY JAMES HILL, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND FELLOW OF NEW COLLEGE, OXFORD.

SECOND AMERICAN EDITION,

CONTAINING THE NOTES TO THE FORMER EDITION,

BY FRANCIS J. TROUBAT,

WITH FULL NOTES AND REFERENCES TO ENGLISH AND AMERICAN DECISIONS,

BY HENRY WHARTON.

PHILADELPHIA:

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TO
THE HON. SIR WILLIAM ERLE,

ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS,

The following Work

IS

(BY PERMISSION)

MOST RESPECTFULLY DEDICATED

BY THE AUTHOR.

ADVERTISEMENT

TO THE SECOND AMERICAN EDITION.

THE present edition of "Hill on Trustees" contains, it is believed, full and accurate references to the American decisions and the more important statutes in the different States, and also to the principal English cases and statutes since the publication of the text, with regard to the subject of the work. Some of the notes upon topics incidentally treated of by the author, are rather more elaborated than would have been necessary if the American authorities thereon were fully collected elsewhere. The editor has to acknowledge the valuable aid which he has derived, on various points, from the notes of Judge Hare and the late Mr. Wallace to the "Leading Cases in Equity."

The notes and additions of the editor are distinguished, in general, from those of the author, by a division line at the foot of the original page. Some, however, to economize space, have been inserted in the author's notes; and these are enclosed within brackets. To the notes of Mr. Troubat the initial letter "T." has been subjoined. The paging of the First American Edition has been retained in the margin, as it is that which has been in use in the United States, and as the English paging had, unfortunately, not been preserved therein.

The references throughout the book, with the single exception of the Table of American Cases, are to the marginal or star paging.

HENRY WHARTON.

PHILADELPHIA, December, 1853.

P R E F A C E.

THE existence and established character of Mr. Lewin's very valuable "Treatise on the Law of Trusts and Trustees," may seem to call for some apology for the appearance of the present work. It might, perhaps, be sufficient for the writer to state that his own work had been commenced previously to the appearance of that of Mr. Lewin; but, in truth, it will be seen on examination that the object, as well as the arrangement, of the two treatises is very dissimilar in many material respects. The present work, as appears from its title, is written principally for the information and guidance of Trustees in the discharge of their office, and the Law of Trusts has not been gone into further than appeared absolutely essential for the development of that object. However, even with this limited purpose in view, a Treatise on the Law relating to Trustees involved, in a greater or less degree, the consideration of the whole Law of Real and Personal Property; and the difficulty of effecting a clear and continuous arrangement, which should embrace all the branches of the subject, is proportionably great. The defects on this point, as well as many of those attending the execution of the work, are sufficiently apparent even to the writer himself; but he feels that those who will discover the imperfections must also be sensible of the difficulty of avoiding them, and will, therefore, be disposed to make the requisite allowances, and with this conviction he has greater confidence in bringing his work before the public.

6 NEW SQUARE, LINCOLN'S INN,
26th May, 1845.

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- Page 57, 3d line from bottom, for "Got." read "Gill's Rep."
- | | | | |
|-------------|-----|---|--|
| " 62, 16th | " " | " | for "11 Dunlap," read "§ 11; Dunlop." |
| " 66, last | " " | " | after "ante," add "page 48." |
| " 126, 34th | " " | " | for "Balvin v. Johns," read "Baldwin v. Johnson, Saxton, 441." |
| " 169, 2d | " " | " | for "2 E. & J. Ch.," read "22 L. J. Ch." |
| " 177, last | " " | " | for "note 2, page 66," read "note to page 79." |
| " 231, 17th | " " | " | before "14 Penn. St., &c.," insert "10 Barr. 285." |
| " 508, 4th | " " | " | for "4 Rand.," read "6 Rand." |
| " 558, 21st | " " | " | for "1850," read "1853." |

A T R E A T I S E

ON THE

LAW RELATING TO TRUSTEES,

ETC., ETC.

I N T R O D U C T I O N .

A TRUSTEE, in the widest meaning of the term, may be defined to be, "A person, in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another."

This definition, however, would include executors and administrators, guardians of infants, and committees of lunatics, as well as assignees in bankruptcy and insolvency, and others filling any fiduciary situation. It would also extend to bailees, factors, and agents, whose duties in their fiduciary characters are recognised, and enforced at common law. But the term "trustee" in its more defined acceptation has acquired a meaning distinct from any of those characters; the persons filling which are also amenable to other jurisdictions, besides that of the Court of Chancery. It is not intended that those branches of the subject should be objects of discussion in the following pages, which will be confined to the law relating to trustees in the usual and more restricted meaning of the term, against whom the only remedy is by the writ of *subpœna* issuing from the Court of Chancery.

In consequence of the strict construction put upon the Statute of Uses by the judges of the day, the estate of the old feoffee to uses was preserved with little alteration in that of the modern trustee.^(a) However, the courts of equity, in the exercise of their new jurisdiction, avoided in a great degree those mischiefs, which had made uses

^(a) Bl. Com. 333; Co. Litt. 290, b; Bull. n. l. 3; 2 Fonbl. Eq. B. 2, Ch. 1, s. 4; *Hopkins v. Hopkins*, 1 Atk. 591.

intolerable.(b) This new species of estate was gradually modified and altered to meet the continual changes in the state of society, and the progressive wants of the community; and it has been applied by analogy to personal property, as well as to a great variety of cases [42] which never could have been in the *contemplation of those by whom it was originally introduced.(c) In the existing state of society, it is difficult to conceive how the requisite circulation of property could be established and maintained without the interposition of some such machinery as the system of trustees readily supplies. The utility of this system, and its adaptation to the wants of the community, is sufficiently shown by its almost universal prevalence. A vast portion of the property of the country is at this moment vested in trustees, and the variety and daily increasing number of associations and institutions, which afford an employment for capital, is continually adding to the extent and importance of this branch of our national jurisprudence.

Courts of equity, from their inherent jurisdiction, assumed from the beginning the exclusive control over trustees in the discharge of their duties, whether affecting real or personal estate.¹ There are few cases arising from matters of trust (with the exception of bailments, and rights founded on contract), of which the courts of common law are capable of taking cognizance.(d) In the exercise of this jurisdiction certain rules have been established by the practice of the courts; and it has been remarked by Lord Hardwicke, "that these rules should not be laid down with a strictness, to strike terror into mankind, acting for the benefit of others, and not for their own; and that as a trust is an office, necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it! To add hazard or risk to that trouble, and to subject a trustee to losses, which he could not foresee, and consequently could not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office."(e)

A recent eminent writer on Equity Jurisprudence,(f) whilst ad-

(b) 2 Bl. Com. 336.

(c) 2 Stor. Eq. Jur. § 969.

(d) 3 Bl. Com. 431; Co. Litt. 290, b;

Butl. note; 2 Fonbl. Eq. b. 2, Ch. 1;

2 Stor. Eq. Jur. § 962.

(e) Knight v. Earl of Plymouth, 1

Dic. 126; S. C. 3 Atk. 480.

(f) 2 Stor. Eq. 480.

¹A court of admiralty, though influenced in the determination of cases by equitable considerations, and taking notice of equitable titles when arising incidentally, has no direct jurisdiction over trusts as such; and where a trust is the foundation for relief, the libellant states himself out of court. Davis v. Child, Daveis's Rep. 71; Berkhard v. Flyne, 6 Moore Priv. Coun. Cas. 56.

mitting the propriety of these remarks, adds a doubt, whether the courts of equity have always proceeded upon the broad and liberal basis, which the observations of Lord Hardwicke tend to establish; and he remarks upon what he terms "the artificial rules" established by the courts, in the exercise of their control over the conduct of trustees.⁽¹⁾ However this may *be, it is obviously of [*43] the greatest importance in the numerous transactions which are of daily occurrence, that the law, as settled by these rules, should be accurately ascertained and universally known; and this it has been imperfectly attempted in the following pages, to collect and methodize from the several decided cases.

(1) The author's reference to the page of Story is inaccurate; it should be p. 514, § 1272, *et seq.* The language of the late learned judge is as follows:—"The true result of the considerations, here suggested, would seem to be, that where a trustee has acted with good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property, see *Hart v. Ten Eyck*, 2 Johns. Ch. R. 76; *Thompson v. Brown*, 4 Id. 619, 629. On the contrary, courts of equity have laid down some artificial rules for the exercise of the discretion of trustees, which import (to say the least) extraordinary diligence and vigilance in the management of the trust properly." And then, in order to exemplify the *artificiality* alleged, he proceeds to quote cases of the *investment* of trust funds by the trustees in stock or personal securities who were held accountable for a depreciation or loss, although no *mala fides* existed, and no negligence could be imputed. It is evident that these, not being cases of management of the trust, but investment of the fund, without the aid of the court, do not establish the position of the late Mr. Justice Story. Indeed, all the opinions which he cites and all the doctrine he reasons out, show conclusively that the rules of equity, in the matter of *investment*, are not artificial, but the reverse; they are the simple and natural evolutions of the system proposed for the prevention of constructive frauds. In this country, particularly, where trusts of all kinds are sought as a source of emolument, the rules animadverted on should be preserved in their most stringent tendency, for they clearly must prevent *speculation* by the trustee with the funds committed to his care. In England, where ALLOWANCES to trustees are more restricted, and commissions are only granted in a few specified cases (*vide post*, p. 597, 598), there might seem to be some plausible ground for a relaxation of the strictness of the rules; but in the United States it is best—to adopt the language of the same eminent writer, "to act under the direction of a court of equity, which trustees at all times have a right to ask." (2 Sto. Eq. 518, n.) in the matter of lending trust money.—T.

BEFORE the relation of trustee can be constituted, there must necessarily exist: 1st. A subject-matter proper for a trust; 2d. A person competent to create the trust; 3d. One capable of holding property as trustee; and 4th. A person for whose benefit the trust-property may be held, who is known by the somewhat barbarous appellation of "*cestui que trust*."

I.—WHAT MAY BE THE SUBJECT-MATTER OF A TRUST.

All property of a valuable nature, not only everything that may be legally transferred or disposed of, but also many things which the rules of common law do not recognise as available property, or at any rate do not permit to be dealt with by assignment; such as choses in action, and possibilities of every description,¹ as well as mere naked persons and authorities, may be made the subject-matter of a trust.(a)

Although the courts of equity in England cannot in suits concerning lands situated out of the limits of their jurisdiction make any decree directly affecting the realty,(b) yet they will support a trust

(a) 1 Cruis. Dig. Tit. 12, Ch. I.; Hobson v. Trevor, 2 P. Wms. 191; Wright v. Wright, 1 Ves. sen. 411. [Wetherhed v. Wetherhed, 2 Sim. 183; Douglass v. Russell, 4 Sim. 524; Langton v. Horton, 1 Hare, 549.] Carteret v. Petty, 2 Sw. 323, n. [See Bunbury v. Bunbury, 3 Jur. 644, 1 Beav. 318; Bent v. Young, 9 Sim. 190; Houlditch v. Donegal, 8 Bligh N. S. 344; Portarlington v. Soulby, 3 My. & K. 108; Henderson v. Henderson, 3 Hare,

(b) E. of Kildare v. Eustace, 1 Vern. 115; Preston v. Melville, 15 Sim. 85.] 421; Roberdeau v. Rous, 1 Atk. 543;

¹ As to how far possibilities and expectancies are assignable in equity, see Mitchell v. Winston, 2 Story, 630; 6 Bost. Law Rep. 347; Letcher v. Schroeder, 3 J. J. Marsh. 11; Varich v. Edwards, 1 Hoff. Ch. 382; Merriweather v. Herraw, 8 B. Monr. 162; Story's Equity, § 1040 (b.), 1055; 12 Jur. Part II. 213; Notes to Row v. Dawson, 2 Lead. Cases, Equity, *573. A growing crop of cotton may be the subject of a trust, Robinson v. Maulden, 11 Alab. 980; as may the receipt for a medicine, Green v. Folgham, 1 S. & St. 398.

of such lands against a trustee resident within the jurisdiction by a decree operating *in personam*.^(c) Thus, questions involving trusts of real property in Ireland,^(d) in the Island of Sark,^(e) and the West Indies,^(f) have been entertained by the Court of Chancery here; and it seems, that a similar jurisdiction would be exercised in the case of lands within the dominions of a foreign state.^(g)¹

(c) *Penn v. Ld. Baltimore*, 1 Ves. 214; *E. of Arglasse v. Muschamp*, 1 sen. 454; *Com. Dig. (Chancery)*, 3 Vern. 75.
X., 4 E., 4 W. 27.

(e) *Toller v. Carteret*, 2 Vern. 495.

(d) *E. of Kildare v. Eustace*, 1 Vern. 421; *Cartwright v. Pettus*, 2 Ch. Ca. Ves. 182.

(f) *Ld. Cranstoun v. Johnston*, 3

(g) *Angus v. Angus*, 1 West. 23.

¹It is clearly settled in the United States, that in cases of fraud, accident, or trust, equity will interfere, though the property to be affected, be in another state or country, where the principal defendants are served with process, and where adequate relief can be given by a decree *in personam*. According to the nature of the case, the court will direct the property to be brought within the jurisdiction, order a deed to be cancelled, or a conveyance to be executed, in accordance with the law of the place where the land, if it be such, is situated. *Farley v. Shippen*, Wythe, 125; *Massie v. Watts*, 6 Cranch, 148; *Ward v. Arredondo*, 1 Hopk. 513; *Meade v. Merritt*, 2 Paige, 606; *Howell v. James*, 7 Paige, 213; *Shattuck v. Cassidy*, 3 Edw. Ch. 154; *De Klyn v. Watkins*, 3 Sandf. Ch. 185; *Barclay v. Tallman*, 4 Edw. Ch. 126; *Spear v. Scoville*, 3 Cush. 581; *Saufhan v. Barclay*, 6 Whart. 392; *Guerrant v. Fowler*, 1 H. & Munf. 5; *Episcopal Church v. Wiley*, 2 Hill Ch. (S. C.) 586. It is not necessary to the exercise of this power, that the defendant should be domiciled at the place of the *forum*; a bill will be entertained though all the parties be foreigners, and in such a case, a *ne exeat* may be granted. *Mitchell v. Bunch*, 2 Paige, 606. So in the case of a resulting trust to heirs-at-law (*Hawley v. James*, 7 Paige, 213), or of a direction to executors to sell lands in another state, *Campbell's case*, 2 Bland. 209. In *Shattuck v. Cassidy* (3 Edw. Ch. 154), trustees appointed under an Act of the Legislature of New Jersey, to sell lands in that State, were decreed to execute a contract made by them in New York, with respect thereto. A very decided opinion was expressed by the Vice-Chancellor in *Barclay v. Tallman* (4 Edw. Ch. 126), where an Insurance Company, incorporated in Maryland, but doing business in New York, made an assignment for the benefit of creditors, that a bill would lie against the trustees in New York, for the purpose of protecting and enforcing the trust. It was sufficient that either the person or property was within the jurisdiction. But see *Williams v. Maus*, 6 Watts, 278.

But in order to induce the court to interfere in such cases, it must be competent to administer the appropriate equity required by the case, and capable of giving effect to the decree. *Bank of Virginia v. Adams*, 1 Pars. Eq. 547; *Morris v. Remington*, 1 Pars. Eq. 397. Where called upon to act directly on the land itself, or to affect the title thereto, it will refuse its aid. *Blount v. Blount*, 1 Hawks, 376; *Walker v. Ogden*, 1 Dana, 252. In *Williams v. Mause*, 6 Watts, 278, it was held that the appointment of a trustee by the court of another state, in the room of a deceased trustee, to whom land in Pennsylvania had been conveyed, vested no title in the former. See further on this subject Story's Equity,

According to the law of England, and of almost every other country, personal property has no locality; but is subject to the law; which governs the person of the owner. It follows that the [*45] foreign personal property of *a British subject may properly become the object of a trust, which will be recognised in this country. (h)

But no valid trust can be founded on an interest derived from an illegal contract, or established in contravention of the general policy of the law. (i) Thus in the case of an officer's half pay; (k) or a goaler's fees; (l) or a right to property depending on the issue of a suit then pending; (m) or any interest, the assignment of which is forbidden by the law on the ground of public policy; (n) the court will not recognise any trust, which is attempted to be attached on a disposition of such property,—for such a trust would be in direct violation of those rules of law.¹

Copyholds were not comprised in the Statute of Uses; (o) but it has long been settled, that they may be subject to a trust; and the trust will be binding on the lord, if taken notice of on the court

(h) Smith. Merc. Law, 567; Hill v. Reardon, 2 Russ. 608, 629.

(i) Exp. Dyster, 1 Mer. 172; Curtis v. Perry, 6 Ves. 739; Exp. Houghton, 17 Ves. 251; Campbell v. Thompson, 2 Hare, 140.

(k) Stone v. Lidderdale, 2 Anst. 533. [See Price v. Lovett, 4 Eng. L. & E. 110.]

(l) Mithwold v. Walbank, 2 Ves. sen. 238.

(m) Stevens v. Bagwell, 15 Ves. 156. [See 4 Kent Comm. 448; and note to 3 Ves. 494, Sumner's ed.]

(n) Stone v. Lidderdale, *ubi supra*.

(o) Gilb. Ten. 170; Co. Litt. 271, b, n. 1, VIII.

§ 743, 899; Chalmers v. Hack, 19 Maine, 124; Ditchen v. King, 3 J. J. Marsh, 186; Ring v. McCoun, 3 Sandf. S. C. 524.

Though there has been considerable conflict of authority as to the extent to which an executor or administrator is liable to account for assets beyond the jurisdiction, it seems settled that where he is a mere trustee, or as to matters not involved in the administration account, as rents of freehold estate, the locality of the property will be not material. Gardiner v. Fell, 1 Jac. & W. 24; Atchison v. Lindsey, 6 B. Monroe, 88; Allsup v. Allsup, 7 Hump. 284.

¹ See notes to Row v. Dawson, 2 Lead. Cas. in Eq., (1st Am. Ed. Part II. 217, 223; Hunter v. Marlboro, 2 W. & M. 168; Murphy v. Hubert, 16 Penn. St. R. 500.

Where the trusts declared in a deed are divisible into distinct parts, a Court of Equity will exercise a discrimination, so as to uphold them in part, though some of the provisions may be illegal and void. Greenfield's Estate, 14 Penn. S. R. 480; Dupre v. Thompson, 4 Barb. S. C. 279; Lorillard v. Coster, 5 Paige, C. R. 172; Howley v. James, 5 Paige, C. R. 310; 16 Wend. 61; Grout v. Van Schooneven, 1 Sandf. 336; Craftin v. Frith, 3 Eng. E. & L. 162; Vail v. Vail, 7 Barb., S. C. 226. But where the trusts are indivisible, or the main object of the conveyance or devise is defeated, the whole will be declared void. Arnold v. Gilbert, 3 Sandf. Ch. 532; Andrews v. Bible and Prayer Book Soc., 4 Sandf. S. C. 156. In Tritt v. Crotzer, 13 Penn. St. R. 451, it was held that a conveyance to a trustee, with the intent to avoid the collateral inheritance tax, vested the estate on the grantor's death, subject to the tax, without invalidating the trust.

rolls.(p) Previously however to the passing of the statute 4 & 5 Will. IV. c. 23, it seems that copyholds would not have been bound by a trust, in case they had escheated to the lord by the failure or forfeiture of a trustee, where the admission of the trustee was expressed on the rolls to be absolute.(q) But this distinction is done away with by that statute, which empowers the Court of Chancery, in all such cases, to enforce the execution of trusts of copyholds in favor of the parties beneficially interested.

II.—WHO MAY CREATE A TRUSTEE.

With regard to the capacity of creating a trustee (independently of any power, conferred by a previous instrument, which will be the subject of future consideration), it may be broadly stated, that every person, who is capable of making a valid disposition of property of any description, has also the power of attaching such limitations or declarations to the act of disposition, as will convert the person taking the legal estate into a trustee for the parties to whom the beneficial interest is given.

The estate of the trustee, if created by persons not *sui juris*, will be valid only to the extent of their legal capacity to convey.

Therefore an appointment by a *feme covert* of a trustee of her real estate, must be executed with the formalities required by the recent act for the abolition of fines and recoveries.(1)

So, where an infant makes over property to a person upon trusts, by any act of assurance, which is voidable only, and not void, the estate of *the trustee will remain good, until the assurance [*46] be avoided.(r)¹ Although it might be a question, whether a resulting trust would not arise in such a case in favor of the infant.(s) Previously to the statute 1 Vict. c. 26, an infant of the age of four-

(p) *Burgess v. Wheate*, 1 Ed. 232; (r) *Co. Litt.* 248, a; *Hearle v. Green-Weaver v. Maule*, 2 R. & M. 97. bank, 1 Ves. 304.

(q) *Att.-Gen. v. D. of Leeds*, 2 M. & (s) 4 *Cruis. Dig.* 130.
K. 343.

(1) But a *feme covert*, with respect to property settled to her separate use, is regarded in equity as a *feme sole*. She may therefore convey her equitable interest in such property, whether real (*Major v. Lansley*, 2 R. & M. 355) or personal (*Fettiplace v. George*, 1 Ves. sen. p. 46), to trustees, for the benefit of herself or others, as effectually as if she were unmarried. [See note, post, page 421.]

¹ 1 *Kent*, 234; *Eagle Fire Co. v. Lent*, 1 *Edw. Ch.* 301; 6 *Paige*, 305; *Ins. Co. v. Grant*, 2 *Edw. Ch.* 544; *Temple v. Hawley*, 1 *Sand. Ch.* 153; *McGour v. Marshall*, 7 *Humph.* 121. The deed of an infant *feme covert*, however, is absolutely void. *Sandford v. Mehean*, 3 *Paige*, C. R. 117; *Kenney v. Udall*, 5 *J. C. R.* 464; *Schrader v. Decker*, 9 *Barr.* 14.

teen years might have appointed a trustee of personal estate by will;(t) but now, by the 7th sect. of that act, it is declared, that no will, made by any person under the age of twenty-one years, shall be valid.

A person *non compos mentis*, being in general incapable of disposing of his property by deed or contract, cannot appoint a trustee. But it seems that a feoffment by such a person, with livery of seisin, cannot be avoided by him at law, although his heirs may enter after his death.(u) However, it is conceived (from analogy to the case of a declaration of uses on a fine, levied by a person in a similar state of incapacity), that no declaration of trusts on such a feoffment could be supported in equity, which in such a case would raise a resulting trust in favor of the feoffer.

Previously to the statute for the abolition of fines and recoveries, if an infant, or an idiot, or lunatic, were permitted to levy a fine, or suffer a recovery, and he made a declaration of its uses, the estate so created would be good at law, until the fine or recovery were reversed.(x) But in cases of that nature a court of equity would unquestionably interpose the doctrine of resulting trusts, and would relieve against the parties taking the legal estate, by treating them as trustees for the person making the conveyance.(y) This, however, applies to the question of the creation of trustees by implication, which will be considered in a future place.¹

Before the Statute of Uses the sovereign might have declared uses upon his letters patent.(z) By common law, and also by statute 39 & 40 Geo. III. c. 88, he has the power of disposing of his personal estate by will;(a) and there can be little doubt, but that any declaration of trust, made upon a valid legal transfer of property by the sovereign, would be capable of being enforced in a court of equity. Thus, the validity of a grant of the Deccan prize-money, by a war-

(t) *Hearle v. Greenbank*, 1 Ves. sen. 303; *Lew. Trust*. 24.

(u) *Co. Litt.* 247, b. [See *Gibson, C. J.*, in *Snowden v. Dunlevy*, 1 Jones (Penna.) 525.]

(x) 2 Rep. 58, a; 4 Rep. 124; *Bac. Uses*, 355; *Sand. Us.* 214.

(y) 4 *Cruis. Dig.* 130; 5 *Ib.* 253.

(z) *Bac. Us.* 66; *Sand. Us.* 215.

(a) 1 *Wms. Exors.* 11.

¹ The principle that a man cannot stultify himself is not in general recognised in the United States. *Ballou v. Clark*, 2 *Iredell Rep.* 23; *Owing's case*, 1 *Bland.* 370; *Harrison v. Lemon*, 3 *Black.* 51; *Rice v. Peet*, 15 *J. R.* 503; *Grant v. Thompson*, 4 *Conn.* 203; *Bensell v. Chancellor*, 5 *Whart.* 371; *Alston v. Boyd*, 6 *Humph.* 504; 2 *Kent Com.* 451. The acknowledgment of a deed by a lunatic in open court, is not equivalent in its effect to a fine. *Milner v. Turner's heirs*, 4 *Monroe*, 245. A lunatic's conveyance is, however, voidable only, and not absolutely void, in the absence of fraud or notice. *Breckenridge v. Ormsby*, 1 *J. J. Marsh.* 240; *Allis v. Billings*, 6 *Metc.* 415; *Price v. Berrington*, 15 *Jur.* 599; 7 *Eng. L. & E.* 259 (*semble*); see *Molten v. Camrous*, 2 *Exch.* 487; 4 *Exch.* 167. *Contra*, *Desilver's estate*, 5 *Rawle* 162; and see *Bensell v. Chancellor*, 5 *Wh.* 376; though this case can hardly be reconciled with *Beals v. See*, 10 *Barr.* 60.

rant under the royal sign-manual to trustees for certain purposes, was not disputed in a recent case; (b) although it was determined, that no definite right had been conferred by the warrant upon the *cestui que trusts*, which could be enforced by them against the trustees. (1)¹

In like manner all corporations of every description, subject to the restrictions imposed by the disabling statutes, have at law a general right of alienating their property: (c) and their consequent power of appointing *trustees, on any disposition made by [*47] them, is coextensive with this right. (d)²

No alien is capable of holding *real* property in this country. (e) He has no ability to make a feoffment, grant, or lease; (f) nor can he confer any legal or equitable right or interest in real estate by contract, or other disposition. An alien *enemy*, unless residing in this country with the king's license express or implied, is equally incapable of holding or disposing of any *personal* property. But an alien *friend* may acquire property in goods, money, and other personal estate, except chattels real, with the same powers of disposition as a British subject. He may therefore convey such property upon trusts, either by act *inter vivos*, or by will. (g)³

Attainder for treason or felony works a forfeiture of the real estate of the offending party, which has relation backwards to the time when the act was committed; (h) and it would therefore invalidate any conveyance upon trusts, made by the attainted party subsequently

(b) *Alexander v. D. of Wellington*, 1 R. & M. 35; vide et *Stevens v. Bagwell*, 15 Ves. 152. (e) Com. Dig. (Alien), C. 4; 1 Bl. Com. 371.

(c) *Mayor of Colchester v. Lowten*, 1 V. & B. 226. (f) Co. Litt. 42, b. (g) Com. Dig. (Alien), C. 5, 7; 1 Bl. Com. 372.

(d) *Att.-Gen. v. Aspinwall*, 2 M. & Cr. 613; *Att.-Gen. v. Wilson*, 1 Cr. & Ph. 1. (h) 4 Bl. Com. 380.

(1) By the statute 39 & 40 George III. c. 88, the sovereign is authorized to grant trust property, which has escheated to the crown, to trustees, for the purpose of executing the trusts.

¹ A State may appoint trustees, and convey in trust, *Commiss. v. Walker*, 6 How. Miss. 143; but it cannot remove those of a private corporation or appoint new ones. *State v. Bryan*, 7 Hamm. 82 (pt. 2.) See *Dartmouth College v. Woodward*, 4 Wheat. 578.

² *Catlin v. Eagle Bank*, 6 Conn. 233; *State of Maryland v. Bank of Maryland*, 6 Got. 206; *Dana v. Bank of U. S.*, 5 W. & S. 224; *Arthur v. Comm. Bank*, 9 S. & M. 391; *Barry v. Merchants' Exch. Co.*, 1 Sandf. C. R. 280; *Hopkins v. Turnpike Co.*, 4 Hump. 403; *Reynolds v. Stark County*, 5 Hamm. 207; *Angell on Corporations*, 153.

³ See 2 Kent's Comm. 53. In *Legget v. Dubois*, 5 Paige, 114, it was held that where an alien purchased land in the name of another, there was no resulting trust.

to the commission of the crime. However, by the statute 54 Geo. III. c. 145, "no attainder for felony, except high treason, petit treason, or murder, shall extend to the disinheriting any heir, nor to the prejudice of any other person than the offender himself during his life." It follows therefore, that a *bona fide* conveyance upon trusts by an attainted person who comes within the operation of that act, would be supported to the extent of any interest given after his decease.

The forfeiture of goods and chattels takes effect on the conviction of the party of treason or felony, and has no relation backwards: therefore a traitor or felon may, if *bona fide* and for a good consideration, convey his personal property to trustees for other persons at any time before his conviction. But if the transaction be collusive, the law, and particularly the statute 13 Eliz. c. 5, will reach them, and recover them for the king.(i)

Outlaws also, though it be but for debt, are incapable during their outlawry, of appointing trustees of their personal property by act *inter vivos* or will;(k) for their goods and chattels are forfeited during that time.

By the operation of the Bankruptcy Acts,(l) the whole present property of a bankrupt, as well as what he may acquire before obtaining his certificate,¹ becomes *ipso facto* vested in his assignees by virtue of their appointment. An uncertificated bankrupt is therefore disabled from passing any interest in property, to any other person, either as trustee or otherwise. However, it seems that his right to his allowance, and the surplus of his estate, is an interest that remains vested in him with all the incidents of property.(m) It follows, that a bankrupt may make a valid disposition of such an interest, either upon trusts or otherwise.

[*49] *By a recent act for abolishing arrest on *mesne* process (1 & 2 Vict. c. 110, s. 27), the order of the Insolvent Court made upon the petition of a prisoner, has the effect of vesting in the provisional assignee the whole real and personal estate of the insolvent, either present, or what he may acquire before he becomes entitled to his final discharge. An insolvent therefore, subsequently

(i) 4 Bl. Com. 387; Perkins v. Bradley, 1 Hare, 219.

(k) 2 Bl. Com. 499; and see Attorney-General v. Richards, 8 Jurist, 230; 8 Beav. 380.

(l) 6 Geo. IV. c. 16, ss. 63 to 68; 1 & 2 Will. IV. c. 56, ss. 25 and 26.

(m) Ex parte Safford, 2 Gl. & J. 128.

¹ Under the 3d Section of the Bankrupt Act of 1841, it was held that property acquired by a bankrupt between the time of his discharge, and his certificate, did not pass to the assignees. In the matter of Grant, 5 Bost. Law Rep. 11; 2 Story, 812; Mosly v. Stell, 7 Alab. 300; see ex parte Newhall, 2 Story, 360.

to such an order, is equally incapacitated with an uncertificated bankrupt from conveying property to a trustee.¹

III.—WHO MAY BE A TRUSTEE.

There is no equitable doctrine more firmly established, than that a trust, once properly created, shall never fail on account of the death, disability, or non-appointment, of the trustee. The court will in all cases follow the subject-matter of a trust into the hands of the holder, unless he be a purchaser for valuable consideration without notice, and treat him as a trustee.(n)

However, it very rarely happens that a trust is declared, without a contemporaneous appointment of a trustee for its execution, who, unless otherwise incapacitated, will take the legal interest in the property subject to the performance of the trust. And it may be stated generally, that all persons, who are capable of taking a beneficial interest in property, as well as some others besides, may hold as trustees for other persons.(o)

Thus *femes covert* infants, idiots, and lunatics, and other persons who are *non sui juris*, may become trustees, subject of course to their legal incapacity to deal with the estate vested in them; wherever that incapacity has not been relieved by the remedies devised by the legislature for that purpose.²

And there is no question, but that a husband may hold property as a trustee for the separate use of his wife.(p)

When trusts were first introduced, it was held, that none but those who were capable of being seised to an use, could be trustees: this doctrine however has been long since exploded.(q)

(n) *Att.-Gen. v. Downing*, Amb. 550; 6 Barb. S. C. 492; *Crochteron v. Jaques*, Bennet v. Davis, 2 P. Wms. 316; 3 Edw. Ch. 207; and see post, 171.]
 (o) 2 Fonbl. Eq. 139 n.
 (p) Bennet v. Davis, 2 P. Wms. 316.
 (q) *Shirley v. Shirley*, 9 Paige Ch. 363; *Jameson v. Brady*, 6 S. & R. 467; *Boyd v. Ciples*, 2 Hall Ch. 200; *Picquet v. Swann*, 4 Mason, 455; *Griffith v. Griffith*, 5 B. Monr. 113; 2 Kent, 163.]
 (n) *Att.-Gen. v. Downing*, Amb. 550; 6 Barb. S. C. 492; *Crochteron v. Jaques*, Bennet v. Davis, 2 P. Wms. 316; 3 Edw. Ch. 207; and see post, 171.]
 (o) 2 Fonbl. Eq. 139 n.
 (p) Bennet v. Davis, 2 P. Wms. 316.
 (q) *Shirley v. Shirley*, 9 Paige Ch. 363; *Jameson v. Brady*, 6 S. & R. 467; *Boyd v. Ciples*, 2 Hall Ch. 200; *Picquet v. Swann*, 4 Mason, 455; *Griffith v. Griffith*, 5 B. Monr. 113; 2 Kent, 163.]
 (q) 1 Sand. Us. 348.

¹ See *Williams v. Chambers*, 10 Q. B. 337; *Rochfort v. Battersby*, 2 House of Lords Cases, 388.

² *Clarke v. Saxon*, 1 Hill Ch. 69; *Bradish v. Gibbs*, 3 J. C. R. 523; *Livingston v. Livingston*, 2 J. C. R. 541; *Dundas v. Biddle*, 2 Barr. 160; *Eyrick v. Hetrick*, 1 Harris (Penna.) 494; or one found habitually drunk. *Webb v. Deitrick*, 7 W. & S. 401. So a *nun* may be a trustee in Maryland; *Smith v. Young*, 5 Gill. 197.

Thus it has long been settled, that a corporation may be a trustee in the same manner as an individual.^(r)¹ And corporations may to this day be constituted trustees of personal property to the same extent as private persons;^(s) but in consequence of the Statutes of Mortmain, unless a corporate body possess a license from the crown, it cannot now acquire or hold fresh real estate, either beneficially, or as a trustee for the benefit of others. Thus a devise of lands to a body corporate on trust is void at law, and the legal estate descends [*49] to the heir-at-law: but the trust, if *sufficiently created, will in such a case fasten itself upon the estate, and the heir will be decreed to be a trustee to the uses of the will.^(t)²

It does not appear to have been ever directly decided, whether a trust could be enforced against any property, either real or personal, in the hands of the sovereign. There are not wanting *dicta* in

(r) *Green v. Rutherford*, 1 Ves. sen. 468; *Att.-Gen. v. Foundling Hospital*, 2 Ves. jun. 46; *Att.-Gen. v. Landerfield*, 9 Mod. 287.

(s) *Att.-Gen. v. Ironmongers' Co.*, 2 Beav. 313.

(t) *Powley v. Clock-makers' Co.*, 1 Bro. C. C. 81.

¹ So in the United States generally. *Trustees of Phillips Academy v. King*, 12 Mass. 546; *Vidal v. Girard*, 2 How. U. S. 187; *Miller v. Lerch*, 1 Wall, jr. 231; *Columbia Bridge Co. v. Kline*, Bright. N. P. 320; *Angell on Corp.* 124. If the trusts be repugnant to or inconsistent with the proper purposes for which the corporation was created, it has been ruled by the Supreme Court of the United States, that though it may not be compellable to execute them, they will not therefore be held void; a new trustee will be appointed. *Vidal v. Girard, ubi sup.* In New York, however, a different rule has been adopted, at least with regard to charitable uses. It has been there held that where a legacy is given to a corporation in trust for an authorized pious use, and also for a use foreign and extrinsic to those which the corporation can execute by law, the trust, being entire and indivisible, is entirely void; and the trust results to heir-at-law. *Andrews v. Bible Soc.*, 4 Sandf. S. C. 156; *Ayres v. Methodist Ch.*, 3 Sandf. S. C. 352. In Pennsylvania an unincorporated society may be trustee for a charity, *Pickering v. Shotwell*, 10 Barr. 27; *Magill v. Brown*, Bright. N. P. 350. So in Massachusetts it has been ruled that a legacy to an unincorporated association, with a direction that it should go to the treasurer for the time being, is good. *Tucker v. Seaman's Aid Society*, 7 Metc. 188. The Statutes of Mortmain are not adopted in the United States in general (2 Kent Com. 282); but were declared to be in force in Pennsylvania by the Report of the Judges, 3 Binney App. 626; and assumed to be so in several Acts of Assembly, particularly that of April 6th, 1833; though this has been denied, *Vidal v. Girard*, 2 How. 187; *Magill v. Brown*, Bright. N. P. 350. But at any rate, a purchase of land by a corporation will be good against all but the State, even under the Act of 1833. *Runyan v. Coster's lessee*, 14 Pet. 122; *Miller v. Lerch*, 1 Wall, jr. 321; *Leazure v. Hillegas*, 7 S. & R. 321.

² In *Mitchell v. Reynolds*, 1 Phill. 185, it was held that the Governor-General of India, and in *Nightingale v. Gouldburn*, 2 Phill. 594; 5 Hare, 484, that the Chancellor of the Exchequer of England for the time being, might be respectively trustees for public charitable uses.

favor of the affirmative of this proposition. Thus, in *Penn v. Baltimore*, Lord Hardwicke, after observing that the Duke of York, while a subject, was to be considered as a trustee; adds, "why not afterwards as a royal trustee? It is a notion established in courts of revenue by modern decisions, that the king may be a royal trustee."^(u) And apparently, on the authority of these cases, it has been laid down in treatises of established authority, that the king may be a trustee.^(x) In the great case of *Burgess v. Wheate*,^(y) the Master of the Rolls (Sir Thomas Clarke) draws a distinction between trust estates vested in the crown by escheat, and those to which it becomes entitled by forfeiture. He says, "the crown takes an estate by forfeiture, subject to the engagements and encumbrances of the person forfeiting. The crown holds in this case as a royal trustee. But in general, I apprehend an escheat is taken free from any equitable claim."^(z) Lord Mansfield, in his judgment in the same case, supports the position, that failing the heirs of the trustee, the king would take the estate in a court of equity subject to the trust;^(a) but the Lord Keeper (Lord Northington) declined giving an unnecessary opinion on that point.^(d) With regard to the question, whether the king upon a legal estate should be liable to an equity of redemption? that learned judge observed, "I do not know that it has ever been so determined. Lord Hale thought the king should, because it is an ancient right, which the party is entitled to in equity. Baron Atkyns thought the same, because he saw the same equity against the crown, as against a common person."^(c) Yet it is observable, that there is in that case (*Pawlett v. Attorney-General*) a recognition of the equity without any declaration of the remedy. Whether this remedy has since been settled in the Exchequer, *where alone it can*, I really do not know; but I hope it is so settled, for I see a great deal of equity to support the opinion of Hale and Atkyns. I hope that there is no equity, that the subject is not entitled to against the crown. But I own, upon very diligent inquiry and consideration of the case, I at present think the arms of equity are very short against the prerogative."^(d)

It will be observed, that the several *dicta* in favor of the existence of this equity against the crown are all extrajudicial; and the judges, while advocating the right, declare their incapacity to en-

(u) *Penn v. Ld. Baltimore*, 1 Ves. sen. 453; vid. et E. of *Kildare v. Eustace*, 1 Vern. 439; re *Roberts*, 3 Atk. 309.

(x) 1 Saund. Us. 349; 1 Cruis. Dig. 403.

(y) 1 Ed. 177.

(z) *Burgess v. Wheate*, 1 Ed. 203.

(a) Id. 229.

(b) Id. 246.

(c) *Pawlett v. Att.-Gen.*, Hard. 467.

(d) *Burgess v. Wheate*, 1 Ed. 255-6.

force it(*e*) in a suit against the sovereign. In two instances, where it became necessary to decide the point, the relief was refused.(*f*)¹

[*50] *However, in consequence of the alteration of the law by statute, the question with regard to trust property, vested in the crown by escheat, cannot now arise. By the statute 39 & 40 Geo. III. c. 88, s. 12, the sovereign, in case of the escheat of trust property, was empowered to make grants of it to trustees, for the purpose of executing the trust; and by the recent act for the amendment of the law relating to the escheat and forfeiture of real and personal property held in trust,(*g*) a still more effectual remedy is provided; for by the 2d and 3d sections of that act, no trust property will in future be the subject of escheat in any case, in consequence of the failure or forfeiture of a trustee; and the 6th sect. provides, that in all cases of that nature, which may have already occurred, the trust property shall be under the control of the Court of Chancery, for the use of the parties beneficially interested.²

With regard to trust property becoming vested in the person of the sovereign by descent, or representation to the original trustee,

(*e*) Pawlett v. Att.-Gen., Hard. 469; Hodge v. Att.-Gen., 3 Young & Coll. Burgess v. Wheate, 1 Ed. 255; Penn 342; Giles v. Grove, 6 Bligh, N. S. v. Ld. Baltimore, 1 Ves. sen. 453. 392; but see Prescott v. Tyler, 1 Jur.

(*f*) Pawlett v. Att.-Gen. Hard., 467; 470; Casbord v. Ward, 6 Price, 44.]
Reeve v. Att.-Gen., 2 Atk. 223. [See (*g*) 4 & 5 Will. IV. c. 23.

¹ By the Revised Statutes of New York (part I., ch. 1, art. 1, § 2, 3d ed.), it is provided that all escheated lands, when held by the State or its grantees, shall be subject to the same trusts, incumbrances, &c., as they would have been had they descended; and the Court of Chancery is empowered to direct the attorney-general to convey the lands to the parties equitably entitled, or to trustees. See Mason v. White, 6 J. C. R. 360, 367; Farmers' Loan Co. v. The People, 1 Sand. Ch. 139. So in Virginia by the Code of 1849 (tit. 32, ch. 113, § 26), an estate vested in a person by way of mortgage or trust, is not to escheat or be forfeited, merely by reason of his being an alien or dying without heirs. In Pennsylvania, the Act 29th Sept. 1787, § 11; Dunlop, 3d ed. 163, provides that in case of escheat the estate is to take *no other or greater* title than the person dying intestate had. And in most of the other States the conclusion appears to be, from their statutes on the subject, that escheated lands would be held subject to the trusts. 4 Kent Comm. 425; 1 Greenleaf's Cruise, 417, note 1; Casey's lessee v. Inloes, 1 Gill. 507; Mathews v. Ward, 10 G. & J. 443. In O'Hanlin v. Dew, 1 New Jersey, 31, it was, however, held, that the real estate of an intestate dying without heirs vested immediately in the State, and that the Orphans' Court had no jurisdiction to order a sale for the payment of debts of the former owner; and see Congregational Church v. Morris, 8 Alab. 193.

² Now by the "Trustee Act of 1850," (13 and 14 Vict. c. 60, Sect. 15), where a trustee dies without heirs, or the heirs are not known, the court may make an order vesting the estate in a new trustee; and, by Sect. 46, in cases of attainder or forfeiture of a trustee of lands or chattels, the legal estate shall not escheat, but a new trustee shall be appointed; except (Sect. 47) so far as the trustee had a beneficial interest.

or which he may have held as trustee previously to his acquiring the crown; and also in the improbable case of his being personally appointed a trustee; it would appear that the question, whether he would or would not hold subject to the trust, still remains open.^(h)

All the principles of equity seem to be in favor of the right of the *cestui que trust* in such cases. The arguments of the Master of the Rolls (Sir Thomas Clarke), in his elaborate judgment in *Burgess v. Wheate*, in favor of the lord by escheat not being bound by a trust, are founded mainly on the nature of the tenure of property by escheat, and do not apply to the cases now under consideration. The observations of Lord Hardwicke, in *Penn v. Lord Baltimore*,⁽ⁱ⁾ go directly to support the equity against the crown; and it may be observed in support of it, that it is admitted that the sovereign may be constituted an executor;^(k) and in that character he will of course hold property upon trust.

However, the existence of this right against the sovereign does not seem to have been ever judicially determined, still less the mode of enforcing it. This, if any, would appear to be by a petition of right in the Court of Exchequer;^(l) or in future in the Court of Chancery, since the transfer of the equitable jurisdiction of the Exchequer to that court by the recent statute.^(m)

Previously to the passing of the statute 4 & 5 Will. IV. c. 23, the question, whether a subject—taking trust property, on the failure or forfeiture of the trustee, as lord by escheat—would be bound by the trust does not seem to have been settled. Cases are not wanting, which support the claims of the *cestui que trust* under such circumstances.⁽ⁿ⁾ It is clear, that if the lord had in any way recognised the existence of the trust, as, for instance, by admitting the trustee to a copyhold tenement upon trusts expressed in the admission, he would hold as trustee *for the parties beneficially entitled.^(o) [*51] But the weight of authority seems to have been in favor of the lord's taking in these cases discharged from any trust, which he had not recognised,^(p) as in the case of a mortgagee admitted absolutely to a copyhold, and dying without heirs.^(q) However, the equity of the *cestui que trust* is now clearly established against the lord, by the

(h) See *Penn v. Lord Baltimore*, 1 Ves. 453.

(i) 1 Ves. sen. 453; vid. et *Hoven-den v. Ld. Annesley*, 2 Sch. & Lef. 617.

(k) 1 Wms. Exors. 113.

(l) Com. Dig. (Prerogative), D. 79; *Pawlett v. Attorney-General*, *ubi sup.*; *Reeve v. Attorney-General*, *ubi sup.*; *Burgess v. Wheate*, 1 Ed. 255.

(m) 5 Vict. c. 5, s. 1.

(n) *Geary v. Bearcroft*, Cart. 67; *Esles v. England*, Prec. Chan. 200; *Burgess v. Wheate*, 1 Ed. 230.

(o) *Weaver v. Maule*, 1 R. & M. 97.

(p) *Stephens v. Bailey*, Nels. 107; *Harg. Jur. Ex. vol. i.* 390; 2 Fonbl. Eq. 170, n.; 3 Cruis. Dig. 418.

(q) *Attorney-General v. D. Leeds*, 2 M. & K. 343.

recent statute; and the question therefore cannot be the occasion of any future difficulty.¹

It seems that an alien may take lands, or hereditaments, by purchase or otherwise, but that on office found they go to the king.^(r)² It might, therefore, before the statute 4 & 5 Will. IV. c. 23, have been a question, whether, if real estate were conveyed to an alien as a trustee, the legal estate would not have passed by the conveyance, and escheated to the crown, on office found, discharged of the trust. However, without doubt, an alien friend may well become a trustee of such personal chattels as the law allows him to hold.

Previously to the recent statute 4 & 5 Will. IV. c. 23, traitors, felons, and outlaws, during the continuance, and to the extent of their incapacity to be the holders of property, were also incapable of being trustees; but by the 3d section of that act the disability of such persons to hold property upon trust has been removed.

Trust property vested in a bankrupt, according to the construction put upon the Bankruptcy Acts, does not pass to the assigns;^(s) and by an analogous construction, an assignment by an insolvent under the statute 7 Geo. IV. c. 57, or since the passing of the statute 1 & 2 Vict. c. 110, an order of the Insolvent Court under the 27th section of this act, would not pass property vested in him as a trustee.^(t) The legal estate therefore in trust property, vested in a bankrupt or insolvent, previously to his bankruptcy or insolvency, remains in him unaffected, until it be divested by legal transfer;^(u) and *à fortiori* such persons have incurred no legal incapacity to prevent them from taking property of any description, conveyed to them subsequently as trustees, in case any one should be disposed to place such confidence in them.

A person by a proper declaration may convert himself into a trustee.

- (r) Co. Litt. 2, b; Com. Dig. (Alien), 25; Ontario Bank v. Mumford, 2 Barb. Ch. 596; Hynson v. Bartin, 5 Pike, 492.]
 (s) Scott v. Surman, Willes, 402; Carpenter v. Marnell, 3 B. & P. 40; Gladstone v. Hadwen, 1 M. & S. 526; Exp. Gennys, 1 M. & M. 258. [See post, 269, 304, 530; Kip v. Bank of N. Y., 10 Johns. 63; Blin v. Pierce, 20 Verm. 584.]
 (t) Lewin, Trust. 258. [So in the United States, Kip v. Bank of N. Y., 10 Johns. 63; Kennedy v. Strong, Id. 289; Clarke v. Minot, 4 Metc. 346.]
 (u) Exp. Painter, 2 Deac. & Ch. 584.

¹ See Evans v. Brown, 5 Beav. 114; Viscount Downe v. Morris, 3 Hare, 394.

² See Fairfax v. Hunter, 7 Cranch. 621; Smith v. Zaner, 4 Alab. 99; Vaux v. Nesbit, 1 McCord, Ch. 352; Montgomery v. Derian, 7 N. H. 475; Craig v. Radford, 3 Wheat. 594; Clifton v. Haig, 4 Desaus. 330. In New York it has been held that an alien might be a corporator and trustee in a religious society. Commey v. United German Churches, 2 Sandf. Ch. 186.

An alien trustee may convey, and such sale will not be set aside. Ferguson v. Franklin, 6 Munf. 305; see Escheater v. Smith, 4 McCord, 452.

tee of property vested in him, without divesting himself of the possession of the legal estate.(x)

It may be observed, that at law no person can be a trustee, unless he takes a vested legal interest in the trust estate.(y)

IV.—WHO MAY BE CESTUI QUE TRUST.

All persons who are capable of taking an interest in property at law, *may, to the extent of their legal capacity, and no further, become entitled to the trust of such property in equity. [*52] The beneficial interest in property may also become, and frequently is, vested in objects as *cestui que trusts*, whose existence is not recognised at law.¹

By the old law, it appears that the king could only take the use of *land* when the use had been found of record.(a) But it has never been decided that the Court of Chancery would refuse to enforce the execution of a trust of *real estate* in favor of the crown, if declared otherwise than by matter of record. In the case of *Burgess v. Wheate*, in which the right of the crown to take the trust of an estate on the failure of an heir to the *cestui que trust*, was elaborately considered, that objection to the title of the crown was not attempted to

(x) *Exp. Pye*, 18 Ves. 139; *Wheatley v. Purr*, 1 Keen, 551; *Meek v. Kettlewell*, 1 Hare, 469; 1 Phill. 342; *Atcherley v. Vernon*, 10 Mod. 518; 1 Sugd. V. & P. 171, and cases cited; *Thorpe v. Owen*, 5 Beav. 224; see post 82.

(y) *Owen v. Owen*, 1 Atk. 496.

(z) 1 Sand. Us. 339.

(a) *Gilb. Us. 44*; *Bac. Abr.*, (Uses and Trusts), E. 2.

¹ It is not necessary to the creation of a trust estate that a *cestui que trust* should be named, or in being at the time. Thus a devise to a father for accumulation, in trust for the use of such child or children as he may have lawfully begotten at the time of his death, is valid. *Ashhurst v. Given*, 5 W. & S. 329. But where land was conveyed under articles of agreement or trust for subscribers thereto, it was held that the title of the grantor was not divested until there were subscribers. *Urket v. Coryell*, 5 W. & S. 61. A donee must have capacity to take, whether it is attempted to convey title directly to the party himself or in trust for him. Thus a slave cannot be the *cestui que trust* of his own freedom, under a bequest thereof, where direct emancipation would be illegal. *Trotter v. Blocker*, 6 Porter, 269; see *Ross v. Duncan*, *Freem. Ch.* 603; *Frazier v. Frazier*, 2 Hill, Ch. 305. A *cestui que trust* may affirm and enforce the trust, though created without his knowledge. *Moses v. Murgatroyd*, 1 J. C. R. 119; *Pratt v. Thornton*, 28 Maine, 355; *Shepherd v. McEvers*, 4 J. C. R. 136; *Pleasants v. Glasscocke*, 1 S. & M. Ch. 17; *Bryant v. Russell*, 23 Pick, 520. His assent will be presumed in the absence of proof to the contrary, if beneficial to him. *Field v. Arrowsmith*, 3 Humph. 442. In order indeed to constitute a waiver or a trust fund, there must be a clear, unequivocal and decisive act of the party, evincing a determination not to have the benefit of it. *Breedlove v. Stump*, 3 Yerger, 257. See post 83, 338.

be urged. But, however this may be, it appears that a trust of *personal property* may be constituted in favor of the crown, in the same manner as in the case of a private person.(b) Even by the old law it seems that the king might take real estate by devise, though not of record;(c) and it is therefore conceived from analogy, that the court would be bound to recognise a trust even of *land*, where it is created by *devise* in favor of the king.¹

The law does not permit the Statutes of Mortmain to be evaded by the mere substitution of an equitable for a legal estate. Therefore corporations cannot acquire an interest in real estate, as *cestui que trust*, without a license from the crown to hold in mortmain.(d) The statute 43 Geo. III. c. 107, establishes an exception in favor of the corporation of Queen Anne's Bounty, which it exempts from the operation of the Mortmain Acts. With regard to their capacities for the acquisition of personal property, corporations in general are on the same footing as private persons.²

(b) *Middleton v. Spicer*, 1 Bro. C. C. 201; *Brummell v. M'Pherson*, 5 Russ. 264; 1 Saund. Us. 339, n. (c) *Com. Dig. (Prerogative)*, D. 66. (d) *Co. Litt.* 99, a.; 1 *Sand. Us.* 330, n.

¹ A conveyance to one and his heirs in trust for the State vests the legal title in the State. *Lamar v. Simpson*, 1 Richard. Ch. 71. In *Nightingate v. Goulborne*, 5 Hare, 484, a bequest to the Queen's Chancellor of the Exchequer, for the time being, to be by him appropriated to the benefit and advantage of Great Britain, was held to be valid as to pure personalty, but null as to moneys due on mortgage. See *Whitehall v. Reynolds*, 1 Phill. Ch. 185. A declaration of trust by the grantee of land for a burying ground for "the Jewish Nation," was supported in *Gomez v. The Tradesman's Bank*, 4 Sandf. S. C. 106; but no objection appears to have been taken to the uncertainty, or in fact, non-existence of the *cestui que trust*, and query how far the decision is consistent with *Leggett v. Dubois, &c.*, post, 53, note 1.

² Where a corporation has power under its charter, to take real and personal estate by deed and devise, it may also take and hold property in trust, in the same manner and to the same extent that a private person may; if the trust be repugnant to, or inconsistent with, the proper purpose, for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise exceptionable), will not be void, and a court of equity will appoint a new trustee, to enforce and perfect the objects of the trust. *Vidal et al. v. The City of Philadelphia et al.*, 2 Howard's Rep. Sup. C. U. S. 127. Neither is there any positive objection in point of law, to a corporation's taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them. *Id. ibid.* Under a general power in the charter, "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry and happiness," the corporation may execute any trust german to these objects. *Id. ibid.* Thus a trust for the establishment of a college, or seminary of learning, and especially one for the education of orphans and poor scholars. *Id. ibid.* Where trusts are in themselves valid, but the corporation incompetent to execute them, the heirs of the deviser could not take advantage of such inability; it could only be done by the state in its sovereign capacity, by a *quo warranto*, or other proper judicial proceeding. *Id. ibid.* T. [See ante, note 1.]

*The operation of the Bankruptcy and Insolvency Acts extends to property vested beneficially in the bankrupt or insolvent. An uncertificated bankrupt therefore, or an insolvent before his final discharge, cannot become entitled as *cestui que trust*. We may except a bankrupt's right to his allowance, and to the surplus of his estate, which, as we have seen, are interests vested in and assignable by him.^(e) The wearing-apparel and tools of an insolvent, to the value of 20*l.*, which are expressly exempted from the operation of the 37th sect. of 1 & 2 Vict. c. 110, will also form an exception to this rule. [*53]

On the same principle, that equity follows law, no person, under legal incapacity to hold property, will be permitted to acquire a right to the beneficial enjoyment. Thus, although an alien friend may take an equitable as well as a legal property in *chattels personal*, yet he cannot protect himself from forfeiture by taking a conveyance of *real estate* in the name of a trustee.^(f)¹ And the same may be predicted of traitors, felons, and outlaws, during the continuance of their legal incapacity.²

However, in addition to the persons who are capable of taking the legal estate, the equitable interest in both real and personal estate may be held for the benefit of many objects as *cestui que trusts*, whose separate existence as the recipients of property is not recognised or admitted by the common law. Such are those numerous institutions and associations which have not been invested with any legal personification by letters patent, or charter of incorporation, but which, under the general appellation of charitable uses were

(e) Supra.

(f) Sugd. V. & P. 2d vol. 9th ed. 35. 106; 1 Sand. Us. 339, n.; 3 Ch. Rep.

¹ *Atkins v. Kron*, 5 Ired. Eq. 207; *Hubbard v. Goodwin*, 3 Leigh. 492. Equity will not raise a *resulting trust* in favor of an alien. *Leggett v. Dubois*, 5 Paige, 214; *Hubbard v. Goodwin*, ut supra; *Phillips v. Cramond*, 2 Wash. C. C. R. 441; *Taylor v. Benham*, 5 How. U. S. 270; though see *Farley v. Shippen*, Wythe, 135. But he may be *cestui que trust* of personalty. *Bradwell v. Weeks*, 1 J. C. R. 206; or of the proceeds of land directed to be sold by will. *Com. v. Martin*, 5 Munf. 117; *Craig v. Leslie*, 3 Wheat. 563; *Taylor v. Benham*, 5 How. U. S. 269; see *Anstice v. Brown*, 6 Paige, 448. A legacy given to an alien cannot be charged on the real estate of the testator, *Atkins v. Kron*, 2 Ired. Eq. 423, and it seems that a court of equity would not permit land liable to escheat, to be sold for debts, in order to preserve the personalty for alien legatees. *Trezavant v. Howard*, 3 Desaus. 87. Where a suit was brought by a plaintiff as trustee for an alien enemy, it was held to be no objection after the war had terminated. *Hamersly v. Lambert*, 2 J. C. R. 508.

² In *Bishop v. Curtis*, 17 Jur. 23, a testator had bequeathed to C. a promissory note, not to be sued on, or be made available before he came of age. Before that time C. became a convicted felon. It was held that the legal title to the note was in the executors, and was not divested by the conviction, though they became thereupon trustees for the crown. See *Stokes v. Holden*, 1 Keen, 153.

gradually permitted by the courts of equity to acquire the beneficial enjoyment of a large portion of the property of the country.

The statute 9 Geo. II. c. 36 (usually called the Statute of Mortmain), has much curtailed the power of disposing of *real estate* in favor of charitable uses. But at the present day trusts of real estate may be raised in favor of such objects, and will be supported by the Court of Chancery, as long as they do not infringe upon any of the provisions of that statute, which, it may be observed, has received a very strict judicial construction. However, the capacity of such objects to take the beneficial interest in *personal property* is not affected by the Mortmain Act, and the court is always disposed to put a liberal construction upon such dispositions in favor of charitable uses.(g)

In these cases there are usually no persons capable of enforcing their [*54] *rights as *cestui que trusts*, but their interests will be represented by the Attorney-General as the officer of the crown. It is not proposed to consider in this place, what are the several objects in whose favor the court will enforce a trust of this nature; it will be sufficient for our present purpose to observe, that charitable uses are objects capable in equity of taking a beneficial interest in property both real and personal as *cestui que trusts* to the extent limited by the legislature. The extent and nature of those limitations, and their effect upon the validity of trusts of this description, will be reserved for future consideration.

An illegitimate child, when born, or *in ventre sa mere*, may beyond all doubt be the object of a trust; but a trust in favor of illegitimate children, not in existence, but to be born thereafter, will not be enforced.(h).

(g) *Moggridge v. Thackwell*, 2 Ves. 456; see *Pratt v. Flamer*, 5 H. & J. 10; 78; *White v. White*, Id. 423; *Fonbl. Gardner v. Heyer*, 2 Page, 11; *Collins v. Hoxie*, 9 Page, 81; *Evans v. Davis*, Eq. 211.

(h) *Wilkinson v. Wilkinson*, 1 N. C. 7 Hare, 498; *Owen v. Bryant*, 13 Eng. C. 657. [In *re Connor*, 2 Jones & Lat. L. & Eq. 431.]

THE CONSTITUTION OF TRUSTEES.

THE legal owner of property is *prima facie* entitled to its beneficial enjoyment; and in order to convert him into a trustee, there must be a sufficient indication of the intention of the parties, that he should hold the estate for the benefit of others.

A person may be constituted trustee:—1st, by express declaration; 2d, by implication or construction of law; 3d, by way of substitution in the place of a trustee already created; and 4th, when so constituted, he must assent to and except the trust.

DIVISION I.

THE CONSTITUTION OF TRUSTEES BY EXPRESS
DECLARATION.

THE declaration constituting a party trustee may be made, either by parol, or by instrument in writing. And, first,—of the creation of trustees by parol declaration: in treating of which, it is proposed to consider—1st, what may be the subject of a parol trust; and, 2d, what will be a valid declaration of such a trust.

CHAPTER I.

THE CREATION OF TRUSTEES BY PAROL.

SECT. I.—WHAT MAY BE THE SUBJECT OF A PAROL TRUST.

USES in the beginning were of a secret nature, and depended merely on a parol agreement or declaration between the feoffee to

uses and the *cestui que use*.^(a) But even before the Statute of Frauds, this principle does not seem to have been applicable to all cases, and in many instances it appears to have been a matter of considerable doubt, whether at common law uses could be raised by parol, or even by writing without a seal.^(b)

Lord Chief Baron Gilbert has extracted a principle from the cases [*56] *which seems to reconcile their apparent contrariety. That eminent writer, in his "Treatise on Uses," observes, "at common law a use might have been raised by word upon a conveyance, *that passed the possession* by some solemn act, as a feoffment. But where there was no such act, there it seems a deed declaratory of the use was necessary: for as a feoffment might be made at common law by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the uses. Thus a man could not covenant to stand seised to a use without a deed, but a bargain and sale by parol has raised a use without."^(c) And this distinction appears to be supported by the observations of Lord Thurlow in his judgment in the case of *Fordyce v. Willis*.^(d)

In considering this question, it is material not to lose sight of the distinction between the *raising* of an use originally by verbal declarations, and the admission of parol averments to *prove or support* it when raised. Whatever may have been the law on the former point, there seems to be no doubt, but that such averments were allowable in the latter case, subject to the rules as to the admission or exclusion of parol evidence.^(e)

Trusts succeeded to uses.—It seems, therefore, that before the Statute of Frauds a valid trust, either of real or personal estate, might have been created by parol declaration, if not in all cases, at any rate wherever a deed was not requisite at law, for passing the estate or property itself.

The 7th Sec. of the Stat. 29 Car. II. c. 3 (usually called the Statute of Frauds), enacts, "That all declarations, or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else shall be void." The 8th Sec. exempts from the operation of the act trusts arising or resulting by the implication or construction of law.²

(a) Sand. Uses, 210.

(d) 3 Bro. C. C. 587.

(b) Stor. Eq. Jur. § 971.

(e) *Fordyce v. Willis*, 3 Bro. C. C.

(c) Gilb. Us. 270. 1.

237; *Dowman's case*, 9 Rep. 10.

¹ That a trust in land could be created at common law by parol, was denied in *Dean v. Dean*, 6 Conn. 287: but asserted in *Fleming v. Donahoe*, 5 Ohio, 250.

² These Sections have been re-enacted in words or in substance in nearly all of the United States. Rev. Stat. Vermont (1839), ch. 66, § 22; Rev. Stat.

It will be observed, that the 7th Sect. merely requires that the trust should be *manifested and proved* by writing; and upon the construction put upon these words it has been decided, that a trust of land may be still effectually *created* by parol; and in order to satisfy the statute, it will be sufficient to show by written evidence the existence of the trust.^(f)¹ This distinction, although at first sight it may appear of little moment, has been attended by consequences of considerable importance.

If the trust were considered to derive its existence *ab initio* from the written declaration, the trust estate could not form part of the disposable property of the *cestui que trust*, previously to the execution of that declaration; and, moreover, up to that time, it would be liable for the acts and incumbrances of the ostensible owner. But now the declaration, when made, has relation backwards to the time of the creation of the trust, of which it is the evidence, and consequently gives effect to all intermediate ^[*57] acts of disposition made by the *cestui que trust*, between the declaration of the trust and its actual creation; while it defeats the rights which parties claiming

(f) *Forster v. Hale*, 3 Ves. 707; *S. C.* 5 Ves. 308; *Randall v. Morgan*, 12 Ves. 74.

Massachusetts (1836), Ch. 59, § 30; *Dean v. Dean*, 6 Conn. 285, Rev. Stat. New York, 3d ed. part I, Ch. 7, tit. 1, § 6; Rev. Stat. New Jersey, tit. 17, Ch. 1, § 11; *Dorsey v. Clark*, 1 H. & J. 557; *Maccubbin v. Cromwell*, 7 G. & J. 157; 1 *Dorsey's Laws*, 37; 2 *Cooper's Stat. South Car.* 401, 525; 2 *Cobbs Georgia Digest*, 1128; *Elliott v. Armstrong*, 2 Blackf. 198; *Hovey v. Holcomb*, 11 Illinois R. 610; Rev. Stat. Arkansas, Ch. 65, § 10; Rev. Stat. Missouri, Ch. 68, § 3; Rev. Stat. Michigan, p. I, tit. 1, Ch. 1, § 27; Wisconsin Rev. Stat. page 164; *Thompson's Florida Digest*, 178. In Maine, the statute runs "all trusts, except &c., shall be created and manifested by some writing, &c. Rev. Stat. 1847, Ch. 92, § 31. *Acc. Rev. St. of N. H.* (1842) Ch. 130, § 13. The 7th Section of the Statute of Frauds has been, however, omitted in North Carolina: there, consequently, trusts may be proved by parol. *Fry v. Fry*, 2 Hayw. 231. So too, it would seem, in Tennessee. *Caruthers & Nichols' Digest*, 350; *Meig's Digest*, 541, see *Thompson v. Thompson*, 1 Yerg. 100; *McLanahan v. McLanahan*, 6 Hump. 99; *Haywood v. Gurley*, 8 Hump. 460. In Virginia the Section in question was omitted both in the earlier Acts and in the Code of 1849, tit. 33, Ch. 116, § 1, see *Bank v. Carrington*, 7 Leigh. 576. In Ohio it was ruled that before the Act of 1810, a trust in land might be proved by parol. *Fleming v. Donahoe*, 5 Ohio, 250: and that statute does not apparently re-enact the Section; but see *Starr v. Starr*, 1 Ohio 329. In Pennsylvania also, after some discussion it has been settled that under the Act of 1779, trusts may be proved by parol. *Murphy v. Hubert*, 7 Barr. 420; *Tritt v. Crotzer*, 13 Penn. St. R. 451; *Wetherill v. Hamilton*, 16 Penn. St. R. 195.

¹ *Movan v. Hays*, 1 J. C. R. 339; *Johnson v. Ronald*, 4 Munf. 77; *Jackson v. Moore*, 6 Gowen, 706; *Flagg v. Mann*, 2 Sumner 406; *Church v. Sterling*, 16 Conn. 388; *Lloyd v. Inglis*, 1 Desaus. 333; *Rutledge v. Smith*, 1 M'Cord Ch. 119; *Maccubbin v. Cromwell*, 7 G. & J. 157, 2 *Story Eq.*, § 972; *Pinney v. Fellows*, 15 Verm. 525; *Unitarian Soc. v. Woodbury*, 14 Maine, 281. See, however, *Rev. St., Maine and New Hampshire ut. sup.* In *Church v. Sterling*, *ut. sup.* it was held that parol proof of a trust was admissible where there had been a payment of purchase money by the *cestui que trust*, and an entry and occupation with improvements.

under the trustee might have otherwise acquired. This is, of course, subject to the protection always given in equity to persons in the situation of *bona fide* purchasers for valuable consideration without notice.

Thus, where a freeman of London purchased real estate in the name of another person, without any trust being expressed at the time, and the freeman died, having devised the estate, and *after his death* the trustee declared that he held in trust for the freeman: this declaration was held good, so as to entitle the devisee in opposition to the widow, who claimed the estate by the custom of London.(g)

So, where a copyholder made an absolute surrender to A., and died; and *after his death* A. admitted that the surrender was made to him in trust for the surrenderor, and after his death for the purpose of his will; the devisees under the copyholder's will, and not his customary heir, were held to be entitled.(h)

On the same principle in a case where a lease was granted absolutely to a person, and the grantee afterwards became bankrupt, and *subsequently to his bankruptcy* made a declaration that the lease had been granted to him as a trustee for another person: it was held by the Vice-Chancellor, and the decision was affirmed on appeal by Lord Lyndhurst, that the assignees of the bankrupt were not entitled to the lease.(i) (1)

The 7th Section of the Statute of Frauds applies only to "lands, tenements, and hereditaments." Therefore the law, as it affects chattels personal, remains unaltered; and a valid trust of such property may not only still be created, but, if necessary, established and proved by mere parol declarations.(k)

With regard to the question of what property is within the scope

(g) *Ambrose v. Ambrose*, 1 P. Wms. 322. *M'Fadden v. Jenkyns*, 1 Hare 461; S. C. 1 Phill. 153, 7; [*Kimball v. Morton*, 1 Halst. Ch. 31; *Robinson v. Howell*, 6 Geo. 590; *Martin v. Greer*, 1 Geo. Dec. 109; *Kirkpatrick v. Davidson*, 2 Kelley, 297; *Porter v. Bank of Rutland*, 19 Verm. 410.]

(h) *Wilson v. Dent*, 3 Sim. 385.

(i) *Gardner v. Rowe*, 2 S. & St. 346; S. C. 5 Ross 258.

(k) *Fordyce v. Willis*, 3 Bro. C. C. 587; *Benbow v. Townsend*, 1 M. & K. 510; *Bayley v. Boulcott*, 4 Russ. 347;

(1) On a similar principle it has been held, that a settlement made after marriage, which recites a parol agreement, entered into previously to the marriage, will be good against creditors notwithstanding the statute of Elizabeth. *Montacute v. Maxwell*, 1 Str. 237; *Hodgson v. Hutchenson*, 5 Vin. Abr. 542, pl. 34; *Dundas v. Dutens*, 1 Ves. jun. 196, and S. C. 2 Cox 235; and see *Dubeil v. Thompson*, 3 Beav. 475. But there seems to be considerable doubt whether these decisions would now be followed, if a similar question arose at the present day. See *Morgan v. Randall*, 12 Ves. 74; *Spurgeon v. Collier*, 1 Ed. 55; *Battersbee v. Farington*, 1 Sw. 106, and Sugd. Pow. 247, (6th Ed.)

[This later opinion is the one generally followed in the United States. *Satterthwaite v. Emley*, 3 Green Ch. 485; *Andrews v. Jones*, 10 Alab. 400; *Davidson v. Graves*, Riley Eq. 217; *Simpson v. Graves*, Id. 232; *Izard v. Izard*, 1 Bailey

of the 7th Section,—it has been repeatedly decided that leasehold interests are within the statute.(l) But it seems that money, secured by mortgage, whether in fee or for a term of years, is not. And a parol trust of a mortgage debt will still be supported.(m) (1) Nor does the statute apply to a *share in the mining co-partnership, [*58] or to any other shares which are personal estate.(n)

There may, perhaps, still be a question, whether copyholds and customary freeholds are or are not included in the 7th Section. It is clear, that they are not within the 5th and 6th Sections of the same statute;(o) but that decision seems to have proceeded solely upon the peculiar operation of a *devise* of lands by that tenure, and it has no necessary application to the case of a creation or declaration of a trust.

In the case of *Doe dem. Cook v. Danvers*,(p) Lord Ellenborough expressly stated, that *wills* of copyholds are not within the 7th Section of the Statute of Frauds;(p) and previously to the statute 1 Vict. c. 26, it was the opinion of writers of the highest authority, that a *devise* of copyholds by parol might be good by custom notwithstanding the statute.(q) However, all question on this point is now set at rest by the recent Will Act (1 Vict. c. 26,) the 9th Section of which enacts, that no will shall be valid, unless it shall be in writing, and executed as provided by the act.

In the case of *Devenish v. Baines*,(r) the court was of opinion, that where by the custom of the manor an estate might be created by parol, a trust of such parol estate might likewise be raised without writing, notwithstanding the statute. This seems to be the only case that at all favors the position, that parol creations of trust of copyholds by act *inter vivos* are not within the operation of the 7th Section of the statute. It will be seen on examination, that the case was decided on another point, and the opinion was therefore clearly

(l) *Riddle v. Emerson*, 1 Vern. 108; *Hutchins v. Lee*, 1 Atk. 447; *Forster v. Hale*, 3 Ves. 696; S. C. 5 Ves. 308; *Gardner v. Rowe*, 5 Russ. 258; [*Otis v. Sill*, 8 Barb. S. C. 102.] ton v. Lord Langdale, 15 Jur. 868; *Walker v. Milne*, 11 Beav. 507; *Myers v. Perrigal*, 16 Sim. 533.]

(m) *Bellasis v. Compton*, 2 Vern. 294; *Benbow v. Townshend*, 1 M. & K. 510. (o) *Tuffnell v. Page*, 2 Atk. 37; *Carey v. Askew*, 2 Bro. C. C. 59.

(n) *Forster v. Hale*, 3 Ves. 696; S. C. 5 Ves. 308; [See *Powter v. Bank of Rutland*, 19 Verm. 410; *Hilton v. Giraud*, 1 De Gex & Sm. 183; 11 Jur 838; *Ash-* (p) *Doe dem. Cook v. Danvers*, 7 East, 299, 322.

(q) 1 Jarm. Pow. Dev. 61; 1 Watk. Cop. 130. (r) *Prec. Chan.* 4.

Eq. 228; see *Babcock v. Smith*, 22 Pick. 61; *contra* *Woods v. Savage*, Walker, Ch. 471; *Brooks v. Dent*, 1 Mary, Ch. Dec. 526 (*semb.*); though in this last case the declarations of the husband after marriage were held insufficient evidence. See also *Smith v. Kane*, 2 Paige 303; *Magniac v. Thompson*, Baldw. C. C. 344.]

(1) It would seem to follow from this case, that legacies, annuities, and other sums of money charged on land, do not come within the operation of the statute, respecting parol declarations of trust of lands.

extrajudicial; moreover the circumstances seem only to warrant the application of those expressions to a customary *devise* by parol; and at the most they only authorize the *raising* of a trust by verbal declaration, which, as we have already seen, may still be done, notwithstanding the statute. Both copyholds and customary freeholds, if not within the words, are certainly within the spirit of the 7th Sect.; and no objection arising from the tenure of such property can in this case be urged in favor of their being exempted from its operation; an exemption which, even in the case of the 5th and 6th Sects., has been regarded with disapprobation by the courts.(s)

It may be observed that in the recent case of *Benbow v. Townshend*,(t) in which the question arose of the validity of a parol declaration of trust of a mortgage of copyholds, the exemption of property of that tenure from the operation of the 7th Sect. was not attempted to be urged on behalf of the party claiming under the trust; and the case throughout proceeded, as if there was no difference in that respect between copyholds and freeholds.

It has been decided, that the Statute of Frauds applies only to such English colonies as were founded at the time when the act was passed(u). Those colonies which have been established subsequently, are not bound by that or any other English act of parliament in which [59] they are not *named; unless, indeed, its adoption may have been sanctioned by their own legislature;(x) (1) and the court in dealing with real estate in a foreign country will be guided by the law of evidence as prevailing in that country.(y) It follows therefore, that the validity of a parol trust of property in a British colony or foreign state must depend upon the law of the country where the property is situated.

It is settled that the sovereign is not bound by the Statute of Frauds, and on that ground parol evidence has been admitted, to prove a verbal trust of lands for *superstitious uses* in support of the king's title.(z) But where it was attempted to apply the same principle to trusts *for charitable purposes*, and parol evidence was offered to prove such a trust, the court rejected the evidence, and decided, that trusts for charities were within the 7th Sect.(a) It may also be re-

(s) *Wagstaff v. Wagstaff*, 2 P. Wms. 258; *Doe v. Danvers*, 7 East 322.

(t) 1 M. & K. 506.

(u) *Mem.* 2 P. Wms. 75.

(x) *Goodrich v. Sheddon*, 8 Ves. 481; *Becket v. Marsden*, 4 M. & S. 1; *Att.-Gen. v. Stewart*, 2 Mer. 145, n.

(y) *Tulloch v. Hartley*, 1 Y. & Coll. N. C. 114.

(z) *Attorney-General v. Jones*, 3 Atk. 146; *Attorney-General v. Lawson*, *ib.*; *King v. Portington*, *ib.*

(a) *Adlington v. Cann*, 3 Atk. 150; *Mauekleston v. Brown*, 6 Ves. 62; *Strickland v. Aldridge*, 9 Ves. 516.

(1) However, it has been decided, that real property of an Englishman in India did not pass by a will, attested by two witnesses, but descended to his heir at law. *Gardiner v. Fell*, 1 J. & W. 22.

marked here, that Lord Hardwicke's observations, as reported in the case of *Adlington v. Cann*, appear to throw considerable doubt on the correctness of the general rule, according to which the king has been held not to be bound by the statute.

It has been seen, that, by the 8th Sect., trusts arising or resulting by the implication or construction of law, are expressly exempted from the operation of the statute: and as trusts of that nature were disposable by a bare declaration by parol before the act, they must still be considered as on the same footing.(b)

A court of equity will not permit the Statute of Frauds to be set up as a defence by a party infected with fraud, and parol trusts of real estate have frequently been established in direct contradiction to the statute on the ground of fraud. Thus where a person obtains a gift of property upon a parol assurance to the donor, that he will dispose of it either wholly or partially in a particular way; the court will compel the performance of such an engagement.(c) But this is a subject which will be reserved more conveniently for discussion in a future chapter.(d)

SECT. II.—WHAT WILL BE A VALID TRUST BY PAROL.

In order to fasten a trust on property of any description by means of parol declarations, the expressions used must amount to a clear and explicit declaration of trust. They must also point out with certainty the subject-matter of the trust, and the person who is to take the beneficial interest. Loose and indefinite expressions, and such as indicate only an incomplete and executory intention, are insufficient for this purpose.¹

*Therefore where a mother had assented to a recommendation, made to her by a third person, to make a settlement upon her daughter, and had requested her adviser to give instructions to her solicitors to prepare a proper deed for the purpose, but afterwards

(b) *Bellasis v. Compton*, 2 Vern. 294; *v. Lee*, 1 Atk. 447; *Chamberlain v. Benbow v. Townshend*, 1 M. & K. 510. *Agar*, 2 V. & B. 262; *Pring v. Pring*, 2 Vern. 99; *Kingsman v. Kingsman*, ib. See post 91.

(c) *Devenish v. Baines*, Prec. Chan. 559.
3; *Walker v. Walker*, 2 Atk. 98; *Podmore v. Gunning*, 7 Sim. 649; *Hutchins* 1. (d) Vide post, Div. II., Ch. II., Sect. 1. [post 150, 167, and notes.]

¹ *Harrison v. McMenomy*, 2 Edw. Ch. 251; *Slocum v. Marshall*, 2 Wash. C. C. 398; *Mercer v. Stark*, 1 Sm. & M. Ch. 479; *Dorsey v. Clarke*, 4 H. & J. 551; *Chiler v. Woodson*, 2 Bibb. 71; *Steere v. Steere*, 5 J. C. R. 1.; see *Donohoe v. Conrahy*, 2 J. & Lat. 694, for a statement of circumstances under which a parol trust will be enforced.

refused to execute the deed; it was held, that the expression of the mother's inchoate intention to settle the property was not such a declaration of trust, as the court could act upon.(e)¹

But a declaration by a person on investing money on a mortgage, "that the security was to be made in the name of his brother Job, as he intended the mortgage to be for his benefit, and that it would then be his," has been considered sufficient.(f) And in like manner a trust was decreed on a verbal declaration, that an investment of stock was *in trust for four children equally*.(g) But in that case the parol expressions were supported by a contemporaneous written entry.(1)

Where it is attempted to convert a *prima facie* absolute gift into a trust by means of verbal declarations, the expressions must be used contemporaneously with, or in contemplation of, the act of disposition.(h) And it must be remembered, that even in that case they will be inadmissible for the purpose of contradicting any written instrument.(i)

Since the statute 1 Vict. c. 26, no parol declaration can be made to take effect as a noncupative will; but it has been decided that a *donatio mortis causa* may be made to a trustee for a particular purpose.(k)² And such a gift does not seem to be effected by the late Will Act.

(e) Bayley v. Boulcott, 4 Russ, 345. 537; [Southerby v. Arden, 1 J. C. R.

(f) Benbow v. Townshend, 1 M. & K. 506. 240; Tritt v. Crotzer, 1 Harris (Penn.), 457; see Drum v. Simpson, 6 Binn.

(g) Kilpin v. Kilpin, 1 M. & K. 520; 478.]
and see Wheatley v. Purr, 1 Keen, 551. (i) Leman v. Whitley, 4 Russ. 423.

(h) See Kilpin v. Kilpin, 1 M. & K. (k) Blunt v. Burrow, 4 Bro. C. C. 75.

(1) Where the transaction is altogether voluntary, a trust will not be enforced as against the donor upon a parol declaration, unless a complete *executed* trust be clearly proved. Therefore where a testatrix drew a cheque on her banker in favor of A., and verbally directed A. to apply it in making up a legacy she had given to B., to a certain value; and no communication on the subject was made to B. by the testatrix in her lifetime; Sir J. Wigram, V. C., refused to enforce the trust against the estate of the testatrix in favor of B., Hughes v. Stubbs, 1 Hare, 476; and see McFadden v. Jenkyns, Id. 438. There seems to have been no doubt however in that case, but that A. was a trustee for the testatrix and her representatives. The same doctrine applies alike to voluntary trusts whether they are created by parol, or written declarations; and the reader is referred to a subsequent part of this work, where the law respecting voluntary trusts is more fully considered. [Post, 82.]

¹ In Lloyd v. Inglis Exrs., 1 Desau, 333, it was held that the testimony of a conveyancer, that a deed drawn by him, absolute on its face was intended to be in trust, was inadmissible to establish the trust. Proof of the intention of the grantor is insufficient by itself. Harris v. Burnett, 3 Gratt, 339.

² Moore v. Darton, 7 Eng. L. & E. 134; Wells v. Tucker, 3 Binn. 370; Brone-man v. Sedlinger, 3 Shepley, 429; 8 Shepl. 185; Coutant v. Schuyler, 1 Paige,

It is to be observed, that a trust, once effectually created by parol, cannot subsequently be extinguished, revoked or altered by the party creating it, any more than a more formal assurance.^(l)

The evidence of a person claiming the beneficial interest in property under a parol declaration, is inadmissible for the purpose of establishing the trust in his own favor; but there is no objection to the testimony of the creator of the trust, who has parted with the whole interest, nor *à fortiori* to that of the trustee himself.^(m)

No evidence can be admitted, for the purpose of engrafting a parol trust upon an instrument, which purports to be an absolute gift⁽ⁿ⁾,¹ (excepting *in cases of fraud or mistake);^(o) however, it has [*61] been frequently decided, that a plaintiff is entitled to an answer to allegations contained in a bill, suggesting the existence of a parol trust in such a case;^(p) and a general demurrer to a bill of that nature, will be overruled.^(q)² But no relief will be given where the defendant denies by oath, in his answer, the trust alleged by the bill;^(r) except indeed in cases of fraud, which, if otherwise established, would warrant the interference of the court under any circumstances.^(s)

(l) *Kilpin v. Kilpin*, 1 M. & K. 531, 539; *Cripps v. Jee*, 4 Bro. C. C. 472; *Podmore v. Gunning*, 7 Sim. 644, 665.
Adlington v. Cann, 3 Atk. 151. [Free-
 man v. Freeman, 2 Pars. Eq. 81; see (p) *Muckleston v. Brown*, 6 Ves. 52;
Greenfield's Estate, 14 Penn. St. R. 489; *Strickland v. Aldridge*, 9 Ves. 516; *Cham-*
Kirkpatrick v. McDonald, 11 Penn. 387.] *berlain v. Agar*, 2 B. & B. 259; *Newton v*

(m) *Fordyce v. Willis*, 3 Bro. C. C. 581, 2, 3; *Strode v. Winchester*, 1 *Pelham*, 1 Ed. 514, cited post, p. 167.
 Dick. 397. (q) *Muckleston v. Brown*, 6 Ves. 52;
 (r) *Fordyce v. Willis*, 3 Bro. C. C.

(n) *Irnham v. Child*, 1 Bro. C. C. 92; 576; *Bartlett v. Pickersgill*, 1 Ed. 515,
Bartlett v. Pickersgill, 1 Ed. 515; *Le-* post 167.
man v. Whitley, 4 Russ. 423. (s) *Strickland v. Aldridge*, 6 Ves.

(o) *Irnham v. Child*, 1 Bro. C. C. 92; 520; *Podmore v. Gunning*, 7 Sim. 665.

Ch. 316; but in *Dole v. Lincoln*, 31 Maine, 422, it was ruled that a *donatio mortis causa*, cannot be of a fund in trust to be disposed of for benevolent uses, at the entire and unlimited discretion of the donee.

¹ *Dickerson v. Dickerson*, 2 Murp. 279, 1 Car. Law Rep. 262; *Steere v. Steere*, 5 J. C. R. 1.; *Dean v. Dean*, 6 Conn. 285; *Hutchinson v. Tendall*, 2 Green, Ch. R. 357; *Starr v. Starr*, 1 Hamm. 321; *Lloyd v. Inglis Exrs.* 1 Desau. 333; *Movan v. Hays*, 1 J. C. R. 343; *Philbrooke v. Delano*, 29 Maine 410; see notes to *Woollam v. Hearn*, 2 White & Tud. Eq. p. 1, 540.

² Though the defendant admit a parol trust in his answer, he may nevertheless set up the Statute of Frauds as a defence; but if he does not do this by way of plea, or in his answer, he will be deemed to have waived it. *Flagg v. Mann*, 2 Sumn. 528; *Ontario Bank v. Root*, 3 Paige, 478; *Wood v. Dille*, 11 Ohio, 455; *Newton v. Swasey*, 8 N. H. 9; *Rowton v. Rowton*, 1 Hen. & Munf. 91; *Lingan v. Henderson*, 1 Bland. 236; *Tarleton v. Vietes*, 1 Gilm. 470; *Stearns v. Hubbard*, 8 Greenl. 320; *Thornton v. Heary*, 2 Scam. 219; *Trustees v. Wright*, 12 Illin. 432. Where it is to be gathered from the face of the bill, that the alleged trust is only in parol, the objection may be taken advantage of by demurrer. *Walker v. Locke*, 5 Cushing, 91. This must, however, appear distinctly to be the case, or a demurrer will be overruled. *Cozine v. Graham*, 2 Paige, 178; *Switzer v. Skiles*, 3 Gilm. 534.

Where there is an absolute conveyance to a person, but under a secret trust for purposes which the law will not suffer to take effect, the donee will hold absolutely for his own benefit; unless he admit the trust by his answer, or it be otherwise established in evidence against him.(t)

With regard to what will be a sufficient written manifestation, or proof of the creation of a trust, to satisfy the Statute of Frauds, we have seen that the 7th Sect. required "a writing, signed by the party *legally entitled to declare the trust.*"

These words will be satisfied by a written document of any description; and, accordingly, a bond to assign as *cestui que trust* shall direct,(u) or a covenant to purchase and convey lands to specified uses,(x) or a recital contained in a deed,(y) as well as written statements, of a much looser and more informal description, such as those contained in a bill or answer(z) in Chancery, or even in notes or letters in the handwriting of the party,(a) have been considered sufficient to take a parol trust out of the statute. But it must be borne in mind, that the same principles of construction will be applied to trusts proved by evidence of this description, as in other cases; and the objects and nature of the trust must always appear from such documents with sufficient certainty, as well as their connexion with the property in question.(b)

By the express words of the statute, the required declaration may be made by will; but if the instrument containing such a declaration, by reason of some informality, could not be supported as a will, it might nevertheless, if signed by the party, be a sufficient evidence of the creation of the trust, to take it out of the statute.(c)

The writing which is to furnish the evidence of the trust, must be

(t) *Cottington v. Fletcher*, 2 Atk. 156.

(u) *Moorcroft v. Dowding*, 2 P. Wms. 314. [*Orleans v. Chatham*, 2 Pick. 29; *Hardin v. Bond*, 6 Litt. 346; *Graham v. Lambert*, 5 Hump. 595; *Gomez v. Tradesman's Bank* 4 Sand. S. C. 106.]

(x) *Earl of Plymouth v. Hickman*, 2 Vern. 167; *Blake v. Blake*, 2 Bro. P. C. 250.

(y) *Degg v. Degg*, 2 P. Wms. 412. [Or a memorandum in an agreement, *Dale v. Hamilton*, 2 Phillips. 266; 11 Jur. 574.]

(z) *Butler v. Portarlington*, 1 Conn. & Law. 15; S. C. 1 Dr. & W. 20; *Hampton v. Spencer*, 2 Vern. 288; *Wilson v. Dent*, 3 Sim. 385; [*Maecubbin v. Cromwell*, 7 G. & J. 157; *Unitarian Society*

v. Woodbury, 2 Shepl. 281; *Podmore v. Gunning*, 7 Sim. 655; *Fisher v. Field*, 10 J. R. 505.]

(a) *O'Hara v. O'Neil*, 7 Bro. P. C. 227; *Forster v. Hale*, 3 Ves. 707; *Crook v. Brooking*, 2 Vern. 106; *Morton v. Tewart*, 2 N. C. C. 67; [*Steere v. Steere*, 5 J. C. R. 12.]

(b) *Forster v. Hale*, 3 Ves. 708; [*Steere v. Steere*, 5 J. C. R. 1; *Abeel v. Radcliffe*, 13 John. R. 1; *Rutledge v. Smith*, 1 McCord, Ch. 119; *Freeport v. Bartol*, 3 Greenl. 340; *Arms v. Ashley*, 4 Pick. 71.]

(c) *Nab v. Nab*, 10 Mod. 404; 1 Eq. Ca. Abr. 404, Pl. 3; [See however, *Johnson v. Ball*, 9 Eng. L. & E. 160; *Briggs v. Penny*, 13 Jur. 905.]

signed by the party legally entitled to declare it. If it be not previous to or contemporaneous with the act of disposition, the party legally entitled to declare the trust, will be the trustee himself; for when a person has once *divested himself of all interest in property, [*62] by an absolute conveyance, it is no longer competent for him, either by parol or written declaration, to convert the party taking under such a conveyance, into a trustee.(d) It would be otherwise indeed, where the circumstances of the transaction were such, as to raise a resulting or implied trust upon the conveyance; in which case, the person entitled to such an interest, would clearly have the right at any time to declare the trust.(e)

Where there is any written evidence that the person apparently entitled is not really so, that will open the door to the admission of parol evidence to prove the trust notwithstanding the statute. As where there are entries in the books of the grantee, of payments made by him to or on account of the grantor, which payments were inconsistent with the grantee's taking the beneficial interest.(f)

[*63]

CHAPTER II.

OF THE CREATION OF TRUSTEES BY INSTRUMENT IN WRITING.

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| <p>I. OF THE INSTRUMENT BY WHICH
* A PERSON MAY BE CREATED
TRUSTEE, [63].</p> <p>II. WHAT DIRECT FIDUCIARY EXPRESSIONS WILL CREATE A TRUST, [65].</p> <p>III. WHERE A POWER WILL BE A TRUST, [67].</p> | <p>IV. WHERE WORDS OF RECOMMENDATION, ETC., WILL RAISE A TRUST, [71].</p> <p>V. OF THE EFFECT OF A VOLUNTARY DISPOSITION IN TRUST, [82].</p> |
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OF THE INSTRUMENT BY WHICH A PERSON MAY BE CREATED TRUSTEE.

At common law if any instrument, operating as a legal disposition of property, contained a direction or declaration, that the party taking under it should hold for the benefit of another, the conscience

(d) *Adlington v Cann*, 3 Atk. 145; [See *Lee v. Huntton*, 1 Hoff. Ch. 447; *Harris v. Bennett*, 3 Gratt. 339.]
 [Tritt v. Crotzer, 13 Penn. St. R. 451; in re Dunbar, 2 Jones & Lat. 120.]

(e) *Bellasis v. Compton*, 2 Vern. 294; (f) *Cripps v. Jee*, 4 Bro. C. C. 472; [Hollingshead v. Allen, 17 Penn. St. 275; *Prevost v. Gratz*, 1 Peters, C. C. 366.]

of the donee was affected, and he took the legal estate as a trustee for the beneficial owner. The Statute of Uses was passed with the view of preventing the trustee from taking any interest at all under such a disposition of real property, and of vesting the legal as well as the equitable ownership in the person to whom the beneficial enjoyment was given.

However, in consequence of the strict construction put upon that statute, the power of vesting real estate in trustees, either by deed or will, remained almost to as great an extent as before. It has been laid down, that there are three direct modes of creating a trust of lands, notwithstanding the statute; 1st, Where a use is limited upon a use,—as in a conveyance or devise to the use of *A.* and his heirs, to the use of *B.* and his heirs; 2d, Where copyhold, or leasehold estates are limited by deed or will to a person upon any use or trust; and 3d, Where the donee to uses has certain trusts or duties to perform, which require that he should have the legal estate.^(a) In all these cases, however, the question is, not whether the first taker shall hold beneficially, or as a trustee, but whether he takes any legal estate *at all* under the limitation to him; and the further consideration of this subject will be reserved more conveniently for future discussion.^(b)¹

The Statute of Uses, it is scarcely necessary to add, does not affect the power of disposing of chattels personal.²

A trustee of real or personal property may be created by any formal instrument, whether deed or will, which passes the legal title to the trust estate, and contains a proper declaration of the trust; or without any transmutation of possession the owner of property may convert himself into a trustee of it by a proper declaration of the trust.

Nor is it necessary, that the declaration of the trust should be contained in the same instrument, which vests the legal estate in the trustee; although such is the more convenient as well as the more usual course. In *Inchiquin v. French*,^(c) Lord Thomond by his will gave 20,000*l.* to Sir W. W., and *by a deed-poll of the same date*, referring to his will, he declared that the legacy was given in trust for C.; and Lord Hardwicke held, that the trusts of the legacy were well declared by the deed-poll. So in *Wood v. Cox*^(d), a testatrix

(a) Bac. Us. 335; 2 Bl. Com. 336; (d) 2 M. & Cr. 684; and see Stubbs
1 Cruis. Dig. Tit. 12, Ch. I., s. 4 to 36. v. Sargon, 2 Keen, 255; S. C. 3 M. &

(b) *Post*, Part. II., Ch. I., page 229. Cr. 507; *Smith v. Attersoll*, 1 Russ. 266.

(c) 1 Cox, 1.

¹ See notes, post 229, &c.

² *Rice v. Burnett*, Spears Ch. 579; *Lord v. Lowry*, Baily Chan. 520.

bequeathed all her personal estate to *A.* for his own use and benefit, trusting he would act in conformity with her wishes; on the same day she made *another testamentary paper*, giving several legacies; and Lord Cottenham held, that *A.* was a trustee for the payment of those legacies.

But where there is an absolute conveyance by deed, or other act *inter vivos*, the instrument by which the trust is created, must be made in contemplation of or contemporaneously with the conveyance. For, except in the case of fraud, no *subsequent* instrument executed by the grantor would operate to deprive the grantee of his right to the beneficial interest.^(e)

And even if the gift be by will, no trust will be raised on any instrument, subsequently executed, unless it operate as a revocation of the will.^(f)¹

Hence it is obvious, that it is not the legal conveyance, or transfer of the property, but the declaration of the trust, that operates in the

(e) *Adlington v. Cann*, 3 Atk. 145, *Kilpin v. Kilpin*, Id. 520, 532. 151; *Crabb v. Crabb*, 1 M. & K. 511; (f) 3 Atk. 152.

¹ In *Briggs v. Penny*, 13 Jurist, 905, a testatrix had made her will in 1835, by which she bequeathed various charitable and other legacies, and gave to S. P. £3000, and a like sum of £3000 in addition for the trouble she would have in acting as executrix. She then gave further charitable and other legacies and specific bequests, and then gave all the residue of her personal estate to the said S. P., her executors, administrators, and assigns, "well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." Four papers were found in the testatrix's handwriting, undated, unsigned, and unattested, which were written after the date of the Wills Act, in which she named various persons, and designated various charitable institutions, as objects of her bounty, and gave directions for money being laid out in land for charitable purposes. The will and codicil, and one other paper were admitted to proof, but these four papers were not. It was held, that S. P. did not take the residue beneficially, but was a trustee for the next of kin of the testatrix; and a reference was directed to the master to inquire and state whether the views and wishes concerning the disposition of the residue, which were mentioned in the will of the testatrix, were ever and when declared or made known by her, in and by any instrument, paper or writing, or instruments, papers, or writings. (Affirmed, post 71, note.) In a subsequent case, however, a testator bequeathed a policy of insurance on his own life to A. and B., upon the uses of a letter signed by himself, but at the date of the rule there was no such letter; subsequently the testator addressed a note to his executor and signed a memorandum by which he stated his wishes as to the disposition of the money to be received in respect to the policy. He kept the policy in his possession until his death. It was held that no trust was created. *Johnson v. Bull*, 9 Eng. L. & E. 160. In *Dawson v. Dawson*, 1 Chev. 148 (2d part), a person having executed his will, conveyed his property to the uses of the will, by deed. It was decided that a trust resulted to the grantor during his life, and that the profits for that period belonged to him absolutely; but that property purchased, with the *corpus* of the estate, went to the persons named in the will.

creation of the trustee. And it is by no means necessary, that this declaration should be made by a formal deed or will. A simple letter, or memorandum, or any writing of a similar untechnical and informal character, will be sufficient, if it clearly express the gift to be in trust, and sufficiently connect the trustee with the subject-matter of the trust.(g)

And a person without parting with the legal possession of property may, by a similar declaration of trust in favor of another, convert himself into a trustee for the third party.(h)

In addition to the ordinary mode of treating trustees in the transactions between private individuals, it may be observed, that trustees are frequently appointed by special acts of parliament, for the particular or general purposes directed by the statute. However, trustees thus specially created, do not materially differ in their ordinary duties and functions from other trustees; and they are equally amenable to the jurisdiction and supervision of the Court of Chancery.(i)

By the statute 48 Geo. III. c. 149, a declaration of trust in writing must be stamped, in order to be admissible as evidence; and therefore if there be reason to suppose that the original instrument was unstamped, the court will not receive a draft copy as secondary evidence of its existence.(k)

[*65] *A written declaration of trust by the trustee constitutes a perfect equitable title in the *cestui que trusts*, and will prevail over the claim of the assignees of the trustee, if he subsequently become bankrupt. although the trust property remain in his name and under his control.(l)

II.—WHAT DIRECT FIDUCIARY EXPRESSIONS WILL CREATE A TRUST.

When there is a disposition of property by deed or other formal instrument, operating *inter vivos*, it rarely happens that any question can arise, whether a person takes beneficially, or as a trustee for others. The cases on this point have usually arisen on the construction of gifts by will; although in deciding upon the effect of

(g) *Smith v. Attersoll*, 1 Russ. 266; *Hughes v. Stubbs*, id. 478; *Wheatley v. Purrr*, 1 Keen, 553; [*Stapleton v. Stapleton*, 14 Simons, 197; 2 Spence Eq. Jur. 53, and note; *Suarez v. Pampelly*, 2 Sandf. Ch. 336.]
(i) See *Cottrell v. Hampton*, 2 Vern. 5; *Buchanan v. Hamilton*, 5 Ves. 722.

(h) *Exp. Pye*, 18 Ves. 149; *Meek v. Kettlewell*, 1 Hare, 469; [1 Phill. 157;]
(k) *Rose v. Clerke*, 1 N. C. C. 534.
(l) *Pinkett v. Wright*, 2 Hare, 120.

an executory and informal instrument, not of a testamentary nature, the court will adopt the same principles of construction as have been established respecting wills.(m)

Any expression manifesting an intention that the donee of property is not to have the beneficial enjoyment of the whole, or some part of it, will be binding on the conscience of the trustee, and will in equity effectually exclude any claim by him to the beneficial interest.(n)

For this purpose, it is by no means necessary that the donee should be expressly directed to hold the property to certain "uses," or "in trust," or as "trustee," although such terms, having a defined and technical meaning, are more usually as well as more properly employed. It is one of the fixed rules of equitable construction, that there is no magic in particular words; and any expressions that show unequivocally the intention of the parties to create a trust, will have the same effect. It was said by Lord Eldon, that the word "trust," not being made use of, "is a circumstance to be attended to, but nothing more; and if the whole frame of the will creates a trust, for the particular purpose of satisfying which the estate is devised, the law is the same, though the word 'trust' is not used."(o)

Thus, where a gift in a will is expressed to be "*for the benefit*" of others;(p) or to be at the disposal of the donee "*for*" herself (1) and children;(q)¹ or "*towards her support and her family*"(r); or

(m) *Countess of Lincoln v. D.* of 140; *Youmans v. Boulke*, Riley, 134; *Newcastle*, 12 Ves. 227; *Blackburn v. Fisher v. Fields*, 10 J. R. 495, Story, *Stables*, 2 V. & B. 369; *Jervoise v. D.* Eq. § 974, 1068.]
of *Northumberland*, 1 J. & W. 574; see (p) *Jubber v. Jubber*, 9 Sim. 503;
Stubbs v. Sargon, 2 Keen, 255, 273; S. *Raikes v. Ward*, 1 Hare, 445; *Inderwick*
C. 3. M. & Cr. 503; *Croft v. Adam*, 12 v. *Inderwick*, 8 Jur. 53; 13 Sim. 652.
Sim. 639.

(n) See *Morice v. Bishop of Durham*, (q) *Crockett v. Crockett*, 1 Hare, 451.
10 Ves. 537. (r) *Woods v. Woods*, 1 M. & Cr.
401; [see the remarks on this case in

(o) *King v. Denison*, 1 V. & B. 273; 2 Phill, 553.]
[*Porter v. Bank of Rutland*, 19 Verm.

(1) It is immaterial that the donee in trust is himself entitled to a partial beneficial interest, as one of the objects of the testator's bounty. *Woods v Woods*, 1 M. & Cr. 401; *Crockett v. Crockett*, 1 Hare, 451. S. C. 2 Phill. 553. [*Hennershitze's Estate*, 16 Penn. St. 435; *Mason v. Mason*, 2 Sandf. Ch. 432, 477.]

¹ *Crockett v. Crockett*, cited in the text, where the testator directed that all his property should be "at the disposal of his wife, for herself and children," subsequently came up again in 5 Hare, 320, but that decision was overruled in S. C. 2 Phillips, 553, and it was held that there was no joint tenancy between the wife and children; but that the widow, though not entitled to the property, absolutely, had a personal interest in it; and as between herself and her children, was either a trustee of the fund with large discretionary powers as to the application of it, or she had a power in favor of the children, with a life estate in herself. And see remarks in *Webb v. Woolls*, 13 Eng. L. & Eq. 65.

"to enable the donee to provide for or maintain" his children;(s)¹ or "for the express purpose of enabling him to present" to certain persons;(t) or where the testator "orders and directs" the donee [*66] to take care of and provide *for an individual;(u) or where the gift is expressed to be made "to the end" or "to the intent" that the donee should apply it to certain purposes.(x) In all these cases the terms employed have been held sufficient to fasten a trust on the conscience of the donee; and it would be possible to multiply instances of a similar construction to a much greater length, were it not conceived that those already adduced have abundantly exemplified the doctrine of the court on this point; showing that in every case the general purpose and intention of the donor, and not the use of one particular term or another, will decide the question, whether a party does or does not take in a fiduciary character.(y) (1)

In all cases, however, the fiduciary words must be imperative on the donee; and if they confer a mere power or authority, and leave it entirely at his discretion to apply or not to apply the gift to the designated purpose, no trust will be created.(z)

But if a trust in favor of certain objects be once created *ex vi terminorum*, a discretionary power of selection or distribution in the donee, however ample, will not do away with the effect of the trust previously declared, or render him less a trustee for the objects of that power.(a)

(s) *Brown v. Cassamajor*, 4 Ves. 498; *Hamley v. Gilbert*, Jac. 354; *Wetherell v. Wilson*, 1 Keen, 80; [see *Brown v. Paull*, 1 Eng. L. & Eq. 136; *Costerbadie v. Costerbadie*, 6 Hare, 416; *Crockett v. Crockett*, 2 Phill. 553.]

(t) *Stubbs v. Sargon*, 2 Keen, 255; and 3 M. & Cr. 507.

(u) *Broad v. Bevan*, 1 Russ. 511, n.

(x) *Burrell v. Burrell*, Ambl. 660; *Raikes v. Ward*, 1 Hare, 445.

(y) See *Gilbert v. Bennett*, 10 Sim. 371; *Thorp v. Owen*, 2 Hare, 607; *Kilvington v. Gray*, 10 Sim., 293. [Porter

v. Bank of Rutland, 19 Verm. 140; *Erickson v. Willard*, 1 N. Hamp. 209.]

(z) *Morice v. Bishop of Durham*, 10 Ves. 536; *Ommaney v. Butcher*, T. & R. 270; *Gibbs v. Rumsey*, 2 V. & B. 297; *Ball v. Vardy*, 1 Ves. Jun. 270; *Thorp v. Owen*, 2 Hare, 607; *Randall v. Hearl*, 1 Anstr. 124. See post, Sect. 3, as to where a power will be a trust.

(a) *Burrell v. Burrell*, Ambl. 660; *Hockley v. Mawby*, 1 Ves. Jun. 150; *Walsh v. Wallinger*, 2 R. & M. 78; vide post, Sect. 3.

(1) The effect of dubious fiduciary expressions in creating an obligatory trust, is necessarily considered to some extent in the two following sections, to which the reader is referred.

¹ But in these cases where the interest of legacies or rents, or the proceeds of shares, are to be applied by the parent to the support and maintenance of the children, though a trustee as to the *corpus*, the parent takes the interest, &c., subject to no account, provided he discharges the duty of maintaining and educating. *Brown v. Paull*, 1 Eng. L. & Eq. 130; *Hadow v. Hadow*, 9 Sim. 438.

Where a gift is conclusively and absolutely impressed with the character of a trust, the trustee will not in any event be entitled to the beneficial enjoyment, although the particular object of the donor's bounty becomes unable to take it. "Wherever," said Lord Eldon, "there is a plain declaration, that a person, to whom property is given, is to take it in trust; there, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking will be a trustee,—*if not for those who were to take by the instrument, for those who take under the disposition of the law.*(b)

As a general rule, therefore, if the particular purpose declared does not extend to exhaust the entire beneficial interest, or for any reason cannot be carried into execution, the donee will hold the interest thus undisposed of as a trustee by resulting trust for the heir or next of kin of the donor. This rule, however, and its exceptions will be reserved more conveniently for discussion in a future chapter.(c)

According to the general principles of construction, the court will always strive to give effect to every part of an instrument. Therefore, where a bequest to a person is couched in such terms, as would, if uncontrolled, undoubtedly convert him into a trustee, but expressions are added, indicating an intention to give him the beneficial enjoyment,—as, *for instance, where it is given him "for his own use and benefit;" the court will endeavor, if possible, [*67] to give effect to those additional words and will decree the donee to take absolutely and not as a trustee.(d)

III.—WHERE A POWER WILL CREATE A TRUST.

In the abstract, the distinction between a power and a trust is sufficiently marked and obvious. "Powers," as Lord C. J. Wilmot has said, "are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted."(e) In practice, however, it frequently happens that a power and a trust are so intimately blended, either by the express terms or by necessary construction, that it becomes a question of great nicety to de-

(b) *Morice v. Bishop of Durham*, 10 Ves. 537. [*Penny v. Briggs*, 13 Jur. 905.]

(c) Post, Div. II., Ch. I., Sect. 3.

(d) *Lawless v. Shaw*, 1 Ll. & Goul. 558; [5 Cl. & F. 129.] *Wood v. Cox*, 1 Keen, 317; and 2 M. & Cr. 684; *Bards-*

well v. Bardswell, 9 Sim. 319; and see *Meredith v. Heneage*, 1 Sim. 555.

(e) *Wilm.* 23; *Brown v. Higgs*, 8 Ves. 570; 2 Sugd. Pow. 173, 6th ed.; see *Godolphin v. Godolphin*, 1 Ves. 21.

termine, whether the direction is or is not imperative on the conscience of the donee, so as to amount to a trust.

Lord Eldon, in his judgment in the case of *Brown v. Higgs*, after clearly stating and supporting the distinction between a power and a trust, adds: "there is not only a mere trust and a mere power, but there is also known to the court a power, which the party, to whom it is given, is entrusted and required to execute." And his lordship afterwards states the principle of the cases to be, "that if the power is a power, which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute it."(*f*)

In this, as in most other similar cases, the difficulty is, to apply the general rule to the particular case. When it is laid down, that it must be the duty of the donee of the power to exercise it, the doubt still remains, as to what will create such a duty, independently of any imperative directions in the will. On this point it may be observed, that the question, whether a power is simply such, or one in the nature of a trust, has hitherto arisen almost invariably on powers in favor of children or relations; and it might be a question, admitting of very grave argument, whether the construction, that has been adopted in those cases, would be extended to strangers.(*g*)

In examining the doctrine, as laid down above by Lord Eldon, as well as the decided cases on this subject, there appears to be a material distinction between those cases where the *absolute interest* is given to the *donee of the power, and where consequently the [*68] exercise of the power can take effect only out of that interest, and where the person by whom the power is to be exercised, takes only a previous *estate for life*, to which the power is only collateral(*h*).

In the former case the donee of the power himself would be entitled beneficially upon his refusal or omission to exercise it; and the intention or wish of the testator to qualify the gift to him would thus be disappointed. Consequently, in such cases, the court has always

(*f*) *Brown v. Higgs*, 8 Ves. 570, 4. Bull v. Vardy, 1 Ves. jun. 270; 2 Sugd. [See *Miller v. Meetch*, 8 Barr, 417; Pow. 175, 6th ed. *Gibbs v. Marsh*, 3 Metcalf, 243; Withers (*h*) See *Crossling v. Crossling*, 2 Cox. v. Yeadon, 1 Rich. Ch. 324.] 396.

(*g*) *Jones v. Clough*, 2 Ves. 367; see

endeavored to give effect to the apparent intentions of the testator by treating the donee as a trustee for the objects of the power.⁽ⁱ⁾

But where the execution of the power is not to take effect out of the interest of the person by whom it is to be exercised,—as where it is given to a tenant for life to be exercised after the determination of his life estate; or *à fortiori* where the party, to whom it was given, takes *no beneficial interest*, the same arguments on behalf of the objects of the power do not hold good, and the decisions in favor of their taking, in default of the exercise of the power, are not so uniform. Indeed where they have been held entitled, in default of appointment, the decision has proceeded, not on the ground that the power was in the nature of a trust in their favor, but that the bequest operated as a direct gift to the objects in default of the exercise of the power.^(k)¹

(i) *Hardyng v. Glynn*, 1 Atk. 468; (k) *Bull v. Vardy*, 1 Ves. jun. 271; 2 *Brown v. Higgs*, 4 Ves. Jun. 708; S. C. Sugd. Pow. 177; and see *Cox v. Basset*, 8 Ves. 561; *Forbes v. Ball*, 3 Mer. 437; 3 Ves. 155, 164. *Birch v. Wade*, 3 V. & B. 198. [*Wace v. Mallard*, 11 Eng. L. & E. 4.]

¹ A testator devised his real estate and negroes to his son, G. W. in trust, (1) to apply the rents, issues and profits to the use of himself and family, and the education of his children; and (2) to give or devise by deed or will, the said property (and the rents, issues and profits thereof, over and above what he should apply to the uses aforesaid) “unto all or any child or children by him begotten, or to be begotten, in such way or manner, and in such proportion and for such uses, estates and interests, as he shall see fit and proper.” G. W. died, leaving a will whereby he devised the whole of his estate to his wife, with directions to his executors (his wife and sons), to act under “his father’s will in trust, and in every respect and manner intended by their grandfather.” It was held (1) that the legal title was vested in G. W., coupled with a power in trust to appoint at his discretion among his children, (2) but the power could not be delegated, and (3) that as G. W. had neglected to exercise the power, his children were entitled to divide the property equally. *Withers v. Yeadon*, 1 Rich. Eq. 324.

In *Collins v. Carlisle’s heirs*, 7 B. Monr. 14, a husband devised all of his estate, after the payment of his debts, “wholly to his wife, to be disposed of by her, and divided among his children at her discretion,” and it was held that the wife took an estate for life, with power to give it to her children, or to appropriate it to their use at her discretion; and, she dying, the children took the undisposed portions of the estate under the will, and not as her heirs.

A testator, after making provision for certain relatives, and giving the use of the estate in question to his wife during her life, disposed of the residue of his estate in these words: “All the rest and residue of my estates, both real and personal, I give and bequeath to my two brothers A. and B., whom I appoint my executors, with full confidence that they will dispose of such residue among our brothers and sisters, and their children, as they shall judge shall be most in need of the same; this is to be done according to the best of their discretion.” A bill in equity was filed to determine the right of the various parties, claiming under the will, and it was held that a trust had been created by the will in favor of the brothers and sisters, and their children, A. and B. and their children, being ex-

In *Bull v. Vardy*,^(l) a testator, without giving his wife any interest in his general estate, *empowered* her to give away at her death 1,000*l.*, 100*l.* of it to *A.*, and 100*l.* to *B.*; the rest to be disposed of by her will. The wife died without having made any disposition of the 1000*l.* or any part of it. On a suit by *A.* against the wife's executor, claiming the 100*l.*, the Court of Exchequer held, that this was no absolute legacy, but a naked power in the wife, and dismissed the bill.

In the *Duke of Marlborough v. Godolphin*,^(m) a gift by a testator of 30,000*l.* to his wife *for life*, and after her decease, to be divided and distributed to and amongst such of his children, and in such manner and proportion, as she should appoint, was held by Lord Hardwicke to be a mere power, and not a trust for the children in default of appointment. His lordship appears to have drawn a distinction between a gift "amongst my children as *A.* should appoint," which he considered a trust, and a gift amongst *such* of my children, &c., which he held to be a mere power.⁽ⁿ⁾

In *Crossling v. Crossling*,^(o) there was a devise of real estate to the wife *for life*, with a direction that "she should dispose of the same amongst testator's children by her at her decease, as she should think proper." The wife did not exercise this power; and the Court of Exchequer refused to restrain the heir from proceeding with an ejectment against the children, holding that this devise did not create a trust for them, but was a mere power in the wife, which she never executed.

[*69] *In the case of *Brown v. Higgs*,^(p) already mentioned, an estate was devised to one of the sons of *S. B.*, as the father should direct by a conveyance in his lifetime or by his will; and though the point did not call for decision, Lord Alvanley seemed to think this a mere power: an opinion which is supported by the concurrence of Sir E. Sugden.^(q)

However, at the present day, the courts will endeavor, if possible,

(l) 1 Ves. jun. 270.

(o) 2 Cox, 396.

(m) 2 Ves. 61; 5 Ves. Jun. 506.

(p) 4 Ves. jun. 708.

(n) See 2 Sugd. Pow. 178. However it seems that this distinction can no longer be supported, vide post. 69.

(q) 2 Sugd. Pow. 180, 6th ed.

cluded therefrom; so that the estate vested in *A.* and *B.* as trustees for the brothers and sisters and their children, to be enjoyed after the death of the widow, and consequently that after-born children and those who became needy thereafter, could not take; and that the trust was not void by reason of the uncertainty of the persons for whose benefit it was created. *Bull v. Bull*, 8 Connect. 47. The court also in this case, the executors having died without an appointment, directed a reference to determine who were the most needy. See also *Harrison v. Harrison*, 2 Leigh. 1, and post, p. 71, and notes.

to construe a bequest of this description into a gift by implication to the objects of the power, in default of its being exercised, and if the cases of *Duke of Marlborough v. Godolphin*, or *Crossling v. Crossling*, were again to occur, there is little doubt but that the children would be held to take under the terms of the bequest, although the power were not exercised in their favor.^(r) Thus where the tenant for life is desired at his death "*to give it amongst his children as he should think fit*;"^(s) or where the residue, at the death of the tenant for life, "*is to be disposed of amongst her children as she should think proper*;"^(t) or where there is a gift, after the death of testator's wife, *to such of his grandchildren as she should appoint*,^(u) (and many other instances of the same nature might be given;) the power has been held to extend only to the selection from, or distribution amongst, the class of objects; and in default of the exercise of that power they will be all equally entitled.^(x)

The case of *Brown v. Pocock*,^(y) before Sir L. Shadwell, V. C., is a remarkable instance of the disposition of the courts to adopt this construction in favor of the objects of a power. There a testatrix directed a sum of £8000, three per cents., to be set apart, and the dividends paid weekly to *A.* and *B.* during their lives; and by a codicil she gave to *A.* the power of leaving a moiety of that fund to and for the benefit of his wife and children, in such manner as he should by will duly executed give and bequeath the same. *A.* died, having made an invalid appointment of the fund; and the Vice-Chancellor decided that it was clear that the testatrix intended the wife and children to take, and therefore that there was a gift to them by implication subject to the power. In the very recent case of *Croft v. Adam*,^(z) a widow upon her second marriage settled a fund in trust for her own separate use *for life*, and declared that subject thereto the fund should, *as and when she should think fit or be advised*, be settled in trust for the benefit of *A.* her daughter by her first marriage, and her daughter's intended husband and her children, in such manner and for such rights and interests as should be agreed upon either previous to or after the marriage of *A.* with her consent: and that she (the widow) should be *at free liberty and have full power and authority* to settle the fund or any part of it in trust for the *imme-*

(r) See Lord Eldon's observations in *Brown v. Higgs*, 8 Ves. 576, vide et. 2 Sugd. Pow. 179, 180.

(s) *Mason v. Limbury*, 2 Sugd. Pow. 181.

(t) *Kemp v. Kemp*, 5 Ves. 849.

(u) *Witts v. Boddington*, 3 Bro. C. C. 95.

(x) *Davy v. Hooper*, 2 Vern. 665;

Madison v. Andrews, 1 Ves. 57; *Hockley v. Marsby*, 1 Ves. jun. 143; *Longmoore v. Brown*, 2 Ves. 124; *Fowler v. Hunter*, 2 Y. & J. 506; *Walsh v. Wal-linger*, 2 R & M. 78; *Kennedy v. Kingston*, 2 J. & W. 431. [Whitehurst v. Harker, 2 Ired. Ch. 292.]

(y) 6 Sim. 257.

(z) *Croft v. Adam*, 12 Sim. 639.

diate benefit of her daughter and children; but if the daughter should not be married in her mother's lifetime, then that the fund should be in trust for the daughter's benefit and a vested *interest in [*70] her at 21, with a trust over on the death of the daughter without marrying in the mother's lifetime. It was held by the Vice-Chancellor of England, that this was not a power, but a trust for the daughter and her husband and children, although the mother, if she thought fit, might modify the interests of the *cestui que trusts*.(z)

Where there is an express limitation over in default of the power being exercised, that of course will exclude the implication of any gift arising from the terms of the power itself.(a)

There has been already occasion to observe, that where a gift is once clearly impressed with the character of a trust, a discretionary power, however ample, of controlling its application, will not alter that character.(b) And it is immaterial, whether the trustee in such cases takes a beneficial interest jointly with the objects of the power;(c) or whether the power be merely a collateral one, either from the trustee taking no beneficial interest in the trust estate,(d) or from its attaching only after the determination of the life estate given to him.(e)

The circumstance that the discretionary power goes to the *selection* from amongst a class of objects, as well as the distribution or apportionment of their interests, will not affect the stringency of the trust; for it seems that the distinction taken by Lord Hardwicke, in the *Duke of Marlborough v. Godolphin*,(f) cannot now be supported.(g)

And though the power of selection extends to one class of persons, *or another*, in the alternative, it has been held that the trust will be equally binding on the donee.(h)¹

(z) *Croft v. Adam*, 12 Sim. 639.

terton v. Sutherland, 9 Ves. 445; *Kemp v. Kemp*, 5 Ves. 849.

(a) *Pritchard v. Juichant*, Ambl. 126; S. C. 5 Ves. 596, n.; 2 Sugd. Pow. 183.

(f) 2 Ves. 61.

(b) *Ante*, Sect. 2.

(g) *Harding v. Glyn*, 1 Atk. 469; *Witts v. Boddington*, 3 Bro. C. C. 95; 2 Sugd. Pow. 480; *Brown v. Higgs*, 4 Ves. 708; and 8 Ves. 561; *Cruwys v. Colman*, 9 Ves. 319; *Birch v. Wade*, 3 V. & B. 198.

(c) *Burrell v. Burrell*, Ambl. 660; *Raikes v. Ward*, 1 Hare, 445; *Hockley v. Mawbey*, 1 Ves. jun. 143; *Harding v. Glyn*, 1 Atk. 469; *Brown v. Higgs*, 4 Ves. 708; *Forbes v. Ball*, 3 Mer. 437. [1 Rich. Ch. 324; 7 B. Monr. 14.]

(h) *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; and 8 Ves. 561; *Longmore v. Broom*, 7 Ves. 124; *Jones v. Torin*, 6 Sim. 255; see *Prevost v. Clarke*, 2 Mad. 458.

(d) *Reade v. Reade*, 5 Ves. 744.

(e) *Kennedy v. Kingston*, 2 J. & W. 431; *Morgan v. Surman*, 1 Taunt. 289; *Walsh v. Wallinger*, 2 R. & M. 78; *Gas-*

¹ In *Penny v. Turner*, 2 Phillips, 693, there was a gift to the testator's three sisters or their children, as his mother should by deed or will appoint, and the Lord Chancellor held it to be a gift, in default of appointment, to the whole class of daughters and the children, not on the ground that *or* was to be construed *and*,

In all these cases, if the discretionary power be not exercised, the whole of the objects who were within the power, will in general take equally, and no one else can be entitled.⁽ⁱ⁾¹

In some of the earlier cases the court has assumed the right of exercising a discretionary power of selection or application given to trustees.^(k) This jurisdiction, however, is now declaimed; and the court will not only abstain from exercising such a power itself, but will even refuse to interfere with or to control the trustee in the exercise of his discretion, unless improper conduct be shown;^(l) and even in that case the improper appointment will merely be set aside, and the fund left to devolve, as if the power had not been exercised.^(m)

*IV.—WHERE WORDS OF RECOMMENDATION, ETC., WILL
CREATE A TRUST. [71]

It frequently happens that an absolute gift of property is made to a person by will, accompanied by expressions, indicating a wish on the part of the testator, that certain other parties should participate in the beneficial enjoyment. The strong disposition of the courts to give effect to the intentions of testators has given rise to a species of trusts founded on expressions of this nature, and differing in some respects from absolute trusts. These recommendatory trusts will be enforced in favor of the particular objects or purposes thus designated, although they will be insufficient to impress the gift with the character of a trust *generally*; and if the particular object or purpose designated, cannot take or fail, the first taker will be entitled to the benefit of the failure, and will hold absolutely discharged from any trust.

(i) *Kennedy v. Kingston*, 2 J. & W. 431; *Walsh v. Wallinger*, 2 R. & M. 78; *Kemp v. Kemp*, 5 Ves. 849. [Withers *v.* Yeadon, 1 Rich. Ch. 324.]

(k) *Warburton v. Warburton*, 2 Vern. 420; *Longmore v. Broom*, 7 Ves. 124; 2 Sudg. Pow. 190; *Wareham v. Brown*, 2 Vern. 153; *Lewis v. Lewis*, 1 Cox,

(l) *Alexander v. Alexander*, 2 Ves. 640; *Kemp v. Kemp*, 5 Ves. 849. See *Wood v. Richardson*, 4 Beav. 174; *Pratt v. Church*, ib. 177, n. [*Penny v. Turner*, 2 Phill. 497; *Prendergrast v. Prendergrast*, 3 Engl. L. & E. 16.]

(m) 5 Ves. 849.

but because it was referable only to the power given the mother of selection among the class, and as that power could not be exercised by the court, the whole must take equally.

¹ In *Bull v. Bull*, 8 Conn. 48, stated ante, page 68, note, the executors having died without exercising the power of selection, the court directed a reference to determine "who among the brothers and sisters and their children were the most needy" in the terms of the devise; holding that it was competent to exercise the discretion.

It has been established from a series of cases, that where a bequest is accompanied by words expressing a command, recommendation, entreaty, wish, or hope, on the part of the testator, that the donee will dispose of the property in favor of another, a trust will be created:—1st, If the words on the whole are sufficiently imperative; 2d, If the subject be sufficiently certain; and 3d, If the object be also sufficiently certain.(n)

I. With regard to the nature of the recommendatory expressions,—no particular words are necessary. It has been said by Lord Redesdale, that it is sufficient for a testator to express a desire as to the disposition of the property; and the desire so expressed amounts to a command.(o)

Thus the words “desire,”(p) “will and desire.”(q) “request,”(r) “wish and request,”(s) “entreat,”(t) “recommend,”(u) “hope,”(x) “in the fullest confidence,”(y) “not doubting,”(z) “trusting and wholly confiding,”(a) have been considered sufficient to raise a trust, where the two other requisites, viz.: certainty of the object, and the subject are also complied with.¹

(n) *Malim v. Knightley*, 2 Ves. jun. 335; *Paul v. Compton*, 8 Ves. 380; *Wright v. Atkins*, T. & R. 157; *Knight v. Knight*, 3 Beav. 172. [Harrison v. Harrison, 2 Gratten 1; *Lucas v. Lockhart*, 10 Sm. & M. 466.]

(o) *Cary v. Carry*, 2 Sch. & Lef. 189. [But see *Knight v. Boughton*, 8 Jur. 923; 11 Cl. & F. 513; and *Williams v. Williams*, 5 Eng. L. & E. 50.]

(p) *Mogridge v. Thackwell*, 7 Ves. 36; *Mason v. Limbury*, cited in *Vernon v. Vernon*, Ambl. 4; *Harding v. Glin*, 1 Atk. 468; *Cruwys v. Colman*, 9 Ves. 319; *Legge v. Asgill*, T. & R. 265, n.

(q) *Edes v. England*, 2 Vern. 466; *Birch v. Wade*, 3 V. & B. 198; *Forbes v. Ball*, 3 Mer. 437.

(r) *Nowlan v. Nelligan*, 1 Bro. C. C. 489; *Pierson v. Garnet*, 2 Bro. C. C. 38; *Eade v. Eade*, 5 Mad. 118.

(s) *Foley v. Parry*, 2 Sim. 138; S. C. 2 M. & K. 138.

(t) *Prevost v. Clark*, 2 Mad. 458; *Taylor v. George*, 2 V. & B. 378.

(u) *Malim v. Knightley*, 2 Ves. jun. 333; *Tibbitts v. Tibbitts*, 19 Ves. 656; *Harwood v. West*, 1 Sim. & St. 387; *Ford v. Fowler*, 3 Beav. 146; overruling *Cunliffe v. Cunliffe*, Amb. 686. [But see post, page 72 note.]

(x) *Harland v. Trigg*, 1 Bro. C. C. 144.

(y) *Wright v. Atkins*, 1 V. & B. 313; S. C. T. & R. 143; *Podmore v. Gunning*, 7 Sim. 644; [*Wace v. Mallard*, 11 Eng. L. & Eq. 4. But see *Webb v. Woolls*, 13 Eng. L. & Eq. 63, and post 72, note.]

(z) *Massey v. Sherman*, Ambl. 520; *Parsons v. Baker*, 18 Ves. 476; *Taylor v. George*, 2 V. & B. 378.

(a) *Wood v. Cox*, 1 Keen, 317; S. C. 2 M. & Cr. 684; *Griffiths v. Evans*, 5 Beav. 241. [*Baker v. Mosley*, 12 Jur. 740.]

¹ In *Briggs v. Penny*, 3 Mac. & G. 546, 8 Eng. L. & Eq. 231, 16 Jur. 93, affirming S. C. 13 Jur. 905, the rule on this subject was thus laid down by Lord Chancellor Truro as the result of the authorities. “Words accompanying a gift or bequest, expressions of confidence, or belief, or desire, or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions:—First, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not;

Where, however, the expressions used, either in themselves or when coupled with the context, are such as confer only a *power* of disposition on the donee, and the application or non-application of the property to the *purpose designated is left entirely at his discretion, no trust will be created. Thus where a testator "*empowered*" his wife to give away at her death certain sums to parties named in his will, and the wife died without making any appointment: it was decided by Lord Chief Baron Eyre, that no trust was created in favor of those parties, it being a mere naked authority in the testator's wife.(b) [*72]

And if the testator himself declare, that the words of recommendation are not to be considered as words of injunction, it is clear that they will not create an obligatory trust against the donee. Thus in a very recent case a testator, after giving his daughter an absolute power of appointment by will over certain property, "*recommended, though he did not absolutely enjoin*, his said daughter to distribute the same at her decease amongst her daughters in equal shares." And it was held by Sir K. Bruce, V. C., on the principle above stated, that these words were merely precatory, and created no trust.(c) In the same case a question was raised whether the words, "*I most earnestly wish*, that my said sons may give or settle their respective shares on their respective daughters in preference to their sons"—created a trust for the daughters: but the Vice-Chancellor declined to express an opinion on this point, which it became unnecessary to decide.(d)¹

In modern times a strong disposition has been indicated on the part of the judges not to extend the doctrine of raising a trust upon

(b) Bull v. Vardy, 1 Ves. jun. 270; Coll, Ch. 582, 590, 7 Jur. 1197. [See and see Randall v. Hearle, 1 Anst. 124: Huskinson v. Bridge, 3 Eng. L. & E. and ante, Sec. 3; Cox v. Basset, 3 180.]
Ves. 157.

(d) 2 Young & Coll, Ch. 592.

(c) Young v. Martin, 2 Young &

secondly, the subject must be certain; and thirdly, the object expressed not too vague or indefinite to be enforced." (See Corporation of Manchester v. Osburn, 1 House Lords, Cas. 272.) In this case a testatrix gave various legacies to S., and gave to S. P., whom she appointed sole executrix, £3000, and a like sum of £3000 in addition for the trouble *she would have in acting as executrix*. She then made other bequests, and then gave all the rest, residue, and remainder of her estate, of her personal estate to S. P.; her executors, administrators, and assigns, "*well knowing that she will make a good use, and dispose of it in a manner in accordance to my views and wishes*." It was held that S. P. did not take the residue beneficially.

¹ Although the words "it is my wish" in a will generally operate as a direct bequest, yet they will be construed to mean rather an inclination of mind, than an act of the will, where a different construction would produce repugnancy or inconsistency, Brunson v. Hunter's Admin., 2 Hill, Ch. 490; and so of words of recommendation or desire generally, Knott v. Cottee, 2 Phill. 192.

words of recommendation, &c., &c., but as far as the authorities will allow, to give the words their natural and ordinary effect; unless it be clear, that they are intended to be used in a peremptory sense. It has been remarked by a learned judge, (Sir A. Hart,) that "the first case, that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions of late years has been against converting the legatee into a trustee."^(e)¹

(e) *Sale v. Moore*, 1 Sim. 540; *vid.* *Briggs*, 2 Phil. 583; *Webb v. Woolls*, et *Meredith v. Heneage*, 1 Sim. 551; 13 Eng. L. & Eq. 63; *Johnston v. Wright v. Atkins*, 1 V. & B. 315; *Ex Rowlands*, 2 De G. & S. 356, 12 Jur. parte *Payne*, 2 Y. & Coll. 636. [*Knight* 769; *Mekonkey's Appeal*, 1 Am. Law *v. Boughton*, 11 Cl. & F. 513; *Williams v. Register*, 360.] *Williams*, 5 Eng. L. & E. 47; *White v.*

¹ The more recent English decisions have followed the lead of those stated in the text. Thus, where a testator gave £2000 to his wife, to be disposed of by her will in such way as she should think proper, but he recommended her to dispose of one-half thereof, among such of his relations as she should think proper (*Johnston v. Rowlands*, 12 Jur. 769; 2 De G. & Sm. 356), it was held that no trust was created. So where there was a bequest for life to a wife of the use of all the testator's property, and he directed that certain specific chattels should be finally appropriated as she pleased, with a sum of £4000, which sum, however, he recommended her to divide among certain persons. *White v. Briggs*, 15 L. J. Ch. 182, overruling *S. C.* 15 Sim. 33. In *Williams v. Williams*, 5 Eng. L. & Eq. 47 (15 Jur. 715), a testator gave all his personal property to his wife absolutely; but in a codicil in the form of a letter addressed to his wife, used these words, "It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children, when you no longer can enjoy it yourself. But I should be unhappy if I thought it possible that any one not of your family, should be the better for what I feel confident you will so well direct the disposal of." It was held by V. Ch. Knight Bruce, that the widow took the property absolutely. He observed with regard to the modern decisions on the subject, "The point really to be decided, in all these cases, is, whether looking at the whole context of the will, the testator has meant to impose an obligation on his legatee, to carry his wishes into effect, or whether having expressed his wishes he has meant to leave it to the legatee, to act on them or not at his discretion. I doubt if there exist any formula for bringing to a direct test the question, whether words of 'request' a 'hope' or 'recommendation,' are or are not to be considered as obligatory." See the remarks of V. Ch. Wigram, 2 Hare, 510. In *Knott v. Cottee*, 2 Phill. 197, it was ruled that such words would not raise a trust, if they conflicted with any provisions of a more definite and positive import in the same instrument. In a very recent case, *Webb v. Woolls*, 13 Eng. L. & Eq. 63, the Vice Chancellor (*Kindersley*) laid it down as a rule of construction in such cases, that where the latter words of a sentence in a will go to cut down an absolute gift, contained in the first part of the sentence, and are inconsistent with such gift, the court will, if it can, give effect to the absolute gift. Therefore, where in that case, the testator had devised in these words; "All my property of whatever description, whether in possession, &c., I give unto my dear wife, her executors, administrators, and assigns, upon the fullest trust and confidence reposed in her, that she will dis-

In the case of *Sale v. Moore*,^(f) a testator gave his residue to his wife, "recommending to her and not doubting that she would con-

(f) *Sale v. Moore*, 1 Sim. 534.

pose of the same, for the joint benefit of herself and my children, it was held an absolute gift in the wife, and that no trust had been created for the children. In *Wace v. Mallard*, 11 Eng. L. & E. 4, however, a bequest by a testator of all his property to his wife, her executors, administrators, and assigns, for her sole benefit, in full confidence that she would appropriate the same for the benefit of his children, was held to be a gift of an estate for her life, with a power of appointment in favor of her children, and a gift to them, in default of appointment, as joint tenant. The opinion of V. Ch. Turner, is very brief and unsatisfactory in this case, which is obviously in conflict with the foregoing. See further *Winch v. Bruton*, 14 Sim. 379. A direction for a will that a certain person should be employed as agent and manager of the testator's estates, whenever his trustees should have occasion for the service of a person in that capacity, does not create a trust which equity could enforce. *Finden v. Stephens*, 2 Phill. 142. See 2 *White & Tudor*, Eq. Lead. Cases, II. p. 332, 348, notes to *Harding v. Glyn*.

But few cases on this subject have occurred in the United States. In *Erickson v. Willard*, 1 N. Hamp. 217, E. T. devised all his estate to J. W., and appointed him his executor. In the will was this clause, "I desire that the said J. W. should at his discretion appropriate a part of the income of my estate aforesaid, not exceeding \$50 a year, to the support of my widow M. E." It was held that this clause with other expressions rendered the devise to J. W., a trust to the above amount, which a court would enforce. In *Collins v. Carlisle*, 7 B. Monroe, 14, stated ante, page 68 in note, the words "to be disposed of and divided among my children," were held to control the prior devise to his wife, and create a trust for the children. A devise to two executors of the residue of a testator's estate, "with full confidence that they will dispose of such residue among our brothers and sisters and their children, as they shall judge shall be most in need of the same; this is to be done according to the best of their discretion," creates a trust in favor of the needy brothers, &c., which on the death of the trustees without exercising it, devolves on the court. *Bull v. Bull*, 8 Conn. 47. In *Lucas v. Lockhart*, 10 Sm. & M. 466, a husband by his will gave to his wife the entire profit of all his estate during her life, "entrusting to her the education and maintenance of his children," and provided also, for the education and maintenance of the children "out of the profits" of the estate, and it was held that the wife took the estate, coupled with the trust for the education and support of the children. This doctrine of the creation of trusts by precatory words was a good deal discussed in Virginia in *Harrison v. Harrison*, 2 Gratt. 1. There a testator had made his will in these words: "In the utmost confidence in my wife, I leave to her all my worldly goods, to sell or keep for distribution amongst our dear children, as she may think proper. My whole estate, real and personal, are left in fee simple to her, only requesting her to make an equal distribution amongst our heirs, and desiring her to do for some of my faithful servants, whatever she may think will most conduce to their welfare, without regard to the interest of my heirs. Of course I wish, first of all, that all my debts shall be paid." The Court of Appeals, Judge Brooke dissenting, held, 1. That the widow was invested, subject to the payment of the testator's debts, with the legal title to the whole estate, real and personal; taking the beneficial interest in the estate for her life; 2. That the children of the marriage had a vested remainder in fee in the estate, to commence in possession at the widow's death, or earlier, at her election; 3. That the widow might make advancements to the

sider his near relations, as he would have done, if he had survived her." Sir A. Hart, V. C., considered those expressions too loose to raise a trust for the testator's next of kin, and decided that the wife took the residue absolutely.⁽¹⁾ And in another case, where a testator made a residuary gift to his brother Arthur, "to enable him to assist such of the children of his brother Francis, as Arthur might find deserving of encouragement." Sir L. Shadwell, V. C., deter-

(1) *Sale v. Moore*, 1 Sim. 534.

children at her discretion, so that they all ultimately received an equal share of the estate; 4. That she might employ a reasonable portion of the estate for the benefit of the slaves; 5. And that she had power to sell all or any part of the estate, real or personal, for payment of debts, or more convenient enjoyment, advancement, or division. In *Thompson v. McKisick*, 3 Humph. 631, a different conclusion was arrived at. There the bequest was of certain negroes to the testator's daughter, "to be hers for ever, to be disposed of as she may think proper amongst her children and grandchildren, by will or otherwise," and it was held that she took an absolute estate, and that there was no trust for the children, &c. The subject of trusts created by precatory words, has recently been very thoroughly considered in Pennsylvania. In *Coates' Appeal*, 2 Barr, 129, a testator had by his will given his real and personal estate, to be possessed and enjoyed by his wife for life, or during widowhood, "to be used and applied to the maintenance and support of his children, and at her decease or marriage, should either take place before they came of age, then among them equally." By a subsequent will revoking all others, he devised, after payment of his debts, the use, benefits and profits of his real estate to his wife for life; and also all his personal estate of every description—"absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among her children." It was held there that the widow was entitled to the income for life, merely of the personalty, and was a trustee for the children. The word "surplus" was construed to apply only to what should remain after payment of debts. The same will came again before the Supreme Court, in *Mekonkey's Appeal*, 1 Harris, 253, when a somewhat different view was taken of its construction. The widow was held to have taken a life estate in the personalty, with a power in trust for the children, over the principal *remaining at her death*; and therefore an appointment by her omitting one or more of the children was void. The word "surplus" was there applied to the property in the hands of the widow. These two decisions were merely interlocutory in the cause. In *Mekonkey's Appeal*, 1 Am. Law Reg. 306, 7 Harris, however, the case came up for final determination, and after full argument, the former cases were overruled, and the words of the will held not to create a trust. Judge Lowrie in a very able and learned opinion, traced the origin of the rule in the earlier English cases to a misapplication of the provisions of the Roman law, in regard to legacies founded on different principles, and which he declared never to have been adopted in Pennsylvania. The result at which the Court arrived was that, words in a will expressive of desire, recommendation, and confidence, are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; but that such words might amount to a declaration of trust when it appeared from other parts of the will, that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice or discretion.

mined, that no trust was created in favor of the children of Francis.(1) In *Lechmere v. Lavie*,(g) a testatrix, having given the bulk of her property to her two eldest daughters, added a codicil, which concluded thus, "If they die single, *of course* they will leave *what they have* amongst their brothers and sisters, or their children;" and it was held by Sir J. Leach, M. R., that those words expressed the expectation of the testatrix, but were not intended to create an obligation *upon the two eldest daughters.(g) And in *Pope v. Pope*,(h) it was determined by Sir L. Shadwell, V. C., that a [*73] gift by a testator of the capital of his business to his wife, "trusting that she will act justly and properly to and by all our children," was a general expression of a wish, and did not create a trust.(h) The whole of the authorities on this point have been reviewed, and the principle of the cases considered by Lord Langdale, M. R., in his masterly judgment in the recent case of *Knight v. Knight*.(i) In that case, after making an absolute gift of real and personal estate, the testator added, "I trust to the justice of my successors, in continuing the estates in the male succession according to the will of the founder of the family;" and Lord Langdale considered that those words were not sufficiently imperative, to create a trust in favor of the male line.(i)

The effect of expressions of this nature, in creating a trust, depends entirely on the supposed intention of the donor, to be gathered from the whole tenor of the instrument;(k) therefore words, which when taken by themselves would clearly create a trust, have frequently been controlled in their operation when they are annexed to expressions, purporting to give the absolute enjoyment and disposal of the property, in question to the donee.(l) Thus the words "*free and unfettered*," accompanying the strongest expressions of request, have been held to prevent the words of request from being imperative.(m) And where a gift in one case was expressed to be "*at the sole and entire disposal*" of the testator's wife(n) and in another case was made to a testator's son, "his heirs, executors, administrators, and assigns, *to and for his and their own use and benefit*;"(o)—those ex-

(g) *Lechmere v. Lavie*, 2 M. & K. 197. Wood v. Cox, 2 M. & Cr. 684; vid. et. Bland v. Bland, 9 Mod. 478; S. C. 2 Cox, 349.

(h) *Pope v. Pope*, 10 Sim. 5.

(i) *Knight v. Knight*, 3 Beav. 148, 178; [affirmed on appeal, 11 Cl. & F. 513.] (m) *Meredith v. Heneage*, 1 Sim. 542, 555; *Knight v. Knight*, 3 Beav. 174.

(k) *Meggison v. Moore*, 2 Ves. jun. 633. (n) *Hoy v. Master*, 6 Sim. 568.

(l) *Meredith v. Heneage*, 1 Sim. 319. (o) *Bardswell v. Bardswell*, 9 Sim.

556; *Knight v. Knight*, 3 Beav. 174;

(1) *Benson v. Whittam*, 5 Sim. 22.

pressions seem to have materially assisted the court in coming to the decision, that the words of recommendation added to the gift were not sufficiently imperative to convert the parties taking into trustees.

And though the word "trust" be made use of, yet if it be coupled with such expressions as show an intention on the part of the giver not to limit or control the discretion of the donee: as where a testator "trusts to the liberality or to the justice" of his devisees to do something in favor of certain individuals, no imperative trust will be created.^(p)

The case of *Young v. Martin*,^(q) which has been already stated, is also one of this description.

The second requisite for creating a trust by means of expressions of this nature is, that the subject of the recommendation or wish be certain.¹—For this purpose the property to which the trust is intended to apply must be clearly described. Therefore in *Knight v. Knight*,^(r) where a testator, being entitled to several estates real and personal, made an absolute *gift of his real and personal estates; [*74] and, after referring to the estates, which he took under his grandfather's will, concluded by "trusting to the justice of his successors in continuing '*the estate*' in the male succession according to the will of his grandfather;" Lord Langdale, M. R., considered, that the property, which was the subject of the recommendation, was not described with sufficient accuracy, it being uncertain, whether it was it was the testator's intention to include the personal estate, or anything besides the estates of his grandfather, to which he had himself succeeded.^(r) And in a later case a testator, after giving everything he died possessed of to his daughter for life, added, "*whatever she can transfer*" to go to her daughters; and it was held by the same learned judge, that it was impossible to say what was the subject intended by the expressions, "*whatever she can transfer*," and therefore, that the gift to the daughters was void for uncertainty.^(s)

However, any description, no matter how untechnical or inartificial, will be sufficient, as long as it points out clearly what is the property

(p) *Knight v. Knight*, 3 Beav. 177; (q) 2 Y. & Coll. Ch. 582, 7 Jur. 1147. vid. et. *Curtis v. Rippon*, 5 Mad. 434; (r) *Knight v. Knight*, 3 Beav. 179. *Hoy v. Master*, 6 Sim. 568; *Wilson v. Affirmed Dom. Proc.* 8 Jurist, 923; 11 Major, 11 Ves. 205. [*Huskisson v. Cl. & F.* 513. *Briggs*, 3 Eng. L. & Eq. 181.] (s) *Flint v. Hughes*, 6 Beav. 342.

¹ A testator after bequeathing his wife a portion of his property, added a clause to his will in which he requested that a person to whom he had bequeathed nothing, might provide for her a chaise or other suitable conveyance, and attend her whenever and wherever she might wish to go, for a suitable compensation, if she should desire it. It was held that this was too vague and indefinite a provision to be contained as a legacy to the wife. *Whipple v. Adams*, 1 Metcalf, 444.

to which the trust is intended to apply.—Therefore the subject has been considered to be defined with sufficient accuracy by the description of “what fortune he (the first taker) should receive under the testator’s will;”(t) or, “what (the first taker) has in her own power to dispose of that was mine,”(u) or, “the share of my property I have bestowed on her;”(w) so where a testator devised all his lands and hereditaments as well leasehold as freehold and copyhold to his mother and her heirs for ever, in the fullest confidence that she would devise “*the property*” to his family; Lord Eldon considered that the subject was described with sufficient certainty, although his lordship seems to have regarded it as doubtful whether the word property would include the timber as well as the soil of the estate.(x) And the “*residue*” of a testator’s estate after certain purposes are answered, though a subject to be ascertained, is nevertheless so clearly and certainly ascertainable, that it will amount to a sufficient designation.(y)

But any words, by which it is expressed, or from which it may be implied, that the first taker has the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use will prevent the subject of the gift from being considered certain.(z)¹

This principle of construction was established at a very early period, in the case of Attorney General v. Hall,(a) decided in the year 1735. A testator gave the residue of his personal estate to his son Francis, and the heirs of his body; but in case his son should leave no heirs of his body, then he gave “*so much as he should be possessed of at the time of his death*” to the corporation of Goldsmiths in trust, for charity: and it was held by Sir J. Jekyll and Lord Chief Baron Reynolds, that the trust for the charity did not take effect on

(t) Pierson v. Garnet, 2 Bro. C. 1C. 38.

(u) Cruwys v. Colman, 9 Ves. 39.

(w) Prevost v. Clarke, 2 Mad. 458.

(x) Wright v. Atkins, G. Coop. 115; 3 14,] cited 2 Cox, 355.

S. C., T. & R. 157.

(y) Knight v. Knight, 3 Beav. 173.

(z) Knight v Knight, 3 Beav. 174.

(a) Att.-Gen. v. Hall, [Fitzgibbon,

¹ Where A. devises *all his estate* to B. his wife, her executors, &c., but in case of B.’s death, without disposing of it by will, or otherwise assigning or disposing of it, then to his daughter; B. takes an absolute estate in fee. Jackson v. Robbins, 15 Johnson, 171; 16 Johns. 586. So on a devise to one, and in case he dies without issue, then “the said property he *dies possessed of*,” to T., Jackson v. Bull, 10 John. 19; or “*what estate he shall leave*, to be divided, &c.,” Ide v. Ide, 5 Mass. 500; the subsequent limitation is void. A bequest to B. of all the personal estate “to and for her *own use and benefit, and disposal absolutely*. The remainder of said estate after her decease, to be for the use of my son Jesse,” gives an absolute interest to the wife. Smith v. Bell, Mart. & Yerg. 302. See also Davis v. Richardson, 10 Yerg. 290; Thompson v. McKisick, 3 Hump. 631; Zimmerman v. Andrews, 6 W. & S. 220. In Mekonkey’s appeal, 1 Am. Law. Reg. 360, ante, 72 note, the words “leave the surplus to be be divided” were considered as overturning any implication of a trust.

the death of the son without heirs of his body.(a) So in *Bland v. Bland*,(b) a testatrix gave all her real and personal estate to her son, Sir John Bland, his heirs, executors, administrators and assigns, charged with debts and legacies; and *concluded thus "it is [*75] my earnest request to my son, Sir J. Bland, that on failure of issue of his body, he will sometime in his lifetime settle the said premises, *or so much thereof as he shall stand seised of at the time of his decease*, so and in such manner as that on failure of issue of his body, the same may come to my daughter and the heirs of her body." And the Lord Chancellor decided that no trust was created in favor of the daughter and her heirs.(b)

Upon the same principle where the desire or recommendation expressed by the testator, is that the first taker should "give *what should be left at her death*" to his children or grandchildren:(c) or that she would "*leave the remainder of her property*" (after paying certain specified pecuniary legacies) to his nephews who are named:(d) or that if she dies single, "she will leave *what she has* amongst her brothers and sisters, or their children;(e) or that "should she not marry again, and have other children, her affection for their daughter would induce her to make their daughter *her principal heir*;"(f) or that "should she marry again, she might convey '*what property she might then possess*' to trustees, for the benefit of her children;"(g) in none of these cases would the court decree the execution of the trust.

On the same ground, where a testator gave all his real and personal estates to his wife, her heirs, executors and administrators, "trusting that she would, in fear of God and in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the church of God and the poor;" the Vice-Chancellor held the wife absolutely entitled to the property, there being no ascertained part of it provided for the children, and she being at liberty, at her pleasure, to diminish the capital either for the church or for the poor.(h)

The refusal of the courts to establish a trust upon a wish expressed

(a) *Att.-Gen. v. Hall*, [Fitzgibbon, Kingston, 1 Mer. 314; *Tibbitts v. Tibbitts*, 19 Ves. 664.] cited 2 Cox, 355.

(b) *Bland v. Bland*, 2 Cox, 349; vide et. *La Maitre v. Bannister*, Prec. Chan. 201, n.; *Strange v. Barnard*, 2 Bro. C. 197. C. 586.

(c) *Wyne v. Hawkins*, 1 Bro. C. C. 179; *Pushman v. Philliter*, 8 Ves. 7; *Wilson v. Major*, 11 Ves. 205; Bull v. Kingston, 1 Mer. 314; *Tibbitts v. Tibbitts*, 19 Ves. 664.

(d) *Eade v. Eade*, 5 Mad. 118.

(e) *Lechmere v. Lavie*, 2 M. & K. 197.

(f) *Hoy v. Master*, 6 Sim. 568.

(g) *Pope v. Pope*, 10 Sim. 1; vide et. *Horwood v. West*, 1 S. & S. 387.

(h) *Curtis v. Rippon*, 5 Mad. 434.

by a testator, that the first taker should "remember," "consider," or "act justly and properly by," any particular objects, and other expressions of that nature, would seem to be also in part attributable to the rule now under consideration; inasmuch as such expressions rarely designate with any accuracy the part of the property which is to be subject to the trust.⁽ⁱ⁾

3d.—With regard to the certainty requisite in describing the objects or persons to take under trusts of this nature; it is by no means indispensable that they should be mentioned by name. A more general description,—as by referring to them as a class,—will be sufficient, if the context clearly and definitely fixes the persons who are to take.¹

Thus a trust will be established upon words of recommendation, &c. in favor of the "sons," "children," or "grandchildren," either of the *testator himself, or of other persons mentioned in the will:^(k) and where the designation has been the "rela- [*76] tions,"^(l) or the "descendants,"^(m) or "female descendants,"⁽ⁿ⁾ of an individual; that has been considered sufficiently certain, whether the subject were real or personal estate.

With regard to the term "family," the decisions appear to be somewhat at variance with each other.² In *Harland v. Trigg*,^(o)

(i) *Curtis v. Rippon*, 5 Mad. 434; *Birch v. Wade*, 3 V. & B. 198; *Forbes Sale v. Moore*, 1 Sim. 534; *Pope v. Pope*, 10 Sim. 1; *Le Maitre v. Bannister*, Prec. Chan. 201, n.; *Bardswell v. Bardswell*, 9 Sim. 319. *v. Ball*, 3 Mer. 437; *Wright v. Atkins*, 2 T. & R. 161. [See *Bishop v. Cappel*, 11 Jur. 937; *S. C.* 1 De G. & Sm. 411; *Davidson v. Proctor*, 14 Jur. 31; *Ham's Will*, 15 Jur. 1121.

(k) *Mason v. Limbury*, cited Ambl. 4; *Massey v. Shearman*, Ambl. 520; *Malim v. Knightley*, 2 Ves. jun. 333; *Prevost v. Clarke*, 2 Mad. 458; *Ford v. Fowler*, 3 Beav. 146. (m) *Pierson v. Garnet*, 2 Bro. C. C. 38, 226.

(n) *Parsons v. Baker*, 18 Ves. 476.

(o) *Harland v. Trigg*, 1 Bro. C. C. 142.

(l) *Harding v. Glyn*, 1 Atk. 469;

¹ See *Harrison v. Harrison*, stated ante. 72 note. Though a vagueness in the objects will furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations, which show that a trust was purposed; while at the same time, such trust is not sufficiently certain or definite to be carried out. Thus where a testatrix by her will, after giving, among other legacies, a sum of £3000 to S. P., and a like sum of £3000 for the trouble she would have in acting as executrix, bequeathed her residuary estate to the said S. P., "Well knowing that she will make a good use of it, and dispose of it in accordance with my views and wishes," and appointed S. P. executrix, and four codicils were found, but imperfectly attested: it was held by Lord Chancellor Cottonham, affirming, S. C., 12 Jur. 905, that S. P. did not take the residue for her own benefit, but that the words of the bequest created a trust. *Briggs v. Penny*, 3 Mac. & G. 506.

² A testator devised the "balance" "of his estate" to be given to the families of A. and B.'s children: held that the children of A. & B. took *per stirpes* and not *per capita*. *Walker v. Griffith*, 11 Wheat. 375. A devise "for the support of

the testator's brother was entitled to a freehold estate under his father's will, as tenant for life in remainder after the death of his brother, with remainder to his children in strict settlement. The testator, being possessed of some leasehold estates for lives, and also some for terms of years, devised the leasehold for lives to the trustees of his father's will, to the same uses as the estate limited to them by the will; "and all other his leasehold estates in Sutton he gave to his brother for ever, *hoping he would continue them in the family*;" Lord Thurlow decided, that those words created no trust of the leasehold property at Sutton, as they did not clearly demonstrate an object.(o)

In *Barnes v. Patch*,(p) a testator in certain events gave the remainder of his estate to be equally divided *between his brother's and sister's families*. And it was held by Sir William Grant, M. R., that the *children* of the brother and the sister were entitled equally *per capita*, to the exclusion of their parents, both to the real and personal estate.(p)

In *Cruwys v. Colman*,(q) the expressions were "I make my only sister, (Bridget Cruwys,) whole and sole executrix to everything I have, for her own life. And it is my absolute desire, that she bequeaths at her own death *to those of her own family*, what she has in her own power to dispose of, that was mine, provided they behave well to her with decency and affection." The sister died, having declared by her will, that she meant to make no disposition of the testatrix's property; and Sir William Grant, M. R., held, that there was a trust for the *next of kin* of the testatrix.(q)

The next case is the much litigated one of *Wright v. Atkins*.(r) In that case Wright Edward Atkins by his will gave, devised and bequeathed all his lands and hereditaments whatsoever and where-soever, as well leasehold as freehold and copyhold, to his mother Charlotte Atkins and her heirs for ever, "*in the fullest confidence*,

(p) *Barnes v. Patch*, 8 Ves. 604.

(r) *Wright v. Atkins*, 17 Ves. 255;

(q) *Cruwys v. Colman*, 9 Ves. 319.

S. C. 19 Ves. 299; and Coop. 111.

the family" of the testator, is a devise for the support of the widow, and the maintenance and education of the children. *Addison v. Bowie*, 2 Bland, 606. Where, however, a testator devised his estate to his seven sons, with a request, that they should take care of their brother J. T. and his family, it was held, on a bill filed by J. T. and his children, that the term *family* was not sufficiently certain, but that the devise to J. T. was good, and constituted, when the amount was ascertained, a charge on the land. *Tolson v. Tolson*, 10 G. & J. 159. In *Johnston v. Rowlands*, 2 De G. & Sm. 356; 12 Jur. 769, there was a gift of a legacy to the testator's wife, "to be disposed of by her will in such a way as she shall think proper; but I recommend her to dispose of one-half thereof to her own relations, and the other half to such of my relations as she shall think proper," and it was held not to create a trust.

that after her decease she would devise the property *to his family*," and he gave and bequeathed to his said mother all his goods, chattels and personal estate for her own benefit. The first suit of *Wright v. Atkins*(*r*) was instituted by the testator's uncle and heir-at-law, John Atkins Wright, who had become entitled by representation to two incumbrances charged on the devised estates, for the purpose of having those incumbrances discharged: and in that suit, the question arose whether Charlotte Atkins was bound to keep down the interest of the incumbrances; it therefore became incidentally *necessary to determine, whether she was tenant for life, or in fee [*77] of the estates devised to her. At the original hearing, Sir William Grant, M. R., was of opinion that the words in question were sufficient to create a trust, and decreed that Charlotte Atkins was only tenant for life of the devised estates.(*s*) In consequence of Sir William Grant's decision, an injunction was afterwards granted by the Lord Chancellor (Lord Eldon,) to restrain Charlotte Atkins from cutting timber on the estates:(*t*) and his lordship subsequently affirmed the decree made by Sir William Grant at the original hearing, when the case was brought before him on appeal.(*u*) An appeal was then presented to the House of Lords, by whom the previous decisions were reversed, so far as they declared, that Charlotte Atkins was only tenant for life.(*x*) The case came finally before the court again on an application for a fresh injunction to restrain Mrs. Atkins from cutting timber, when Lord Eldon, after observing, that upon reconsideration he was perfectly satisfied that there was no ground for saying, that Mrs. Atkins was only tenant for life, refused to grant the injunction against her, and ordered that she should be at liberty to cut the timber in a husband-like manner, as tenant in fee, upon giving security for the value, or bringing the value into court.(*y*) In *Grant v. Lynam*,(*z*) there was a bequest of personal estate to the testator's wife for life, with a direction for her to bequeath the same *to any one or more of the testator's own family* she might think proper. It was decided by Sir J. Leach, M. R., that the donee had a power to select any object of bounty amongst the testator's relations or family, though not the next of kin. But if the donee did not exercise that power, then the word "family" was to be construed "next of kin;"(*z*) and in the late case of *Griffiths v. Evan*,(*a*) the term "my nearest family," was held to create a trust for the heir, the subject of the devise being real estate.(*a*)

(*r*) *Wright v. Atkins*, 17 Ves. 255;
S. C. 19 Ves. 299; and *Coop.* 111.

(*s*) 17 Ves. 255.

(*t*) 1 V. & B. 313.

(*u*) 19 Ves. 299.

(*x*) T. & R. 145.

(*y*) T. & R. 143.

(*z*) *Grant v. Lynam*, 4 Russ. 292.

(*a*) *Griffiths v. Evan*, 5 Beav. 241.

In the recent case of *Liley v. Hey*,^(b) Sir J. Wigram, V. C., supported the validity of a devise of real estate for the benefit of certain "families," although it was objected, that the description was too uncertain to be enforced.^(b)

So in *Woods v. Woods*,^(c) it was held by Lord Cottenham, that a gift to a wife for the support of "*herself and family*," was a good bequest in favor of the children, whom his lordship decided to be entitled under that description.^(c) And in a still later case, a gift of 6,000*l.* to the *family* of S. W., was held by Sir J. Wigram, V. C., to entitle his six children as joint-tenants.^(d)

Upon examination of these several authorities therefore, it seems to be clear, that a direct gift to or for the benefit of a "family" or "families," is a sufficient description of the objects; and according to the circumstances of the property the next of kin, or the children, will be held to take.^(e)¹

And it is also equally clear, that if there be a gift to a person [*78] expressly **for life*, followed by words creating a trust *in remainder* to "his family," without giving any power of selection to the first taker, that would be a sufficiently certain description, whether the devised property consisted of real or personal estate, or of both united.^(f) But where property is devised to an individual in the first place *absolutely*, and words are added to the gift, importing a trust, or power in the nature of a trust, for the devisee, to devise the property at his death to or among the testator's "family;" the court will not in a suit, instituted by the heir-at-law *in the lifetime of the first taker*, decide, whether the expressions of trust do or not operate to cut down the *prima facie* absolute interest, given by will, to an estate for life; but will leave that question to be disposed of, when it arises at the death of the devisee: and this appears to be all that was decided by the House of Lords on reversing the previous decisions in *Wright v. Atkins*, and by Lord Eldon, when the second suit of that name came before him.^(h) And it was expressly decided in *Grant v. Lynam*, that where the first

(b) *Liley v. Hey*, 1 Hare, 580.

(c) *Woods v. Woods*, 1 M. & Cr. 408.

(d) *Wood v. Wood*, 3 Hare, 65.

(e) *Barnes v. Patch*, 8 Ves. 604;

Woods v. Woods, 1 M. & Cr. 408;

Liley v. Hey, 1 Hare, 580. [See *White*

v. Briggs, 2 Phillips, 583.]

(f) *Wright v. Atkins*, Coop. 117,

122; and T. & R. 156; *Cruwys v. Colman*, 9 Ves. 319.

(h) *Wright v. Atkins*, T. & R. 143, sect. 154.

¹ A bequest to the family of G. was held not to be void for uncertainty, but construed to be a gift to the children of G. (an uncle of the testator, known to live on terms of intimacy with him) as joint tenants, and not to include the parents or their grandchildren. *Gregory v. Smith*, 9 Hare, 708.

taker, to whom a power of selection was given, died without exercising that power, the term "family" was a sufficiently certain description of the objects to take, and that the trust would be supported accordingly.⁽ⁱ⁾

Harland v. Trigg, owing to its peculiar circumstances, cannot be considered an authority upon the general principle. In that case the parties, entitled to the freeholds in remainder under the father's will, endeavored to establish their claim to take the leaseholds bequeathed by the testator as answering to the designation of his "family;" and it has been observed by Lord Eldon, that "it was impossible that the words 'my family' in that case could mean an heir-at-law."^(k)

The case of *Cruwys v. Colman* is a direct authority for considering the term "family" a sufficient description of the objects, where the subject is personal estate: and although it was determined by the House of Lords, that the decision of Sir Wm. Grant, as affirmed by Lord Eldon in the first suit of *Wright v. Atkins*,^(l) was premature, yet those decisions would doubtless have considerable weight, if the same point should again be brought before the court at the proper time. However it must be observed, that throughout Lord Eldon's judgment in the second case of *Wright v. Atkins*,^(m) the tendency of his opinion appears to be strongly against holding the expressions, which were the subject of dispute in that case, to be a sufficiently certain description of the objects of the trust.

It has been remarked by Sir William Grant that "the word 'family' may according to the context have different significations in different wills;"⁽ⁿ⁾ and the effect and construction of the term must depend mainly on the context, and the circumstances, in connexion with which it is usual.^(o) These will of course vary with every case, rendering it *impossible to lay down any more [*79] definite rules of construction on this point.

Where the designated objects of a trust of this nature are a specified class of persons, the certainty of the description will not be affected by the fact of a power of selection being given to the devisee. The whole class will take a vested interest, subject to be divested by the exercise of the power, and if it be not exercised, the whole class will be equally entitled.^(p) Where the objects are desig-

(i) *Grant v. Lynam*, 4 Russ. 292; and see *Griffiths v. Evan*, 5 Beav. 241.

(k) *Coop.* 121.

(l) 17 Ves. 255; and 19 Ves. 299.

(m) T. & R. 143.

(n) In *Cruwys v. Colman*, 9 Ves. 323. See *Woods v. Woods*, 1 M. & Cr. 408.

(o) *Wright v. Atkins*, T. & R. 158; *Woods v. Woods*, 1 M. & Cr. 408.

(p) *Harding v. Glyn*, 1 Atk. 469; *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; and 8 Ves. 570; *Cruwys v. Colman*, 9 Ves. 319; *Birch v. Wade*, 3 V. & B. 198.

nated as "relations," the power would be well exercised in favor of *any* relation, although not one of the next of kin.(q) But in default of exercise of the power, the next of kin, according to the Statute of Distributions, only would be entitled.(r) And in like manner where "family" is the term of description, it seems that the power might be exercised in favor of any one who comes within the ordinary acceptation of that term; although the heir-at law only would take in default of its exercise, if the property were real estate:(s) and the next of kin, if it were personal estate.(t)

So the objects will be sufficiently certain, though the trust be in favor of several persons, or classes of persons;(u) or even alternatively in favor of one person, or class, "*or*" another; which latter case has been held, only to confer a power of selection between the two classes.(x) And in such cases all the objects designated would take equally, if the power were not exercised.(y)

Where an imperative trust is created by precatory words in favor of "charity," or "charitable purposes," the court will give effect to it, although the particular objects to take may not be specified, or are left entirely at the discretion of the trustee.(z) And it seems, that where such a trust applies to a *residue*, or *the corpus of a fund*, the court on application will at once assume the administration of the trust, and will direct a reference to the master to approve of a scheme for that purpose.(a) But where the subject-matter is an *annual*, or *temporary income* to be disposed of from year to year, and an unlimited discretion is left to the trustee with regard to the selection of the objects and the distribution of the fund, the court will not in the lifetime of the trustee interfere with that discretion, by directing a scheme, but will leave any claimant liberty to apply to the court as there may be occasion.(b)¹

(q) *Harding v. Glyn*, 1 Atk. 469; *Forbes v. Ball*, 3 Mer. 437; see T. & R. 162.

(r) *Harding v. Glyn*, ubi sup.; *Birch v. Wade*, 3 V. & B. 198.

(s) *Wright v. Atkins*, T. & R. 156, 159; *Griffiths v. Evans*, 5 Beav. 241.

(t) *Grant v. Lynam*, 4 Russ. 492; *Cruwys v. Colman*, ubi sup.; *Woods v. Woods*, 1 M. & Cr. 408.

(u) *Mason v. Limbury*, cited Ambl. 4.

(x) *Longmore v. Broom*, 7 Ves. 124; *Prevost v. Clarke*, 2 Mad. 458; *Jones v. Torin*, 6 Sim. 255.

(y) *Brown v. Higgs*, 4 Ves. 708. [*Penny v. Turner*, 2 Phill. 693.]

(z) *Moggridge v. Thackwell*, 7 Ves. 36; *Waldo v. Caley*, 16 Ves. 206; *Legge v. Asgill*, T. & R. 265, n.; *Horde v. Earl of Suffolk*, 2 M. & K. 59; *Baker v. Sutton*, 1 Keen, 224; *Townsend v. Carus*, 13 Law Journ. N. S., Chanc. 169. [*Atty.-Gen. v. Lawes*, 8 Hare, 32; 14 Jur. 77; see *Wheeler v. Smith*, 9 How. U. S. 53.]

(a) *Moggridge v. Thackwell*, 7 Ves. 36.

(b) *Waldo v. Caley*, 16 Ves. 206. *Horde v. Earl of Suffolk*, 2 M. & K. 59.

¹ In some of the United States, where the Statute of 43 Elizabeth is not in force, it has been held that the power to enforce charities was in the Court of Chancery at common law, independently of that statute; and that charities within

In *Moggridge v. Thackwell*,^(c) a testator gave the residue of his personal estate to James Vaston, his executors and administrators, "desiring him to dispose of the same in such charities, as he should think fit, *recommending poor clergymen who have large [*80] families and good characters." The suit was instituted after the death of the trustee; and Lord Thurlow decreed, that the residue ought to be applied in charity, regard being had to poor clergymen with good characters and large families, according to the recommendation in the will, and he referred it to the master to settle a scheme for the purpose.^(c) In consequence of an intimation by Lord Rosslyn, when this cause came before him on further directions, it was subsequently re-heard before Lord Eldon, who affirmed Lord Thurlow's decree, after a most elaborate argument.^(d)

In *Waldo v. Cayley*,^(e) there was a trust to pay the income of testator's residuary personal estate to his wife for life; and the will then proceeded as follows, "but nevertheless I do hereby most solemnly enjoin, and earnestly desire, and I am thoroughly persuaded from the invariable fidelity and attachment my dear wife has always shown me, that she will after my decease, with the utmost readiness and cheerfulness, co-operate with my said trustees in

(c) *Moggridge v. Thackwell*, 3 Bro. C. C. 517; S. C. 1 Ves. jun. 464. (d) *Moggridge v. Thackwell*, 7 Ves. 36. (e) *Waldo v. Caley*, 16 Ves. 206.

its definition would be enforced, though the beneficiaries were too vaguely designated to claim for themselves that assistance. It is sufficient if a discretion in the application of the funds is vested anywhere. *Vidal v. Girard*, 2 How. S. C. 127; *Hadley v. Hopkins's Academy*, 14 Pick. 240; *Going v. Emery*, 16 Pick. 107; *Brown v. Kelsey*, 2 Cush. 243; *Burr v. Smith*, 7 Verm. 241; *Wright v. Trustees*, 1 Hoff. Ch. 202; *King v. Woodhull*, 3 Edw. Ch. 79; *Kniskern v. Lutheran Church*, 1 Sandf. Ch. 439; *Bank v. Phelan*, 4 Barb. S. C. 80; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Newcomb v. St. Peter's Church*, Id. 636; (but see *contra* in N. Y., *Andrews v. Bib. Soc.* 4 Sandf. S. C. 156; *Chittenden v. Chittenden*, 1 Am. L. Reg. 538); *Witman v. Lex*, 17 S. & R. 88; *Zanes's will*, Brightly, 350; *Pickering v. Shotwell*, 10 Barr. 23; *Griffiths v. Cope*, 17 Penn. St. 96; *McCord v. Ochiltree*, 8 Blackf. 115; *State v. McGiven*, 2 Ired. Ch. 9; *Griffin v. Graham*, 1 Hawks. 90; *Atty.-Gen. v. Jolly*, 1 Rich. 99; *Beall v. Fox*, 4 Geo. 404; *Wade v. American Col. Soc.*, 7 S. & M. 603; *Dickson v. Montgomery*, 1 Swanu (Tenn.), 340. In other states that statute has been declared to be still in force. *Griffin v. Graham*, 1 Hawks. 96; *Gass v. Withill*, 2 Dana, 170; *Atty.-Gen. v. Wallace*, 7 B. Monr. 611. But the English doctrine of *cy pres* is inapplicable to the circumstances of the country, and has not been adopted. *McAuley v. Wilson*, 1 Dev. Eq. 276; *Witman v. Lex*, 17 S. & R. 88; *Atty.-Gen. v. Jolly*, 2 Strob. Eq. 379; *Dickson v. Montgomery*, 1 Swanu, 348. In Virginia and Maryland, however, it has been decided that neither the statute nor the principles which it embodies, are in force. *Baptist Association v. Hart*, 4 Wheat. 1; *Wheeler v. Smith*, 9 How. U. S. 58; *Gallego v. Atty.-Gen.*, 3 Leigh 451; *Dashiell v. Atty.-Gen.*, 5 H. & J. 392; 6 H. & J. 1. A very exhaustive discussion of the subject of charitable uses will be found in *Magill v. Brown* (*Zanes's will*), Brightly, N. P. 350.

carrying my wishes into execution; and therefore having made a very considerable provision for my said dear wife by this my will, I do direct and desire that she will, with the advice and assistance of my said trustees or the survivor of them, yearly and every year during her life lay out and expend one moiety of the net income of my personal estate in promoting charitable purposes, as well those of a public as of a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as my said wife shall judge most worthy and deserving objects; giving a preference always to poor relations." It was held by Sir Wm. Grant, M. R., and his decision was affirmed on appeal by Lord Eldon, that there was a trust of one moiety of the residue for charity, with a preference, but not confined to poor relations of the testator: the distribution to be at the discretion of the wife, with the advice but not subject to the control of the trustees.^(e)

This decision has been followed by the recent case of *Horde v. Earl of Suffolk*,^(f) where annual sums were bequeathed to persons, with a desire by the testatrix, that "the sums should be given away by the legatees in charity, either to individual persons, or public institutions, in such sums, way and manner, as, according to their own discretion and judgment, they should think fit, without the interference or control of any person whatever:" Sir J. Leach, M. R., decided, that there was a valid trust of the legacies for charity, but that the distribution was at the discretion of the legatees, and he therefore refused to direct any scheme, leaving to any party liberty to apply.^(f) In the late case of *Baker v. Sutton*,^(h) a bequest of a residue "for such religious and charitable purposes, as in the opinion of the trustees should be deemed fit and proper;" was held by Lord Langdale, M. R., to create a valid trust for charitable purposes:^(h) and in the still more recent case of *Townsend v. Carus*,⁽ⁱ⁾ a trust by will to dispose of the residue "for the benefit of such societies, subscriptions for purposes (having a regard to the glory of God [*81] and the *spiritual welfare of his creatures), as the trustees should in their discretion see fit," was supported as a binding trust in favor of charity.

Where the expressions used are such as to create a trust for "charity" or "charitable purposes" at all events, and the discretionary powers given to the trustee, however amply they may be worded, apply only to *the selection of the objects or the distribution of the fund*, the validity of the trust will not be affected by the

(e) *Waldo v. Caley*, 16 Ves. 206.

(h) *Baker v. Sutton*, 1 Keen, 224.

(f) *Horde v. Earl of Suffolk*, M. & K. 59.

(i) *Townsend v. Carus*, 13 Law Journ. N. S. Chanc. 169.

existence of those powers; and the case of *Horde v. Earl of Suffolk* is a remarkable illustration of this rule: but if the will be so worded as to render it doubtful whether it is not left entirely at the discretion of the legatee to apply or not to apply the subject of the bequest to *any* charitable purpose *at all*; such a direction cannot be enforced by the court in favor of any charity.^(k) However, in such cases, if the expressions are such as clearly show it to have been the intention of the testator that the legatee should not take beneficially, a resulting trust will be decreed for the next of kin.

It will be observed that in both the cases of *Waldo v. Caley*, and *Horde v. Earl of Suffolk* the trust for charity was established, although expressed to be in favor such as were of a *private* as well as of a public nature; and although in the latter case it was urged upon Sir J. Leach's attention, that the court would not interfere in cases of private charity, his Honor does not appear to have attached any importance to that objection. However it had been previously decided by Sir Thos. Plumer, M. R., that a trust for "*private charity*" was too indefinite to be carried into execution by the court.^(l) And this decision has since been recognised, and acted upon in more recent cases.^(m) "In what respect," says Sir Thos. Plumer, in his judgment in *Ommaney v. Butcher*, "does private charity differ from benevolence? Assisting individuals in distress is private charity, but how can such a charity be executed by the court or by the crown! Private charity is in its nature indefinite;—how can it be controlled?—how can it be carried into execution?"

In some cases, although the words may be sufficiently imperative, and the subject and the objects sufficiently certain, the trust may notwithstanding fail, on the ground that the interest which the objects are to take, is not clearly defined; as where the general expressions and context of the will show an intention on the part of the testator, that the designated objects should not be absolutely entitled, but do not limit the precise interest which they are to take. In cases of *express* executory trusts, the court will do its utmost to carry out the supposed intention of the parties, and for that purpose will direct such a settlement of the property to be executed, as it conceives will best meet the wishes of the person creating the trust;⁽ⁿ⁾

^(k) *Coxe v. Basset*, 3 Ves. 155, 164; *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522; *Williams v. Kershaw*, 5 Law Journ. N. S. 84; *Ellis v. Selby*, 1 M. & Cr. 286; *Ommaney v. Butcher*, T. & R. 270; *Kendall v. Granger*, 5 Beav. 300; [*Flint v. Warren*, 15 Sim. 626;] vide post, Div. II., Ch. I., Sect. 3.

^(l) *Ommaney v. Butcher*, T. & R. 273.

^(m) *Ellis v. Selby*, 1 M. & Cr. 293; *Nash v. Morley*, 5 Beav. 177.

⁽ⁿ⁾ *Jervoise v. Duke of Northumberland*, 1 J. & W. 570; *Woolmore v. Burrows*, 1 Sim. 512; *Ld. Dorchester v. Effingham*, 3 Beav. 180, n.

but there does not appear to be any decided case in which this jurisdiction has been exercised upon mere *precatory expressions*.

Thus in *Meggison v. Moore* a testator by his will devised all his real estate to his sister for life, with remainder to her children, as [*82] she should *appoint, and in case of no appointment to her children and their heirs as tenants in common. The sister had two daughters: and the testator by a codicil to his will, after giving an annuity to one of those daughters, directed the residue of his personal estate to be invested in land, and "*recommended*" his sister to settle and convey all his estates and property, which she might derive from him after his decease, to the use of her two daughters for life, in such parts, &c., as she should approve, with remainder to their respective issue; and in default of issue of either of them, with cross remainders to the issue of the other, with the usual clauses in strict settlement. The testator's sister died in his lifetime, and her two daughters with his co-heiresses-at-law. And it was held by the Lord Chancellor, that they were entitled jointly in fee to all the real estates, including those directed to be purchased by the codicil, thereby negating the existence of any trust.(o)

So where a testator devised his estate to his daughter, and then added "*I strongly recommend her* to execute a settlement of the said estate, and thereby to vest the same in trustees, &c., for the use and benefit of herself for life, with remainder to her husband and his assigns for life, with remainder to all and every the children she may happen to have, if more than one, share and share alike, and if but one, the whole to such one, or to such other uses as my said daughter shall think proper; to the intent that the said estate in the event of her marriage, shall be effectually protected and secured." Lord Abinger, Lord Chief Baron, held, that the daughter took an absolute estate free from any trust.(p)

And in *Knight v. Knight*, where the testator trusted to the justice of his successors in continuing the devised estates in male succession, according to the will of the founder of the family, (his above-named grandfather,) Lord Langdale, M. R., was of opinion that the objects and the order in which the testator wished them to take, were indicated with sufficient certainty; but his lordship considered, that there was not sufficient clearness to make it certain, what were the interests to be enjoyed by the objects, and on that ground amongst others refused to decree the execution of any trust.(q)

(o) *Meggison v. Moore*, 2 Ves. jun. 630.

(q) *Knight v. Knight*, 3 Beav. 179. Affirmed Dom. Proc. 8 Jurist, 923, 11

(p) *Ex parte Payne*, 2 Y. & C. 636.

Cl. & F. 513.

V.—OF THE EFFECT OF A VOLUNTARY DISPOSITION IN TRUST.

Where there is a conveyance or assignment of the legal interest in property either real or personal to trustees, accompanied by a clear declaration of the trust; it is immaterial that the transaction is a purely voluntary one. The title of the trustees under such an instrument is complete and irrevocable, and will prevail against the person creating the trust, and all subsequent volunteers claiming under him by devise or otherwise.^(r)¹(1) * And if the settlement be of personal estate, the title of the parties undertaking it will be [*83]

(r) *Bolton v. Bolton*, 3 Sw. 414, n.; *nett*, 3 M. & K. 36. [*Simmonds v. Pal-Sear v. Ashwell*, ib. 411, n.; *Jefferys v. les*, 2 J. & Lat. 489; *Smith v. Hurst*, *Jefferys*, 1 Cr. & Ph. 138; *Smith v. 17 Jur.* 30.]
Lyne, 2 N. C. C. 345; *Fortescue v. Bar-*

(1) An important exception to this general rule has been established by the authorities with regard to trust deeds for creditors. For if a debtor voluntarily convey property to trustees upon trusts for the benefit of his creditors; and the transaction is not communicated to the creditors, and they do not execute the deed, and are not in any manner privy to it, the deed will merely operate as a *power* to the trustees, which is revocable by the debtor; and the creditors, even though they be named in the schedule to the deed, cannot enforce the performance of the trust either against the maker of the deed, or the trustees. *Walwyn v. Coutts*, 3 Mer. 707; *S. C.* 3 Sim. 14; *Page v. Broom*, 4 Russ. 6; *Garrard v. Ld. Lauderdale*, 3 Sim. 1; *Acton v. Woodgate*, 2 M. & K. 492. It seems however to have been considered by Sir John Leach, in *Acton v. Woodgate*, in opposition to the opinion of Sir L. Shadwell, V. C., in *Gerard v. Ld. Lauderdale*, that if the trust

¹ *Hardin v. Baird*, 6 Litt. 340; *Bunn v. Winthrop*, 1 J. C. R. 329; *Hayes v. Kershaw*, 1 Sandf. Ch. 261; *Story Eq.* § 433, 987; *Fogg v. Middleton*, *Riley's Ch.* 193; *Greenfield's estate*, 2 Harris, (Penna.) 489; *Kirkpatrick v. McDonald*, 1 Jones, 387; *Graham v. Lambert*, 5 Humph. 595; *Henson v. Kinard*, 3 Strob. Eq. 391; *Dupre v. Thompson*, 4 Barb. Rep. 180; *Dennison v. Goehring*, 7 Barr. 175. See article in 16 Jur. p. 2, 266. But a deed of settlement by which the settlor is delivered, bound hand and foot as to the property settled, into the power of his trustee, cannot be maintained in equity without the clearest proof that it was made at and with the request, consent, knowledge, or instance of the settlor; and a solicitor who takes upon himself to prepare such a deed for execution by his client, without the concurrence of the latter, does so subject to all the consequent liabilities of the deed being set aside, notwithstanding the solicitor may have been influenced by motives for the benefit of his client. Therefore, where the plaintiff, alleged by the defendant to be young and extravagant, applied to a solicitor to raise a certain sum on mortgage, and the latter, with a view to prevent the former from dissipating his fortune tied up the whole of his property, and constituted himself sole trustee, the court, on bill filed by the plaintiff, alleging that the deed of settlement had been prepared without his authority, consent, or knowledge, and there not being any evidence to the contrary, declared the deed void in equity, and directed a reconveyance of the trust property by the trustee. *Moore v. Prance*, 15 Jur. 1188; 20 L. J. Ch. 468. But if voluntary such a deed would be supported. *Slifer v. Beates*, 9 S. & R. 166, 179.

good even against subsequent purchasers; for the statute 27 Eliz. does not apply to personal estate.(s)

The fact that the deed remains in the possession of the party, by

(s) *Bill v. Cureton*, 2 M. & K. 503, 512. [See post 90.]

were communicated by the trustees to the creditors that would defeat the power of revocation by the debtor, see 2 M. & K. 495. And it has been decided that the trustees of such a deed are at any rate entitled to an answer to a bill filed by them against the maker of the deed and the person, in whom the legal estate of the assigned property was vested, to obtain a transfer of that property; where the trustees had acted upon the deed by making payments in advance, and Lord Langdale in that case appears to have been inclined to support the validity of the deed on general grounds. *Hinde v. Blake*, 3 Beav. 234. [See further *Simmonds v. Palles*, 2 Jones & Lat. 489; *Brown v. Cavendish*, 1 Idem. 606; *Semple in re* 3 Id. 488; *Smith v. Keating*, 6 C. B. 136. In *Smith v. Hurst*, 17 Jur. 30, 32, it was said by V. C. Turner to be the result of the authorities that whether a trust for creditors was revocable depended on the circumstances of each case. Thus in *Griffits v. Ricketts*, 7 Hare, 307, 14 Jur. 166; it was held that such a trust was not revocable as against any creditors with whom such communications had taken place as would give them an interest under the deed, but at the most only as to the surplus of the estate after satisfying such creditors, and even as to this it was a question. So where a deed of assignment of debtor's personal property to a trustee for the benefit of all his creditors, who should execute or accede to the deed, was *bona fide* made and executed by both the debtor and the trustee, and the property taken possession of under it, and afterwards the trustee by his assent communicated the contents of the deed and all that had been done to three of the creditors, each of whom expressed himself satisfied with the assignment, but neither they nor any others of the creditors signed the deed or did any act under it, the Court of Queen's Bench held that the deed was valid, and the title in the trustee as against an execution creditor. *Harland v. Binks*, 15 Q. B. 713; 14 Jur. 979; 20 L. J. [Q. B.] 126. Where creditors have actually executed the deed it cannot any longer be treated as a mere voluntary deed of agency revocable by the debtor, *Mackinnon v. Stewart*, 1 Eng. L. & E. 158, 1 Sim. N. S. 76; see the remarks in this case by Rolfe, V. Ch. (the present Lord Chancellor) on *Garrard v. Lord Lauderdale*, and that class of cases.

In the United States though, the trustees in a voluntary assignment are, before the assent of creditors considered rather as the agents of the assignor than of the creditors, *Brooks v. Marbury*, 11 Wheaton, 79; see *Watson v. Bagaley*, 2 Jones, 164; the latter may, on being informed of it, claim the benefit of its provisions and enforce it in equity, though not actually parties thereto. *Moses v. Murgatroyd*, 1 John. Ch. 119; *Shepherd v. McEvers*, 4 J. C. R. 136; *Pingree v. Comstock*, 18 Rich. 46; *Weir v. Tannehill*, 2 Yerg. 57; *Montelius v. Wright*, Wright, 61; *Pearson v. Rockhill*, 4 B. Monr. 296; *Robertson v. Siblett*, 6 Humph. 313; *Ingram v. Kirkpatrick*, 6 Ired. Eq. 463; *Pratt v. Thornton*, 28 Maine, 355. See *Read v. Robinson*, 6 W. & S. 239. Where any of the trusts have been executed, *Ingram v. Kirkpatrick*, 6 Ired. Eq., 463; or notice has been given to the creditors, *Galt v. Dibrell*, 10 Yerg. 147; *Petriken v. Davis*, 1 Morris, 296, the assignment is of course irrevocable. See the remarks on the English cases in *Tennant v. Stoney*, 1 Rich. Ch. 223, and the able notes of the late Mr. Wallace to *Ellison v. Ellison*, 1 Lead. Cas. Eq. 215; and to *Thomas v. Jenks*, 1 Amer. Lead. Cas. 78. See the note, post 332; and *Burrill on Assignments*, 280, 306, where the subject is fully discussed.]

whom it is executed, and that it is not acted upon, or is even subsequently destroyed, will not affect its validity, unless there are some other circumstances connected with the transaction, which would render it inequitable to enforce its performance.(t)

However it has long been an established principle with courts of equity, that they will not interfere to perfect the title of a party claiming merely as a volunteer.(1) Therefore if the transaction, on which the voluntary trust is attempted to be established, be still executory and incomplete, the court will decline to interpose.(u)¹

(t) *Sear v. Ashwell*, 3 Swanst. 411, n.; *Barlow v. Heneage*, Prec. Chan. 211; *Clavering v. Clavering*, 2 Vern. 474; see *Cecil v. Butcher*, 2 J. & W. 573. [*Bunn v. Laithrop*, 1 J. C. R. 329;] and see post; but see *Uniacke v. Giles*, 2 Moll. 267.

(u) *Colman v. Sarell*, 3 Bro. C. C. 12; *Ellison v. Ellison*, 6 Ves. 656; *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 M. & Cr. 226; *Jeffreys v. Jeffreys*, 1 Cr. & Ph. 138; *Dillon v. Coppin*, 4 M. & Cr. 647.

(1) With regard to the question of, who are or are not to be regarded as volunteers, it is settled that a *valuable* consideration is requisite to put the court in motion. And although Sir E. Sugden, (Lord Chancellor of Ireland,) decided in the case of *Ellis v. Nimmo*, that the *meritorious* consideration of blood would be sufficient to induce the court to interfere for the purpose of enforcing the performance of an executory trust; *Ellis v. Nimmo*, 1 Lloyd & Gould, 333;—that decision has been since overruled, and the previous practice restored, by the subsequent cases of *Holloway v. Headington*, 8 Sim. 324, and *Jefferys v. Jefferys*, 1 Cr. & Ph. 138, where it was held by Sir L. Shadwell, V. C., in the one case, and Lord Cottenham, C., in the other, that a *valuable* consideration only would suffice for this purpose. See *Jefferys v. Jefferys*, stated post 84. The early case of *Watts v. Bullas*, 1 P. Wms. 60, appears to be in favor of the validity of the consideration of blood to support a trust, at all events as against the *heir* of the settlor *after his death*. But that decision cannot be regarded as of much weight when opposed to the general current of the later authorities. [In *Moore v. Crofton*, 3 Jones, & Lat. 442, Sir Edward Sugden found himself obliged to yield to the current of authority, and to admit *Ellis v. Nimmo*, to be overruled. He, however declared that he still thought it decided upon sound principles of equity. See 2 Spence, Eq. Jur. 58, note (e) 285;(c) n. 1, White and Tudor, Lead. Ca. 190; 13 Jur. part II., page 213. In America, however, a blood consideration has been held to be enough to support an executory trust in equity, at least where the instrument was under seal. *Taylor v. James*, 4 Desau. 5; *McIntire v. Hughes*, 4 Bibb. 186; *Caldwell v. Williams*, 1 Bailey, Ch. 175. In *Dennison v. Goehring*, 7 Barr. 175, Gibson, C. J. thought that a voluntary trust in favor of the children of the grantor could be enforced; though the case was in fact one of a *constituted* trust, which was undoubtedly irrevocable. So in *Hayes v. Kershaw*, 1 Sandf. Ch. 261, the assistant Vice Chancellor remarked, “covenants and agreements founded upon a good

¹ *Bunn v. Winthrop*, 1 J. C. R. 329; *Hayes v. Kershaw*, 1 Sanf. Ch. 258; *Minturn v. Seymour*, 4 J. C. R. 497; *Acker v. Phoenix*, 4 Paige, 308; *Bank v. May*, 3 A. K. Marsh, 436; *Dennison v. Goehring*, 7 Barr, 175; *Clarke v. Lott*, 11 Illin. 105; *Caldwell v. Williams*, 1 Bail. Eq. 175; *Dawson v. Dawson*, 1 Dev. Eq. 93; *Forward v. Armstead*, 12 Alab. 127; *Darlington v. McCoolle*, 1 Leigh. 36; *Read v. Robinson*, 6 W. & S. 331; *Crompton v. Vasser*, 19 Alab. 259.

But although there may not be any actual conveyance or assignment vesting the legal interest in the property in trustees for the objects of the settlor's bounty, yet if the relation of trustee and *cestui que trust* be otherwise completely and effectually constituted, that is regarded in equity as a perfect title, and will be enforced as such on behalf of the *cestui que trust*.(x) This distinction was put very forcibly by Lord Eldon in the case of *ex parte Pye*. "It has been decided," said that learned judge, "that upon an agreement to transfer stock this court will not *interfere; but if the party *has declared himself to be the trustee of that stock*, it becomes the property of the *cestui que trust* without more, and the court will act upon it."(y)

However, the distinction between what will or will not constitute a complete and perfected voluntary trust, depends upon very nice and refined considerations;(z) and the cases on the subject appear to be somewhat at variance with each other.

A voluntary agreement or covenant to convey property upon trust, though under seal, is clearly executory, and will not be enforced against the covenanting party.(a) This rule was strikingly exemplified in a recent case before Lord Cottenham; where a father by a voluntary settlement conveyed certain freehold estates, and by the same deed covenanted to surrender certain copyhold lands to trustees, in trust for the benefit of his daughters. The settlor afterwards devised part of the estates comprised in the settlement to his wife, who was admitted to some of the copyholds. After the father's death a bill was filed by the daughters against the wife and the trustees to establish the trust of the settlement, and the Lord Chancellor granted the relief prayed, as far as it related to the freeholds, but *dismissed the bill with costs* as to the copyholds.(b)

So any voluntary instrument, which has not the effect of conveying or transferring the *legal* interest in the property, with which it

(x) *Pulvertoft v. Pulvertoft*, 18 Ves. 99; *Wheatley v. Purr*, 1 Keen, 551; *Collinson v. Patrick*, 2 Keen, 123; *Lechmere v. E. of Carlisle*, 3 P. Wms. 222.

(y) *Ex parte Pye*, 18 Ves. 149.

(z) See *M'Fadden v. Jenkyns*, 1 Phill. 157.

(a) *Ellison v. Ellison*, 6 Ves. 656; *Cotteen v. Missing*, 1 Mad. 176; [1 *Leigh*, 36; 12 *Alab.* 127; 1 *J. C. R.* 3; see however *McIntire v. Hughes*, 4 *Bibb*, 186; *Caldwell v. Williams*, 1 *Bail. Eq.* 175.]

(b) *Jefferys v. Jefferys*, 1 *Cr. & Ph.* 138.

consideration, or as it is oftentimes expressed, a *meritorious* consideration, are upheld and enforced in this court." But in *Kennedy's executor v. Ware*, 1 *Barr* 445, it was held that natural love and affection was not a sufficient consideration for an equitable assignment. Collateral consanguinity, is clearly insufficient. *Hayes v. Kershaw*, 1 *Sandf.* 258; *Buford's heirs v. McKee*, 1 *Dana*, 107.]

attempts to deal, appears to be on the same footing as a mere agreement to assign; and it is immaterial that it professes in terms to be a complete and actual assignment or conveyance of the property in question. It is obvious, that such a disposition is still imperfect and incomplete, and can only be perfected by a decree of a court of equity compelling a conveyance by the owner of the legal estate, consequently such an instrument will not of itself create a binding trust;(c)¹ although it may have that effect if it be accompanied by some additional and conclusive act or declaration constituting a perfect trust.(d)

Thus where a voluntary assignment of stock was made, by deed to trustees, for the benefit of a person named in the deed;(e)² or of India Stock, and shares in an Insurance Company, the *legal title* to which did not pass by that mode of assurance;(f) or of the expectant equitable interest of a party in a sum of money as the next of kin of the person entitled in possession;(g) or where a memorandum was endorsed on a receipt for a subscription to a navigation,(h) or on a bond,(i) which memorandum purported to be an assignment by the owner to the party named in the memorandum; in all these cases the court has considered the gift to be incomplete, and has refused to enforce it as a trust against the parties, by whom it was made.

(c) *Colman v. Sarell*, 3 Bro. C. C. 123; *Rycroft v. Christie*, 3 Beav. 238; 12; *Antrobus v. Smith*, 12 Ves. 39; *Hinde v. Blake*, id. 234.

Edwards v. Jones, 1 M. & Cr. 226; (e) *Colman v. Sarell*, 3 Bro. C. C. 12.

Meek v. Kettlewell, 1 Hare, 464; affirmed on appeal by Lord Lyndhurst, 1 Phill. 342; *Dillon v. Coppin*, 4 Jurist, 427; S. C. 4 M. & Cr. 647.

(g) *Meek v. Kettlewell*, 1 Hare, 464; affirmed 1 Phill. 342.

(h) *Antrobus v. Smith*, 12 Ves. 39.

(d) *Collinson v. Patrick*, 2 Kean, (i) *Edwards v. Jones*, 1 M. & Cr. 226.

¹This doctrine and the cases cited below in its support, were substantially overruled in a recent case, *Kekewitch v. Manning*, 12 Eng. L. & E. 120, stated post, page 88. The necessity that the *legal title* must pass at the time of the gift, was directly denied by the Lord Justices, and an assignment of a reversionary equitable interest to trustees for volunteers, supported.

²The assignment of a debt to another, for the benefit of a third person creates a trust, which though voluntary can be enforced. *Kirkpatrick v. Macdonald*, 1 Jones, 390, see *Stapleton v. Stapleton*, 14 Sim. 186; notes to *Ellison v. Ellison*, 1 Lead. Cas. Eq. 177. A. directed his agents to invest part of his balance in their hands, in the purchase of £4000 stock, in the names of himself and his wife, in trust for his infant son. The agents made the purchase in the joint names, but without any trust expressed, because as they afterwards informed A., the bank objected to trust accounts on their books. A. allowed the stock to remain without any trust being declared, and received the dividends of it down to his decease. It was held that neither his son nor his wife (who survived him) were entitled to the stock; which formed part of his assets. *Smith v. Warde*, 15 Sim. 56.

[*85] *Although some of these cases appear to have been much stronger in favor of the trust than others, the decisions clearly establish, that a voluntary assignment of property, which cannot be dealt with by assignment *at law*, will be equally ineffectual for the purpose of raising a trust against the assignor, whether it be or be not under seal, and executed in a legal form.(k)

It appears also to be immaterial, whether the gift in such cases be made directly to the parties, who claim the trust, or to trustees for their benefit.(l)

In some of the cases, the fact of the instrument of gift remaining in possession of its author, and not being acted on up to the time of his death, seems to have had some influence on the court in deciding against the trust; and unquestionably that is a very strong circumstance against it.(m) But in *Edwards v. Jones*, the memorandum, assigning the bond, was not only communicated by the donor to the object of her bounty, but was also acted upon by the delivery of the bond itself to the volunteer: and yet the court refused to recognise this transaction as a trust.(n) In a recent case Sir. J. Wigram, V. C., observed, "that the case of *Edwards v. Jones* shows, that the most clear intention to confer an interest by a present act may not be sufficient to create a trust in favor of a volunteer, although made by the party, in whom the legal interest may be, and communicated by that party to the intended *cestui que trust*."(o)(1)

It would seem to follow from the foregoing decisions, that the

(k) *Colman v. Sarell*, 3 Bro. C. C. 12; *Meek v. Kettlewell*, 1 Hare, 474; *Edwards v. Jones*, 1 M. & Cr. 226; *Holloway v. Headington*, 8 Sim. 324. But from the report of this last case it does not appear what was the nature of the property included in the settlement. [But see ante, 84 note.]

(l) In *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 M. & Cr. 226; and *Meek v. Kettlewell*, 1 Hare, 464, the gift was direct. In *Coleman v. Sarell*, 3 Bro. C. C. 12; and *Dillon v. Coppin*,

4 Jurist, 427; and 4 M. & Cr. 647, it was to trustees.

(m) *Antrobus v. Smith*, 12 Ves. 39; *Dillon v. Coppin*, 4 Jur. 427; S. C. 4 M. & Cr. 647; *Uniacke v. Giles*, 2 Moll. 267.

(n) *Edwards v. Jones*, 1 M. & Cr. 264.

(o) *Meek v. Kettlewell*, 1 Hare, 472; affirmed, L. C. Lyndhurst, 1 Phill. 342. See also *Coningham v. Plunkett*, 2 N. C. C. 245.

(1) It is material for the party who seeks to enforce the trust in these cases, to show, that the person making the assignment has done all in his power to divest himself of the property, and the right to control it. On this ground where the subject of the assignment was stock in the public funds, and the legal title was not completed by a transfer; or where it was India stock, or shares in an insurance society, the legal interest in which might have been transferred by the owner by a different mode of assurance, which he neglected to adopt, the transaction was regarded as imperfect and incomplete. *Coleman v. Sarell*, 3 Bro. C. C. 12; *Dillon v. Coppin*, 4 Jurist, 427; S. C. 4 M. & Cr. 647, and see *Coningham v. Plunkett*, 2 N. C. C. 245.

court will in no case interfere, to enforce the performance of a voluntary trust against its author, if the legal interest in the property be not transferred or acquired, as part of the transaction creating the trust.

The doctrine of the court however does not appear in fact to be so confined. If a formal declaration of trust be made by the legal owner of the property, declaring himself in terms the trustee of that property for a volunteer, or directing, that it shall be held in trust for the volunteer, the court will consider such a declaration as a trust actually created, and will *act upon it as such.(p) And a similar declaration or direction even by the *equitable* owner, [*86] has also been supported as a valid trust.(q)

Thus in *ex parte Pye*, a testator directed by letter his agent at Paris to purchase an annuity for a lady. This was done, but the purchase was made in the name of the testator, who afterwards sent over a power of attorney, authorizing the agent to transfer the annuity into the name of the lady. Before the transfer was made the testator died, but the agent, while ignorant of the death of his principal, *had actually made the transfer*, which under those circumstances was valid by the law of France. It was held by Lord Eldon, that the testator had committed to writing a sufficient declaration, that he held that part of his estate in trust for the annuitant.(r)

In *Wheatley v. Purr*, a testatrix directed her bankers to place a sum of 2,000*l.* in the joint names of the plaintiffs, and of herself as a trustee for the plaintiffs. The sum was placed by the bankers in their books to the account of the testatrix *alone*, as trustee for the plaintiffs, and a promissory note for the amount with interest was given by them to her as such trustee. This note remained in her possession at her death, and her executor received the money, and invested it in his own name. It does not appear from the report of the case, whether any interest on the note was received by the testatrix in her lifetime. Under these circumstances Lord Langdale, M. R., held, that the transaction amounted to a complete declaration of trust, and that the executor was a trustee for the plaintiffs, in whose favor the trust was created.(s) So in the recent case of *M'Fadden v. Jenkins*,(t) A. had sent a direction to B., who owed him 500*l.*, to hold the debt in trust for a third person, who was a volunteer, B. assented to the direction, *and paid 10*l.* to the volunteer*

(p) *Ex parte Pye*, 18 Ves. 149; *Wheatley v. Purr*, 1 Keen, 551; *Meek v. Kettlewell*, 1 Hare, 470; 1 Phill. 342; *M'Fadden v. Jenkins*, 1 Hare, 458; and 1 Phill. 153, 7; *James v. Bydder*, 4 Beav. 600; *Thorpe v. Owen*, 5 Beav. 224.

(q) *Collinson v. Patrick*, 2 Keen, 123; *Rycroft v. Christy*, 3 Beav. 238.

(r) *Ex parte Pye and Dubost*, 18 Ves. 140.

(s) *Wheatley v. Purr*, 1 Keen, 551.

(t) *M'Fadden v. Jenkins*, 1 Hare, 458; 1 Phill. 153.

as part of the trust money. And on appeal, this direction was considered by Lord Lyndhurst, C., as a complete and irrevocable trust, and one that was binding on A.'s executors.(t) And in the still later case of *Thorpe v. Owen*,(u) where B. in his lifetime had added a sum of 1,000*l.* belonging to himself to a trust fund held by him for the benefit of his daughters, and had invested the whole aggregate sum together in his own name, and he subsequently treated and admitted the whole sum including the 1,000*l.* to be held in trust for his daughters. It was held by Lord Langdale, M. R., upon B.'s death, that there had been sufficient to constitute a trust in favor of the daughters.(u) However in *Gaskell v. Gaskell*(x) a person wrote to his bankers, desiring them to transfer certain sums into the names of himself and three other persons as trustees for his wife for life, and after her death for his son. *The transfer was made by the bankers*, but there was some proof, that no communication of the transaction was made to the other trustees, and that the arrangement was made with *the view of avoiding legacy duty.

[*87] Under these circumstances, it was held by the Court of Exchequer, that the fund was never out of the settlor's power, and that he might at any time have revoked the disposition, and consequently, that it formed part of his personal estate. It seems very difficult to reconcile this decision with the principle established by the series of cases above mentioned.

In these cases the legal ownership of the property was vested in the party by whom the trust was declared; but it has been decided that a mere equitable interest may also be the subject of a similar declaration.

Thus in *Collinson v. Patrick*, a bond had been assigned to trustees, in trust for such persons, &c., as A. (a feme coverte) should appoint and in default of appointment, for her separate use. A. by deed voluntarily appointed the sum secured by the bond to one of the plaintiffs in trust for the other two plaintiffs; and Lord Langdale, M. R., considered that this was a complete declaration of trust, which the court would execute.(y) And in a subsequent case, where a person, having an equitable life interest in a sum of money, vested in a trustee by a voluntary deed directed the trustee to apply part of the income for the benefit of an infant; and the trustee accepted the trusts of that deed and acted upon it; it was held by the same learned judge, that a valid executed trust was created, which could not be revoked.(z)

(t) *M'Fadden v. Jenkins*, 1 Hare, Jer. 502. [See *Smith v. Warde*, ante 458: 1 Phill. 153. 84, note].

(u) *Thorpe v. Owen*, 5 Beav. 224; (y) *Collinson v. Patrick*, 2 Keen, 123. and see *James v. Bydder*, 4 Beav. 600.

(x) *Gaskell v. Gaskell*, 2 Young & (z) *Rycroft v. Christy*, 3 Beav. 238; and see *Hinde v. Blake*, ib. 234.

The declaration of trust, however, must be complete and unequivocal; therefore a letter by a residuary legatee to executors, stating that she would consent to a gift of 500*l.* to a volunteer, was considered to indicate merely an intention to give, and not to create a trust.(a)

Moreover, although the declaration of the trust be distinct and perfect, yet if its limitations are of an executory character, the court will not, as against the author of the trust, interfere on behalf of a volunteer to give them effect.(b) And where an equitable interest is the subject of such a declaration, it seems to be necessary to show, that notice had been given to the trustees, in whom the legal estate was vested, and that the trust had been accepted by them.(c)(1)

However, decisions are to be found in the books, which it is very difficult to reconcile with some of the propositions stated above. In *Sloane v. Cadogan*, Mr. Cadogan, being entitled to an equitable reversionary interest in a sum of money, assigned it by a voluntary deed to trustees, upon trusts for the benefit of himself and his wife for their lives, with an ultimate trust, which took effect, for his father, Lord Cadogan; under this trust the executors of Lord Cadogan obtained payment of the fund from the trustees, and the bill was filed by Mr. Cadogan's widow, who was also his executrix and residuary legatee, against the executors of Lord Cadogan, to recover the fund, as part of Mr. Cadogan's estate. But Sir *Wm. Grant, M. R., held that the transaction had created a valid trust, [*88] and dismissed the bill.(d)

In *Fortescue v. Barnett* the defendant made a voluntary assignment of a policy of assurance on his life to trustees, upon trusts for the benefit of her sister and her children. The deed of assignment was delivered to one of the trustees, but the policy remained in the defendant's possession, and no notice of the transaction was given to the insurance society. The defendant subsequently received a bonus, and ultimately disposed of the policy itself to the society, and received the proceeds. The bill was filed by the surviving trustee of the deed, to compel the defendant to replace the amount

(a) *Cotteen v. Missing*, 1 Mad. 176. *M'Fadden v. Jenkins*, 1 Phill. 153, 7.

(b) *Colman v. Sarell*, 3 Bro. C. C. 12; [See on this *Kekewitch v. Manning*, *Holloway v. Healington*, 8 Sim. 324. 12 Eng. L. & E. 127.]

(c) *Beatson v. Beatson*, 12 Sim. 281; (d) *Sloane v. Cadogan*, 2 Sugd. V. *Meek v. Kettlewell*, 1 Hare, 476; 1 & P. Appendix, No. 26, 9th ed. [affirmed *Kekewitch v. Manning*, 12 Eng. 238; see *Godsall v. Webb*, 2 Keen, 99; L. & E. 120.]

(1) Where the interest, which is the subject-matter of such a declaration, is a mere expectancy or possibility, that circumstance will have some influence with the court in determining that the trust is not effectually created. *Meek v. Kettlewell*, 1 Hare, 476. [See 13 Jur. p. II., page 213].

of the sum secured by the policy and the bonus; and Sir John Leach, M. R., held, that a complete trust had been created, and decreed according to the prayer of the bill.^(e)

With regard to this last case Lord Cottenham has observed a distinction, which reconciles it in some measure with the other authorities. "There," said his lordship, "the practice of the office was stated to be, that upon an assignment, the office recognised the assignee, and the policy was therefore an assignable instrument. The policy was not assignable at law, but it was a title which, by contract, was assignable as between the parties."^(f)

The case of *Sloane v. Cadogan* has been disapproved of by Sir E. Sugden;^(g) and the observations of Lord Cottenham in *Edwards v. Jones*, and of Sir J. Wigram in *Meek v. Kettlewell*,^(h) tend considerably to weaken its authority. However it has been remarked by Lord Cottenham, that the claim in that case "was not against the donor or his representatives, for the purpose of making that complete which was left imperfect; but against the persons, who had the legal custody of the fund."⁽ⁱ⁾ For it will be observed, that the trustees of the voluntary settlement had actually obtained payment of the fund.

It will be seen from what has gone before, that it is extremely difficult in the present state of the authorities, to define with accuracy the law, affecting this very intricate subject. However the writer conceives that he is warranted in stating the following propositions to be the result of the several decisions.¹

(e) *Fortescue v. Barnett*, 3 M. & K. 36.

(f) In *Edwards v. Jones*, 1 M. & Cr. 239.

(g) 2 Sugd. V. & P. 168, 9th Ed.

(h) 1 Hare, 475, and see *Fenner v. Taylor*, 2 R. & M. 195,

(i) *Edwards v. Jones*, 1 M. & Cr. 238; and see the examination of this case by Sir L. Shadwell, V. C. E. in *Beatson v. Beatson*, 12 Sim. 291.

¹ These questions were very thoroughly discussed, in *Kekewitch v. Manning*, 1 De Gex., M. & G. 176; 16 Jur. 625; 12 Eng. L. & E. 120, before the Lord Justices of Appeal. In that case, residuary estate, consisting of money in the funds, was bequeathed to a mother and daughter, in trust for the mother for life, and afterwards for the daughter absolutely. The daughter afterwards during the life of her mother assigned her interest under the will to trustees in trust for the issue of a contemplated marriage, and for a niece and her issue. The mother and daughter were executrices; the former, however, did not join in the settlement, though she had notice of it before her death. It was held that this settlement was valid and enforceable by the trustees against the daughter, and against the trustees under a subsequent settlement. The cases of *Sloane v. Cadogan*, *Fortescue v. Barnett*, above cited, and *Blakely v. Brady*, 2 Dr. & W. 311, were deliberately affirmed, and *Edwards v. Jones*, *Meek v. Kettlewell*, &c., so far as inconsistent therewith overruled. The recent case of *Bridge v. Bridge*, 13 Eng. L. & Eq. 497, however, is in accordance with the doctrine of the text. See also 1 Am. Law. Reg. 385.

1st, Where the author of the voluntary trust is possessed of the legal interest in the property.

A clear declaration of trust contained in or accompanying a deed or act, which passes the legal estate, will create a perfect executed trust, and will be established against its author, and all subsequent volunteers claiming under him.^(k)

A clear declaration or direction by a party that the property shall be held in trust for the objects of his bounty, though unaccompanied by a *deed or other act, divesting himself of the legal estate, is an executed trust, and will be enforced against [*89] the party himself or against his representatives, or next of kin after his death.^(l)

An instrument, *purporting to be a conveyance or assignment of property*, either directly to the objects of the party's bounty,^(m) or to trustees in trust for them,⁽ⁿ⁾ *but which does not operate to divest the grantor of the legal estate*, does not create a perfect executed trust, and its execution will not be enforced in equity against the party himself, or against his representatives after his decease. And it is immaterial whether the instrument be a mere note or memorandum;^(o) or a deed under seal and formally executed.^(p)

If however, the title of the parties, taking under such an assignment (though not good at law), is recognised by an express custom or convention (as in the case of a policy of insurance), an absolute voluntary assignment upon trusts may have the same effect as a perfect legal conveyance.^(q)

2d. Where the author of the trust is possessed only of an equitable interest.

If a party, having the equitable interest in property, execute a formal instrument, directing the trustee, in whom the legal interest is vested, to hold in trust for a volunteer; *and this direction is*

(k) *Barlow v. Heneage*, Prec. Ch. 211. *Clavering v. Clavering*, 2 Vern. 474; *Sear v. Ashwell*, 3 Sw. 411, n.; *Bolton v. Bolton*, ib. 413, n.; *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Smith v. Lynde*, 2 N. C. C. 345.

(l) *Ex parte Pye and Dubost*, 18 Ves. 140; *Wheatly v. Purr*, 1 Keen, 551; *M'Fadden v. Jenkins*, 1 Hare, 458; S. C. 1 Phil. 153, 7; *James v. Bydder*, 4 Beav. 600; *Thorpe v. Owen*, 5 Beav. 224.

(m) *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 M. & Cr. 228; *Dil-*

lon v. Coppin, 4 Jur. 427; S. C. 4 M. & Cr. 647.

(n) *Colman v. Sarell*, 3 Bro. C. C. 12; *Holloway v. Headington*, 8 Sim. 324.

(o) *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 M. & Cr. 226.

(p) *Colman v. Sarell*, 3 Bro. C. C. 12; *Holloway v. Headington*, 8 Sim. 324; *Meek v. Kettlewell*, 1 Hare, 474, 5; 1 Phil. 343; *Dillon v. Coppin*, 4 Jur. 427; 4 M. & Cr. 647.

(q) *Fortescue v. Barnet*, 3 M. & Cr. 36; see *Edwards v. Jones*, 1 M. & Cr. 239.

accepted and acted upon by the trustee. That is an executed trust, which will be binding on the party who gives such a direction.(*r*)

But a formal *assignment* of a mere equitable interest in a fund, will not create an executed or binding trust; especially if no notice of the assignment be given to the trustees of the fund, or, if given, it is not accepted by them.(*s*)

The decision of Sir Wm. Grant in *Sloane v. Cadogan* would seem to establish, that a voluntary *conveyance* of a mere *equitable* interest upon trusts, which are declared, will have the same effect in creating a binding trust, as a conveyance of a *legal* estate. But the authority of that case, which was considerably weakened by the disapprobation it has received both from Sir E. Sugden, and Lord Cottenham, must now be considered as completely overturned by V. C. Wigram's decision in the recent case of *Meek v. Kettlewell*,(*t*) which has since been affirmed on appeal by Lord Lyndhurst, Chancellor.(*u*)(1)

[*90] *By the statute 13 Eliz. c. 5, a voluntary conveyance of property whether real or personal upon trusts, will be void, and may be set aside as fraudulent by the creditors of the settlor, if he were indebted to the extent of insolvency at the time of making the settlement.(*x*)¹

(*r*) *Rycroft v. Christy*, 3 Beav. 238;
Collinson v. Patrick, 2 Keen, 123; *Meek*
v. Kettlewell, 1 Hare, 471; but see
Beatson v. Beatson, 12 Sim. 281.

(*t*) 1 Hare, 475.

(*u*) 13 Law Journ. N. S. Chanc. 28;
 1 Phill. 343; but see ante note to page
 88.]

(*s*) *Meek v. Kettlewell*, 1 Hare, 464-
 76; and see *Beatson v. Beatson*, 12 Sim.
 281.

(*x*) *Fletcher v. Sidley*, 2 Vern. 490;
Taylor v. Jones, 2 Atk. 600.

(1) In a recent case at the Rolls, A. made a voluntary assignment of personal property, including a mortgage debt and a policy of insurance, to a trustee in trust for himself for life and after his death for his nephew and niece. He afterwards made a will, bequeathing the settled property to other persons. It was held by the Master of the Rolls (Lord Langdale), that the Court could not act upon this trust, so far as to make a declaration of the rights of the parties claiming under the settlement. *Ward v. Audland*, 8 Beav. 201. A bill, previously filed by the trustee and *cestui que trusts*, against the executors of the settlor for the recovery of the settled property, had been dismissed by the Vice-Chancellor of England for want of equity, and that decision had been affirmed on appeal by Lord Cottenham. S. C. 8 Sim. 571.

¹In *Skarff v. Soulby*, 13 Jur. 1109; 1 Mac. & G. 364, 1 Hall & T. 364, it was held that the mere fact of a settlor's being indebted was not sufficient to invalidate a voluntary settlement; and that it was not necessary on the other hand to show insolvency. The American cases on this subject, which are numerous and conflicting, will be found collected and very ably discussed in *Sexton v. Wheaton*, 1 Am. Lead. Cases, 46. See also *Wilson v. Howser*, 2 Jones Penn. 109, where it was held that a voluntary conveyance by a person indebted

And a similar conveyance of *real* estate (including chattels real), is also inoperative against the claim of a subsequent purchaser for valuable consideration under the statute 27 Eliz. c. 4.(y)¹ And neither the trustees or *cestuis que trusts* under the voluntary settlement have any remedy against the settlor, or the purchaser in such a case.(z) And it is immaterial, that the purchaser had notice of the settlement.(a) However, the settlor himself cannot come into a court of equity to enforce the specific performance of a contract for the sale of the estate, entered into by him after the settlement.(b)

Chattels *personal* are not within the statute 27 Eliz. c. 4, and a voluntary settlement of such property will therefore be valid against a subsequent purchaser.(c)

(y) *Sanders v. Dehew*, 2 Vern. 272. [Not, however, where the voluntary settlement was in favor of a charity; *Newcastle v. Atty.-Gen.*, 12 Cl. & F. 402.]

(z) *Evelyn v. Templar*, 2 Bro. C. C. 148; *Williamson v. Williamson*, 1 Ves. 516; *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

(a) *Pulvertoft v. Pulvertoft*, 18 Ves. 91-93. [But see the American authorities cited in notes to 1 Am. Lead. Cases, 62.]

(b) *Johnson v. Legard*, T. & R. 294, *Smith v. Garland*, 2 Mer. 123.

(c) *Jones v. Croucher*, 1 S. & St. 315. [*Adams v. Broughton*, 13 Alab. 731; *Bohn v. Hendley*, 7 H. & J. 257; *Sewall v. Glidden*, 1 Alab. 53; *contra*; *Hudnal v. Wilder*, 4 McCord 295; *Wade v. Green, et al.* 3 Hump. 547; *Caston v. Cuninghame*, 3 Strob. 59; *Fleming v. Townshend* 6 Geo. 103.]

at the time, is not therefore void if his debts do not bear such a proportion to his whole property as to render their payment doubtful, unless there be actual fraud.

¹In a recent case in England, *Doe d. Newman v. Rusham*, 9 L. & E., 410, it was held that the ground on which voluntary conveyances have been held to be void as against subsequent purchasers is, that by selling the property for a valuable consideration, the vendor so entirely repudiates the former voluntary conveyance, as that it shall be taken conclusively against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser, (see *Cathcart v. Robinson*, 5 Peters, 280, remarks of Chief Justice Marshall); and it was therefore held, that the Stat. 27 Eliz. c. 4. does not apply to a purchaser from the heir or devisee of one who has made such a conveyance in his lifetime. See also, *Doe dem Richards v. Lewis*, 5 Eng. L. & E. 402.

THE CONSTITUTION OF TRUSTEES BY IMPLICATION, OR CONSTRUCTION OF LAW.

THE relation of trustee may be constituted not only by the express declaration of the parties, but also by virtue of a trust, raised and created by implication, or construction of law.

Trusts of this description are either implied, or presumed from the supposed intention of the parties, and the nature of the transaction; when they are known as "resulting or presumptive trusts;" or they are raised independently of any such intention, and forced on the conscience of the trustee, by equitable construction, and the operation of law; and such may be distinguished as "constructive trusts."^(a)

These trusts are expressly exempted from the operation of the Statute of Frauds by the 8th Sect. of that act, which declares, "that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect, as the same would have been, if that statute had not been made."¹

(a) 1 Cruis. Dig. 391; Story. Equity Hamm. 321; *Dean v. Dean*, 6 Conn. Jur. §1195; 1 Spenc. Eq. Jur. 510; 2 285; *Rory v. Hegeman*, 2 Edw. Ch. Id. 198; and see *Cook v. Fountain*, 3 373; *Thomas v. Walker*, 6 Hump. Swanst. 585. [See *Starr v. Starr*, 1 93].

¹ The Revised Statutes of New York (3d Ed., Part II., Ch. 1., Art. 6, § 51, &c.,) have abolished resulting trusts arising from the payment of the purchase money, except as regards the creditors of the party paying; see *Watson v. Le Row*, 6 Barb. S. C. 481; *Jencks v. Alexander*, 11 Paige, 619. Though in Louisiana express trusts have been prohibited, this does not affect those arising by implication or operation of law. *Gaines v. Chew*, 2 How. S. C. 619. The Statute of Rhode Island has omitted the proviso of the 8th section of the English Statute by fraud, in favor of this species of trusts, but this has been ruled to be immaterial, for the exception was only in affirmance of the general law. *Hoxie v. Carr*, 1 Sumner 187.

It must appear on the face of a bill in equity to enforce a trust, whether the trust is direct or by implication of law, and if the latter, the facts whence it is to be implied must be set forth. *Rowell v. Freese*, 23 Maine, 182. Where there is a written trust, there can be no resulting trust; the one excludes the other. *Leggett v. Dubois*, 5 Paige 114; *Anstice v. Brown*, 6 Paige 448; *Clark v. Barnham*, 2 Story, 1; *Mercer v. Stark*, 1 Sm. & M. Ch. 479. A resulting trust is, of course, not executed by the Statute of Uses. *Strimpfler v. Roberts*, 18 Penn. St. R. 301.

CHAPTER I.

TRUSTEES BY VIRTUE OF A RESULTING OR PRESUMPTIVE TRUST.

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| I. WHERE A PURCHASE IS MADE BY ONE PERSON IN THE NAME OF ANOTHER, [91]. | III. WHERE THERE IS A VOLUNTARY DISPOSITION OF PROPERTY UPON TRUSTS, WHICH ARE NOT DECLARED, OR ARE ONLY PARTIALLY DECLARED, OR FAIL, [113]. |
| II. WHERE THERE IS A VOLUNTARY CONVEYANCE WITHOUT ANY DECLARATION OF TRUST, [106]. | |

I.—WHERE A PURCHASE IS MADE BY ONE PERSON IN THE NAME OF ANOTHER.

WHERE, upon a purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting or presumptive trust immediately arises by virtue of the transaction, and *the person named in the conveyance will be a trustee for the party from whom the consideration proceeds; (b)¹ and unless such a resulting trust would break in on the [*92]

(b) *Willis v. Willis*, 2 Atk. 71; *Lloyd v. Spillet*, ib. 150; *Rider v. Kidder*, 10 Ves. 360.

¹ *Buck v. Pike*, 11 Maine, 9; *Baker v. Vining*, 30 Maine, 126; *Page v. Page*, 8 N. H. 187; *Pinney v. Fellows*, 15 Verm. 525; *Peabody v. Tarbell*, 2 Cush. Mass. 232; *Livermore v. Aldrich*, 5 Cush. 435; *Boyd v. McLean*, 1 J. C. R. (N. Y.) 582; *Botsford v. Burr*, 2 J. C. R. 409; *Foote v. Colvin*, 3 J. R. 216; *Jackson v. Seelye*, 16 J. R. 197; *Partridge v. Havens*, 10 Paige, 618; *Depeyster v. Gould*, 2 Green. Ch. (N. J.) 480; *Stewart v. Brown*, 2 S. & R. (Pa.) 461; *Jackman v. Ringland*, 4 W. & S. 149; *Newells v. Morgan*, 2 Harr. (Del.) 225; *Hollis v. Hollis*, 1 Mary. Ch. 479; *Dorsey v. Clark*, 4 Har. & J. (Mary.) 551; *Bank U. S. v. Cumington*, 7 Leigh. 566; *Glenn v. Randall*, 2 John. Mary. Ch. 221; *Henderson v. Hoke*, 1 Dev. & Bat. Eq. (N. C.) 119; *McGuire v. McGowen*, 4 Dess. (S. C.) 491; *Dillard v. Crocker*, *Spears*, Ch. 20; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; *Kirkpatrick v. Davidson*, 2 Kelley, (Geo.) 297; *Foster v. Trustees*, 3 Alab. 302; *Taliaferro v. Taliaferro*, 6 Alab. 404; *Mahorner v. Harrison*, 13 Sm. & M. (Miss.) 65; *Walker v. Brungard*, 13 Sm. & M. 764; *Powell v. Powell*, 1 Freem. Ch. 134; *Ensley v. Ballantine*, 4 Hump. (Tenn.) 233; *Thomas v. Walker*, 6 Hump. 93; *Perry v. Head*, 1 A. K. Marsh. (Ky.) 47; *Letcher v. Letcher*, 4 J. J. Marsh. 592; *Doyle*

policy of an act of parliament, this will be the case, whatever may

v. Sleeper, 1 Dana, 536; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198; *Jenison v. Graves*, 2 Blackf. 444; *Smith v. Sackett*, 5 Gilm. (Ill.) 534; *Prew v. Walton*, 4 Scamm. 35; *Paull v. Choteau*, 14 Missouri, 580; *McGuire v. Ramsey*, 4 Engl. (Ark.) 519; *Tarpley v. Poage*, 2 Tex. 139; *Russell v. Lode*, 1 Iowa, 566; *Powell v. Manufact. Co.*, 3 Mason, 362; *Phillips v. Cramond*, 2 Wash. C. C. 441. In *Gomez v. Tradesman's Bank*, 4 Sandf. Sup. Ct. 106; "a resulting trust" was supported in favor of the "Jewish Nation" on the purchase of a burying-ground, the purchase money being paid expressly for the benefit of that nation. Where, however, a trustee purchases in the name of a third person, with trust fund, the resulting trust will not be to himself; but to his *cestui que trust*. *Russell v. Allen*, 10 Paige, 249.

A resulting trust may arise where the purchase is directly from the commonwealth, as if a warrant is taken in the name of one, but the money is paid by another. *Strimpfler v. Roberts*, 18 Penn. St. R. 300.

A resulting trust has been also held to arise, where a purchase is made by a man in his own name, but with funds in his hands in a fiduciary capacity; as where trustee buys with trust moneys, or a partner with partnership funds. *Phillips v. Cramond*, 2 W. C. C. R. 441; *Kirkpatrick v. McDonald*, 1 Jones, (Penn.) 393; *Balwin v. Johns*, Saxton, 44; *Smith v. Ramsey*, 1 Gilm. 373; *Pugh v. Currie*, 5 Alab. 446; *Edgar v. Donnelly*, 2 Munf. 387; *Martin v. Greer*, 1 Geo. Dec. 109; *Freeman v. Kelley*, 1 Hoff. Ch. 90; *Moffit v. McDonald*, 11 Humph. 457; *Smith v. Burnham*, 3 Sumn. 435; *Turner v. Pettigrew*, 6 Humph. 438; *Piatt v. Oliver*, 2 McLean, 267; *Harrisburg Bank v. Tyler*, 3 W. & S. 373; *Wilhelm v. Folmer*, 6 Barr, 296. So where an agent employed to purchase buys for himself, *Church v. Sterling*, 16 Conn. 388; *Hutchinson v. Hutchinson*, 4 Desaus. 77; (if the agency appears in writing, otherwise it would be within the Statute of Frauds, see post, 96; or the trustees of a corporation buy land with the corporate funds, and take the conveyance in their own name, *Methodist Church v. Wood*, 5 Hamm. 283; or an executor purchases with the avails of his testator's estates, *Garrett v. Garrett*, 1 Strobb. Eq. 96; *Wallace v. Duffield*, 2 S. & R. 521; see *Beck v. Uhrick*, 16 Penn. St. 499; or a committee invests funds of a lunatic in land, *Reed v. Fitch*, 11 Barb. S. C. 399; or a guardian those of his ward, *Caplinger v. Stokes*, Meigs. 175; in all these cases a trust results to the parties whose money has been misemployed, unless, indeed, they elect to take the money instead thereof. On the same principle, where a husband buys land with his wife's separate property, or with the savings out of her separate estate, a trust results to the wife. *Methodist Church v. Jaques*, 1 J. C. R. 450; 3 Id. 77; *Brooke v. Dent*, 1 John. Mary. Ch. 523; *Dickinson v. Codwise*, 1 Sandf. Ch. 214; *Pinney v. Fellows*, 15 Verm. 525; (though, see *Wallace v. McCullough*, 1 Rich. Ch. 526;) but as to savings out of moneys supplied by the husband or her earnings, as has been recently decided in Pennsylvania, it is different; as he is absolutely entitled to these, even under the act of 1848, of that State, called the Married woman's Act. *Raybold v. Raybold*, Sup. C. Penna. 1 Am. Law Reg. 439.

It has indeed been doubted, whether in these cases, the *cestui que trusts*, have properly speaking anything more than a lien for the funds employed in the purchase, and a right to a decree for a sale, if necessary to reimburse them. *Wallace v. Duffield*, 2 S. & R. 529, per Gibson J. (though see same judge in 3; W. & S. 373), see the note to *Woollam v. Hearn*, 2 Leading Cas. in Eq. part II. p. 591; *Wallace v. McCullough*, 1 Rich. Ch. 426; and so are the earlier English cases: but the current of American authority is as above stated.

Where, however, there is no fiduciary relation, the mere use of another's money, as where one sells another's property wrongfully and invests the pro-

be the nature of the property;¹ and whether the conveyance be taken in the names of the purchaser and his nominee jointly, or in the name of the nominee without the purchaser; whether in one name or several, and whether jointly or *successive*; and the principle proceeds upon a strict analogy to the rule of the common law, that where a feoffment is made without consideration the use results to the feoffor.(c)(1)

A similar rule prevails in cases, where the consideration proceeds from two or more persons jointly, and the conveyance of the legal estate is taken in the name of one of them only. A resulting trust will arise in favor of the parties, not named in the conveyance, in proportion to the amount of the consideration, which they respectively may have contributed.² This appears to have been doubted by Lord Hardwicke in the case of *Crop v. Norton*; (d) but in the subsequent case

(c) *Dyer v. Dyer*, 2 Cox, 92; 2 Sugd. (d) *Crop v. Norton*, 2 Atk. 74; and V. & P. 134, 9th ed.; 2 Stor. Eq. Jur. 9 Mod. 233.
120; 2 Mad. Ch. Pr. 140.

(1) A distinction is taken by Sir. E. Sugden in his work on vendors and purchasers, where two or more persons contract for the purchase of an estate, which is conveyed to them both, but the money is paid by one only. In that case, says the learned writer, "the one, who paid the money, cannot call upon those, who paid no part of it, to repay him their shares of the purchase-money, or to convey their shares of the estate to him; nor can it be construed a resulting trust, as such a trust cannot arise at an after period; and perhaps the only remedy he has, is to file a bill against them for contribution." 2 Sugd. V. & P. 931, 9th edition.

ceeds in land, *Ensley v. Ballantine*, 4 Humph. 233; or a clerk in a store pilfers money from his employer and buys real estate, *Campbell v. Drake*, 5 Ired. Eq. 94 (though see *Bank of America v. Pollock*, 4 Edw. Ch. 215), there is no resulting trust.

¹ A resulting trust may be set up as to land or slaves, but not as to property more perishable in its nature, as spirituous liquors. *Union Bank v. Baker*, 8 Humph. 447. Generally speaking, however, the doctrine applies to stock or annuities as well as to realty; *Sidmouth v. Sidmouth*, 2 Beav. 454; *Ex parte Houghton*, 17 Ves. 253; *Kidder v. Kidder*, 10 Ves. 365.

² *Botsford v. Burr*, 2 J. C. R. 405; *Pierce v. Pierce*, 7 B. Monr. 433; *Quackenbush v. Leonard*, 9 Paige, Ch. 334; *Steward v. Brown*, 2 S. & R. 461; *Bernard v. Bengrave*, Harr. Ch. 12; *Shoemaker v. Smith*, 11 Humph. 80; *Powell v. Manufactory*, 3 Mason, 347; *Letcher v. Letcher*, 4 J. J. Marsh. 590; *Jackson v. Moore*, 6 Cowan, 706. But a resulting trust cannot be claimed by one who pays only part, unless it be some *definite* part. *Sayre v. Townshend*, 15 Wend. 647; *White v. Carpenter*, 2 Paige, 238; *Baker v. Vining*, 30 Maine, 121. In *Shoemaker v. Smith*, 11 Humph. 80, however, it was held that the presumption was, in the first instance, where two contributed the funds, and the conveyance was taken in the name of one, that the proportions were equal. Where the purchase is made on the credit of two, and one then furnishes the money, and the conveyance is taken in his name, there is no resulting trust. *Brooks v. Fowles*, 14 N. H. 248.

of *Wray v. Steel*(e) the point called for decision, and Sir Thomas Plumer, V. C., following the true principle decided in favor of the resulting trust.(e) The rule under consideration applies to copyhold as well as to other property.(f) And where copyholds are held for three or more lives *successive*, the other *cestuis que vie* will in general be trustees for the individual, by whom the fine and expenses of the admission were paid; and the rule will be the same, whether the person paying the fine puts his own life in, as one of the lives, or not.(g) And it is immaterial, whether there is a custom enabling the first life to surrender the whole estate, or not.(h)

However, a custom in a manor that the person whose life is put in, shall take beneficially, *unless a trust is mentioned on the rolls of the manor*, is a good custom. And where a reversionary grant to a nephew was taken of a copyhold in a manor, where this custom prevailed, and no trust was declared in favor of the uncle, who paid the fine, the nephew was held to be beneficially entitled.(i)

And in an old case, where the person, whose life was first put in, *was expressly stated in the copy of the admission to be the purchaser*, although the fine was actually paid by a third person, it was held, [*93] that the fine *must be taken to have been paid as expressed in the copy, and consequently that no trust could be enforced.(k)

The doctrine now under consideration applies only to *purchases*; and if a person in actual possession of property make an actual *gift or transfer* of it to another, as a general rule the presumption of a resulting trust will not arise.(l)

A joint purchase by two or more persons, who advance the money in equal proportions, and take a conveyance to themselves as joint-tenants, is considered as a purchase by them jointly of the chance of survivorship; and in the absence of any controlling circumstances, the survivor will take the whole estate in equity, as well as at law.(m)¹

(e) *Wray v. Steel*, 2 V. & B. 388; 2 Sugd. V. & P. 140, 9th ed.; and see *Riddle v. Emerson*, 1 Vern. 108, and *Palmer v. Young*, ib. 276.

(f) *Withers v. Withers*, Ambl. 151.

(g) *Howe v. Howe*, 1 Vern. 415; *Withers v. Withers*, Ambl. 151; *Swift v. Davis*, 8 East. 354, n.; *Prankerd v. Prankerd*, 1 S. & St. 1; *Benger v. Drew*, 1 P. Wms. 781.

(h) *Smith v. Baker*, 1 Atk. 385; *Withers v. Withers*, Ambl. 151.

(i) *Edwards v. Fidell*, 3 Mad. 237.

(k) *Chalk v. Danvers*, 1 Ch. Ca. 310.

(l) Vide post, Sect. 2, and *Jefferys v. Jefferys*, Cr. & Ph. 138; *Currant v. Jago*, 1 Coll. N. C. C. 261.

(m) *Mosse v. Gyles*, 2 Vern. 385; 2 Sugd. V. & P. 127, 9th ed.

¹ Survivorship as an incident to joint tenancy has been abolished in many of the United States; in others it can only exist where a joint tenancy is expressly declared. See 4 Kent's Com. 361. These statutory provisions do not apply to the estates of express trustees. *Parsons v. Boyd*, 20 Alab. 112.

However, joint-tenancy is not favored in equity, and the court will take hold of any circumstances connected with the transaction, for the purpose of preventing a survivorship, and in such cases will treat the survivor as a trustee for the benefit of the estate of the deceased party, to the extent of his share in the property.

Thus, if the proportions of the purchase money advanced by each party are unequal, it has been held, that there will be no survivorship in equity.⁽ⁿ⁾ So if two or more persons take a joint mortgage security for a sum of money advanced between them,^(o)¹ or if the transaction be in the nature of a joint undertaking or partnership, as in the case of a joint purchase of lands for the purpose of improvement and cultivation ;(*p*)² or of a building or farming lease taken by several persons as joint tenants ;(*q*) in all these cases, although the estate will survive at law, a resulting trust will be raised in equity in respect of the surviving shares, and will be enforced against the survivor in favor of the representatives of the deceased partner.^(r)

However, an exception to this rule was introduced by the Ship-Registry Acts.³ If *A.* purchased a ship in the name of *B.*, and the

(*n*) *Rigden v. Vallier*, 2 Ves. sen. 258. [*Brothers v. Porter*, 6 B. Monroe, 106; see *Tompkins v. Mitchell*, 2 Rand. 429.]

(*o*) *Petty v. Styward*, 1 Ch. Ca. 31; and 9 Ves. 597, n.

(*p*) *Lake v. Craddock*, 3 P. Wms. 158.

(*q*) *Jefferys v. Small*, 1 Vern. 217; *Hayes v. Kingdome*, ib. 33; *Lyster v. Dolland*, 1 Ves. jun. 431.

(*r*) 2 Sugd. V. & P. 128, 9th ed.; 2 Stor. Eq. Jur. 120, 2 Mad. Ch. Pr. 142.

¹ *Randall v. Phillips*, 3 Mason, 373; see *Appleton v. Boyd*, 7 Mass. 131. In *Randall v. Phillips*, it was held under the Rhode Island statute, that there was no survivorship at law. It has been held, however, differently in Massachusetts and Maine, *Appleton v. Boyd*, ub sup., *Kinsby v. Abbott*, 20 Maine, 430; see *Caines v. Grant's lessee*, 5 Binn. 119.

² *Caines v. Grant*, lessee, 5 Binn. 119; *Duncan v. Tower*, 6 Binn. 193; *Delaney v. Hutcheson*, 2 Rand. 183; *McAllister v. Montgomery*, 3 Heyw. Tenn. 94; *Farley v. Shippen*, Wythe, 135, (2d ed. 254); *Cuyler v. Brandt*, 2 Ca. C. E. 326; *Sigourney v. Munn*, 7 Conn. 11; *Pugh v. Currie*, 5 Alab. 446; see *Overton v. Locy*, 6 Monroe, 13.]

³ There is another exception to the doctrine stated in the text of a resulting trust in favor of a purchaser, who pays the money and takes the conveyance in the name of a third person, which results from a principle of public policy; and that exception is, that courts of equity will never raise a resulting trust, where it would contravene any statutable provisions of the state, or would assist the parties in evading those provisions. Thus, if an alien, for the purpose of evading any law prohibiting foreigners from holding real estate, should purchase land, pay the money for it, and take the conveyance in the name of a third person, without any written declaration of trust, there, a resulting trust could never be raised, or enforced in chancery in favor of the alien purchaser, in fraud of the rights of the state, or of the law of the land. (*Leggett v. Dubois*, 5 Paige, 114.

sale was registered in the name of *B.*, *B.*'s title could not be dislodged.^(s) So, where a ship was purchased with partnership property, but was registered *in the name of some only of the [*94] partners, omitting the names of others, it was held even against a claim by creditors, that no resulting trust arose in favor of the partners, whose names were omitted; and this decision has been followed by Lord Langdale, M. R., in a case subsequent to the recent Registry Act of the 6th Geo. IV. c. 110.^(t) The law respecting the registration of ships is now governed by the statute 3 & 4 Will. IV. c. 55; and the thirty-third section of that act, after enacting that no greater number than thirty-two persons are to be registered at one time as the legal owners of a ship, provides, that "nothing therein contained shall affect the equitable title of minors, heirs, legatees, creditors, or others, exceeding that number, duly represented by, or holding from, any of the persons in the said number."

The wording of this section is singularly loose and ambiguous, and it does not appear clearly, whether or not it was intended to apply to an equitable interest of the nature now under consideration. The point has not since arisen, but should it occur in future, it would seem to be open to a party, who seeks to establish an equitable title to a ship by virtue of a resulting trust of the nature above stated, to contend that such was the intention of the legislature in passing the statute.

However this may be, it is clear from the words made use of, that the legislature at any rate recognised the possibility of the existence of an equitable interest in a ship in contradistinction to the legal ownership as defined by the register.

With the exception above noticed, the doctrine (as between strangers in blood) has been incontrovertibly established, that upon a conveyance of property, the legal estate shall be held in trust for the party by whom the purchase money is paid. For this purpose, the

(s) *Ex parte Houghton*, 17 Ves. 251; 2 Mad. Ch. Pr. 142.

(t) *Curtis v. Perry*, 6 Ves. 739; *ex parte Yallop*, 15 Ves. 60; *Slater v. Willis*, 1 Beav. 354.

[*Phillips v. Cramond*, 2 W. C. C. R. 44].] Quere, what would be the title of the third person (to whom the conveyance had been made) if offered to a purchaser with notice of his breach of faith with the alien? What would be the remedy of the alien *at law* against the third person, for the recovery of the consideration money paid for his sole benefit (by operation of law) and with his knowledge and consent. (T) [On a similar principle, a trust will not result in favor of a person who has purchased an estate in the name of another, in order to give him a vote in the election of a member of Parliament. *Groves v. Groves*, 3 Y. & J. 163; see *Philpotts v. Philpotts*, 10 C. B. 85.]

payment of the money must be clearly proved; (u)¹ and this may be done by any evidence going directly to the fact of payment; as by the admission of the nominal purchaser; (x)² or by a statement in the purchase deed; or in the admission on the court rolls, where the property is copyhold. (y) But the statement in the purchase deed, or admission, as to the payment of the money, is not conclusive against the nominee, although it will require strong evidence to rebut it. (z) In every case the evidence adduced, must be such as goes distinctly to the fact of payment. Loose and equivocal facts, such as possession of the property by the party, who is alleged to have advanced the money, will not be sufficient. (a) However, it will be enough to prove circumstances leading irresistibly to the conclusion, that the money could not have been paid by the nominal purchaser: *e. g.*, such mean circumstances of the pretended owner, as render it impossible for him to have been the purchaser. (b) But it is doubtful whether mere parol evidence would be admissible under any circumstances against the answer of the nominal purchasers, denying the facts on which the trust is attempted to be established, (c) although such evidence was admitted in an early case. (d)³ [*95]

(u) *Newton v. Preston*, Prec. Ch. 103; *Gascoigne v. Thwing*, 1 Vern. 366; *Willis v. Willis*, 2 Atk. 71; *Groves v. Groves*, 3 You. & Jerv. 169. [*Enos v. Hunter*, 4 Gilm. 211; *Carey v. Callan*, 6 B. Monroe, 44; *Bottsford v. Barr*, 2 J. C. R. 405; *Hickey v. Young*, 1 J. J. Marsh. 3; *Wright v. King*, Harr. Ch. 12; see as to the evidence necessary, *Hunter v. Marlboro*, 2 Wood. & M. 168.]

(x) *O'Hara v. O'Niel*, 2 Eq. Ca. Abr. 475; *Cottingham v. Fletcher*, 2 Atk. 155; 2 Mad. Ch. Pr. 141, 3d ed.; *Ambrose v. Ambrose*, 1 P. Wms. 321.

(y) *Benger v. Drew*, 1 P. Wms. 780. (z) *Ib.*

(a) *Groves v. Groves*, 3 Y. & J. 179. [See *Hunter v. Marlboro*, 2 Wood. & M. 168.]

(b) Per Lord Hardwicke in *Willis v. Willis*, 2 Atk. 81; and see *Ryall v. Ryall*, cited Ambl. 413. [See 18 Penn. St. R. 283.]

(c) *Newton v. Preston*, Prec. Ch. 103; *Fordyce v. Willis*, 3 Bro. C. C. 577; *Bartlett v. Pickersgill*, 1 Ed. 515; 2 Sugd. V. & P. 135; but see *Gascoigne v. Thwing*, 1 Vern. 366.

(d) 1 Vern. 366.

¹ It is not necessary, however, that the funds should be those of the *cestui que trust*; they may be supplied by a third person as a gift or loan, *Gomez v. Tradesman's Bank*, 4 Sand. S. C. 106; *Smith v. Sackett*, 5 Gilm. 534; or even by the nominal purchaser, on credit. *Page v. Page*, 8 N. H. 187; *Runnells v. Jackson*, 1 How. Miss. 358. Where the money is payable by instalments, payment of part is not sufficient. *Conner v. Lewis*, 16 Maine, 274.

² *Malin v. Malin*, 1 Wend. 626; *Pearce v. McKeehan*, 3 Barr, 136; *Harder v. Harder*, 1 Sandf. Ch. 17; *Lloyd v. Carter*, 17 Penn. St. 216; *Peabody v. Jarbel*, 2 Cush. 232; see *Smith v. Burnham*, 3 Sumn. 438; and *a fortiori* by his deposition, *Pinney v. Fellows*, 15 Verm. 525. But a subsequent declaration that he purchased for another, without any previous engagement or advance of money, is not sufficient. *Sidle v. Walter*, 5 Watts, 389; *Haines v. O'Conner*, 10 Id. 313.

³ In the United States it has been held very generally that parol proof is admissible in such case, notwithstanding the denial in the trustee's answer; but the evidence must be very clear, and is to be received with great caution. *Boyd*

Where the consideration money is expressed in the purchase deed to have been paid by the person in whose name the conveyance has been taken, and nothing appears on the face of the deed to create a presumption that the money in fact belonged to another, it has been a subject of controversy, whether parol evidence is admissible *after the death of the nominal purchaser* to prove a resulting trust. There is no question but that such evidence is admissible in the lifetime of the nominal purchaser.¹

Mr. Sanders has maintained the negative of this proposition, on the ground, that the admission of parol evidence in such cases would be contrary to the Statute of Frauds;(e) and he refers to several of the older cases as authorities for this proposition:(f) and this opinion has been adopted and even extended by another writer of considerable authority.(g)

However, on the other hand, Mr. Maddox, in his Treatise on Chancery Practice, expresses the inclination of his opinion to be, that parol evidence *may* be admitted under such circumstances;(h) and Sir E. Sugden, in his work on Vendors and Purchasers, ably maintains the same side of the question, and asserts, that the statute is not more broken in upon, by admitting parol proof after the death of the nominal purchaser, than by allowing such proof in his lifetime.(i) In *Chalk v. Danvers*,(k) which has been already mentioned, the first of three lives, put into a copyhold by S. W., *was expressly stated in the admission to be the purchaser*, although the fine was paid in fact by S. W., it was held, that the fine must be taken to have been paid *as expressed in the admission*.(k) On the other hand, in Sir John Peachy's case(l) it was laid down generally by Sir Thos. Clark, M. R. that if A. sold an estate to C., and the consideration

(e) See Mr. Sander's note to Lloyd v. Spillett, 2 Atk. 150, and Sand. Uses, 259, 260, 3d ed.

(f) Kirk v. Webb, Prec. Ch. 84; Newton v. Preston, ib. 133; Gascoigne v. Thwing, 1 Vern. 366; Hooper v. Eyles, 2 Vern. 480; Crop. v. Norton 2 Atk. 75; and see Chalk v. Danvers, 1 Ch. Ca. 310.

(g) Roberts on Stat. of Frauds, 99.

(h) 2 Mad. Ch. Pr. 141, 3d ed. [Acc. Harrisburg Bank v. Tyler, 3 W. & S. 373; Freeman v. Kelley, 1 Hoff. Ch. 90; Unitarian Soc. v. Woodbury, 14 Maine, 281; Harden v. Harden, 2 Sand. Ch. 17; 2 Green. Ch. 474.]

(i) 2 Sugd. V. & P. 136, 9th ed.

(k) Chalk v. Danvers, 1 Ch. Ca. 310.

(l) Stated in Sugd. V. & P. 137.

v. M'Lean, 1 J. C. R. 582; Botsford v. Burr, 2 J. C. R. 405; Buck v. Pike, 2 Fairf. 24; Baker v. Vining, 30 Maine, 121; Page v. Page, 8 N. H. 187; Snelling v. Utterback, 1 Bibb. 609; Letcher v. Letcher, 4 J. J. Marsh. 590; Elliott v. Armstrong, 2 Blackf. 441; Blair v. Bass, 4 Blackf. 540; Larkins v. Rhodes, 5 Porter, 196. As in other cases, to overthrow the denial of the answer, there must be two witnesses at least, or one witness with corroborating circumstances; Blair v. Bass, 4 Blackf. 540; Page v. Page, 8 N. H. 187; Ensley v. Ballentine, 4 Humph. 233.

¹ Livermore v. Aldrich, 5 Cushing, 435; and cases there cited.

was expressed to be paid by B., and the conveyance made to B., the court would allow parol evidence to prove the money paid by C. So in the case of *Leach v. Leach*,^(m) where the plaintiff *after the death of her husband* endeavored to establish a claim to a trust in an estate, on the ground, that it had been purchased by her husband in his lifetime *with her trust money*; Sir Wm. Grant, M. R., observed, that, as to the ground, that the purchase was made with the trust money, all depended upon the proof of the fact, "for whatever doubts might have been formerly entertained on this subject, it is now settled, that money may in this manner be followed into the land, in which it is invested; *and a claim of this sort may be supported by parol evidence.*"^(m)

*Upon the whole the preponderance of authority seems to be in favor of the admissibility of parol evidence in support [96] of a resulting trust under such circumstances, as well after the death of the nominal purchaser, as in his lifetime; although the purchase deed expressly state the money to be paid by the nominal purchaser.

However it is to be observed, that where the evidence is merely parol, it will be received with great caution, and the court will look anxiously for some corroborating circumstances in support of it:⁽ⁿ⁾ and in cases of this nature the claimant in opposition to the legal title, should not delay the assertion of his right, as a stale claim would meet with little attention.^(o)

Resulting trusts of this nature are strictly confined to cases, where the purchase has been made in the name of one person, and the consideration paid by another. Therefore where a man employs another by parol as his agent to buy an estate, and the latter buys it in his own name, *and no part of the purchase money is paid by the principal*; there, if the agent deny the trust, and there is no written evidence of its existence, it cannot be enforced against him; for that would be in the teeth of the Statute of Frauds.^(p)¹

So where the owner of an estate conveys it to another absolutely

(m) *Leach v. Leach*, 10 Ves. 517.

ford v. Wade, 17 Ves. 97. [*Robertson v. Maclin*, 3 Heyw. 70; *Peebles v. Reading*, 8 S. & R. 484.]

(n) 2 Sugd. V. & P. 138, 9th ed.; and see Sir William Grant's observations in *Leach v. Leach*, 10 Ves. 517, 8. [*Carey v. Callan*, 6 B. Monroe, 44.]

(p) *Rastal v. Hutchinson*, 1 Dick. 44; *O'Hara v. O'Niel*, 2 Br. P. C. 39; *Bartlett v. Pickersgill*, 4 Burr. 22, 5; 1 Cox, 15; S. C. 4 East, 577, n.; 2 Sugd. V. & P. 139; 2 Story, Eq. Jur. § 1201.

(o) *Delane v. Delane*, 7 Bro. P. C. 279; 2 Sugd. V. & P. 186; *Bonney v. Ridgard*, cited 4 Bro. C. C. 138; Beck-

¹ See *Jackman v. Rigland*, 4 W. & S. 149; *Walker v. Brungard*, 13 Sm. & M. 765; *Pinnock v. Clough*, 16 Verm. 507; *Blair v. Bass* 4 Blackf. 540; *Peebles v. Reading*, 8 S. & R. 492; *Moore v. Green*, 3 B. Monr. 407; *Fowke v. Slaughter*, 3 A. K. Marsh. 57; *Taliaferro v. Taliaferro*, 6 Alab. 406; *Flagg v. Mann*, 2 Sumn. 546; *Dorsey v. Clarke*, 4 H. & J. 551; see however, *Howell v. Baker*, 4 J. C. R. 120.

as a purchaser for a valuable consideration, which however is not paid, but no case of fraud or mistake is made; the seller cannot by parol evidence alone establish a trust for himself; and no resulting trust arises on such a transaction; but he will have a lien on the estate for the purchase money.(q)

As the resulting trust in these cases is a mere matter of equitable presumption, it may be rebutted by other circumstances, which negative that presumption. And for this purpose parol proof is admissible,(r)¹ for resulting trusts are left unaffected by the Statute of Frauds, and before that statute a bare declaration by parol would prevent any resulting trust.(s) Moreover the evidence in such a case would be in support of the legal title.

Therefore in case it can be satisfactorily shown, either by parol or other evidence, that it was the intention of the party, from whom the consideration proceeded, that the person, to whom the conveyance is made, should take beneficially, he will be entitled to the estate.(t) And according to the nature of the evidence the presumption in favor of the party, paying the consideration money, may be rebutted as to part of the estate, and prevail as to the remainder.(u)

However in these cases the burden of proof rests upon the volunteer to *show, that the party, from whom the consideration [97] moved, did not mean the purchase to be a trust for himself, but a gift to the stranger.(x)

It is to be observed, that resulting trusts of this description must attach, if at all, by virtue of the circumstances of the transaction itself: they cannot be raised from subsequent matter arising *ex post facto*.(y)² In a case where a lease of a colliery had been granted to

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| (q) <i>Leman v. Whitley</i> , 4 Russ. 423. | (s) <i>Bellasis v. Compton</i> , 2 Vern. 294. |
| [Story Eq. § 902; <i>Pinnock v. Clough</i> , 16 | (t) <i>Maddison v. Andrew</i> , 1 Ves. 58; |
| <i>Verm.</i> 508; <i>Rathbun v. Rathbun</i> , 6 Barb. | <i>Benbow v. Townsend</i> , 1 M. & K. 506. |
| <i>S. C.</i> 107; <i>Bogert v. Perry</i> , 17 John. | (u) <i>Lane v. Dighton</i> , Ambl. 409; |
| 351.] | <i>Benbow v. Townsend</i> , 1 M. & K. 510. |
| (r) <i>Rider v. Kidder</i> , 10 Ves. 364; 2 | [<i>Pinney v. Fellows</i> , 15 Verm. 525.] |
| <i>Sugd.</i> 138; <i>Benbow v. Townsend</i> , 1 | (x) 2 <i>Sugd. V. & P.</i> 139, 9th ed. |
| <i>M. & K.</i> 508; <i>Taylor v. Taylor</i> , 1 Atk. | <i>Dudley v. Bosworth</i> , 10 Hump. 12.] |
| 386. | (y) 2 <i>Sugd. V. & P.</i> 131. |

¹ *Botsford v. Burr*, 2 J. C. R. 405; *Page v. Page*, 8 N. H. 189; *Baker v. Vin- ing*, 30 Maine, 126; *Steere v. Steere*, 5 J. C. R. 18; *Jackson v. Feller*, 2 Wend. 465; *White v. Carpenter*, 2 Paige, 217; *McGorven v. McGorven*, 4 Desaus. 487; *Elliott v. Armstrong*, 2 Blackf. 199; *Sewell v. Baxter*, 2 Johns. Maryl. 448.

² In order to establish a resulting trust the money must have been paid before the time of the purchase by the alleged *cestui que trust*, either with his own or borrowed funds. *Freeman v. Kelley*, 1 Hoff. Ch. 90; *Foster v. Trustees*, 4 Alab. 302; *Forsyth v. Clark*, 3 Wend. 637; *Botsford v. Burr*, 2 J. C. R. 405; *Magee v. Magee*, 1 Barr, 405; *Steere v. Steere*, 5 J. C. R. 1; *Wright v. King*, Harring. Ch. 12; *Bernard v. Bougard*, Harr. Ch. 130; *Rogers v. Murray*, 3 Paige, C. R. 390; *Mahorner v. Harrison*, 13 Sm. & M. 53; *Graves v. Dugan*, 6 Dana, 331;

the defendant, in trust, as was asserted by the plaintiff, for the plaintiff and defendant jointly by virtue of a parol agreement between them; and no fine or other consideration was paid at the time for the grant of the lease, but a moiety of the rent had subsequently been paid by the plaintiff to the lessor; it was argued on behalf of the defendant, that from this payment, being matter *ex post facto*, no resulting trust could be construed to arise in favor of the plaintiff. The case however went on another point, and the court does not appear to have given any opinion on this question.(z)

The rule respecting resulting trusts of this nature is not of universal application. If the person in whose name the conveyance of property is taken, be one for whom the party, paying the purchase money, is under a natural or moral obligation to provide, no equitable presumption or trust arises from the fact of the payment of the money; but on the contrary the transaction will be regarded *prima facie* as an advancement for the benefit of the nominee. In that case, therefore, it will be for the party who seeks to establish a trust on behalf of the payer of the purchase money, to displace by sufficient evidence the presumption that exists in favor of the legal title.(a)

In this respect the law of trusts agrees with the law of uses, as it existed before the statute of Hen. VIII. "For a feoffment to a stranger before that statute without consideration raised a use to the feoffor; but a feoffment by a father to his son without other consideration raised no use by implication to the father; for the consideration of blood settled the use in the son, and made it an advancement."(b)

Therefore where a purchase of real or personal property is made, or a security taken by parent(1) in the name of a "child,"(c) or

(z) *Riddle v. Emerson*, 1 Vern. 108. *Dyer v. Dyer*, 2 Cox, 92; *Grey v. Grey*,

(a) *Murless v. Franklin*, 1 Swanst. 17. 2 Swanst. 594; *Sidmouth v. Sidmouth*,

(b) *Grey v. Grey*, 2 Swanst. 598. 2 Beav. 447; *Skeats v. Skeats*, 2 N. C.

(c) *Mumma v. Mumma*, 2 Vern. 19; C. 9.

(1) All the cases, that have arisen, appear to have been purchases by a "father;" it may be a question, whether the same rules would apply to the case of a similar purchase by a "mother." In *Lloyd v. Read*, 1 P. Wms. 607, the purchaser was a *grandmother*, but no attention seems to have been paid to that fact.

Page v. Page, 8 N. H. 187; *Conner v. Lewis*, 16 Maine, 260; *Pinnock v. Clough*, 16 Verm. 501; *Haines v. O'Conner*, 10 Watts, 313. On a contract for conveyance of land on payment of certain sums at specified times, a resulting trust is not created by payment of part of the money. *Conner v. Lewis*, 16 Maine, 274; but in *Harder v. Harder*, 2 Sandf. Ch. 17, A. had bought a farm in 1800, which was conveyed to him in fee, he giving a mortgage for the purchase money. He resided on it until his death, in 1835; but it was paid for out of the labor and earnings of his four younger sons. The Vice Chancellor decreed a resulting trust in favor of the latter.

several "children;"(d) the transaction will be looked upon as an advancement for the child, and not a trust for the parent: unless it can be shown to have been the intention of the parent that the child should not take beneficially.¹

The rule is the same where the purchaser has placed himself *in loco parentis* to the nominee.(e) And the fact of the child or children being "illegitimate" makes no difference in this respect, "if [*98] there have *been a recognition and filial treatment" on the part of the purchaser towards the child.(f)

A distinction seems to have been taken by Lord Chief Baron Gilbert between a purchaser of *real estate* in the name of a son, and of a "daughter;" on the ground, that though sons are often provided for by settlement of lands, yet daughters seldom are, and therefore the presumption is not so strong.(g) This distinction however does not appear to be borne out by the authorities, and it seems that *daughters* must be considered on the same footing as *sons* with regard to the application of the doctrine in question.(h)

If the father be dead, the same rule prevails in the case of a purchase by a grandfather in the name of his "granchild;" for on the death of the father, the grandfather stands *in loco parentis* to the granchild.(i) In a subsequent case the distinction depending on the death of the father, does not seem to have been attended to.(k) And in the recent case of *Kilpin v. Kilpin*,(l) which came before Sir John Leach, M. R., and subsequently on appeal before Lord Brougham, C., there was a transfer of stock by an individual into the joint names of his natural daughter and her husband, and their children;

(d) *Finch v. Finch*, 15 Ves. 43; *Murless v. Franklin*, 1 Sw. 13.

(e) *Ebrand v. Dancer*, 2 Ch. Ca. 26; *Curran v. Jago*, 1 Coll. N. C. C. 261.

(f) *Beckford v. Beckford*, Loft. 490; *Kilpin v. Kilpin*, 1 M. & K. 536, 542. [See *Anon. Wallace, jr.* 107; and note.]

(g) *Gilb. Lex. Præ.*

(h) 2 Mad. Ch. Pr. 145; 2 Sugd. V. & P. 148; see *Lady George's case*,

cited 3 Cro. 550; and *Bedwell v. Frome*, cited 2 Cox, 97; *Back v. Andrew*, 2 Vern. 120.

(i) *Ebrand v. Dancer*, 2 Ch. Ca. 26; S. C. 1 Coll. N. C. C. 265, n.

(k) *Lloyd v. Read*, 1 P. Wms. 608.

(l) *Kilpin v. Kilpin*, 1 M. & K. 520; see *Curran v. Jago*, 1 Coll. N. C. C. 261, 265.

¹ A purchase by a father in the name of a son is *prima facie* an advancement. *Page v. Page*, 8 N. H. 86; *Partridge v. Havens*, 10 Paige, 618; *Stanley v. Brannon*, 6 Blackf. 194; *Knouff v. Thompson*, 16 Penn. St. 357; *Dennison v. Goehring*, 7 Barr. 182, note; *Taylor v. James*, 4 Desaus. 6; *Bodine v. Edwards*, 10 Paige, C. 504; *Fleming v. Donahoe*, 5 Ohio, 255; *Astreen v. Flanagan*, 3 Edw. Ch. 279; *Taylor v. Taylor*, 4 Gilm. 303; *Tremper v. Barton*, 15 Ohio, 418; *Stanley Brannon*, 6 Blackf. 193; *Thompson v. Thompson*, 1 Yerg. 97; *Dudley v. Bosworth*, 10 Hump. 12; *Jackson v. Matsdorf*, 11 John. R. 91. In *Baker v. Vining*, 30 Maine, 121, a deed was taken in the name of a son, he and his father advancing the money, but the proportion which each paid was uncertain, and the Court refused to establish a resulting trust.

and though the point did not call for decision, the case of the grandchildren was treated throughout as being on the same footing with respect to advancement as that of children, without reference to the death of their father.(l)

This doctrine of advancement obtains equally in the case of a purchase by a husband in the name of his "wife,"(m) and the rule is the same, where the names of children are joined in the conveyance with that of the wife.(n)

However, the relationship between *brothers* is not of such a character, as to raise the presumption, that a purchase by one brother in the name of another was intended as an advancement, and not a trust for the benefit of the purchaser. Therefore where a testator inserted his brother's name in the renewal of a lease, for which he alone paid the fine and rent, there would clearly have been a resulting trust for the testator, had not the brother produced evidence to show, that it was the testator's intention, that he should take beneficially.(o) And this case has been recently followed by a similar decision, where a mortgage security had been taken by one brother in the name of another.(p)

Again, where the nominee stands in the relation of "mother" or "nephew" to the real purchaser, no presumption will arise from such relationship of any intention that those parties should take beneficially, unless indeed the purchaser has placed himself *in loco parentis* to the *nominee;(q) but the general rule will prevail, and they will *prima facie* hold as trustees for the purchaser.(r) [*99]

It appears to be still an unsettled question, whether the rule in favor of the advancement of the child shall prevail, where the conveyance is taken by the father in his own name and that of the child jointly.¹

(l) *Kilpin v. Kilpin*, 1 M. & K. 520; 58. [So of sisters, *Kenton v. Cobb*, 1 Dev. Ch. 439; see *Fields v. Lonsdale*, 14 Jur. 996. 13 Beav. 78.]

(m) *Glaister v. Hower*, 8 Ves. 199, and 9 Ves. 12; *Benger v. Drew*, 1 P. Wms. 780. [Astreen v. Flanagan, 3 Edw. Ch. 279; *Guthrie v. Gardner*, 19 Wend. 414; *Jencks v. Alexander*, 11 Paige, 619.]

(n) *Kingdon v. Bridges*, 2 Vern. 67; *Back v. Andrew*, ib. 120; *Dummer v. Pitcher*, 5 Sim. 35; and S. C. 2 M. & K. 262, 272.

(o) *Maddison v. Andrew*, 1 Ves. sen. 237.

(p) *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Taylor v. Alston*, 2 Cox, 97; cited *Edwards v. Fidel*, 3 Mad.

¹ Where a father paid the purchase money for land and had the bond for title made to himself and his son jointly, it was held in Tennessee to be an equitable

In the case of *Scroope v. Scroope*(s), this point was decided in favor of the child; but there the circumstances of the son not being provided for seems to have been considered material.(s)

In a subsequent case, where a copyhold had been purchased, and the surrender taken to the purchaser and his wife and daughter and their heirs; and the purchaser afterwards mortgaged the whole estate and died: the purchase was considered an advancement for the benefit of the wife and daughter, and a bill filed by the mortgagee to obtain the benefit of his security, was accordingly dismissed.(g)

And in the case of *Grey v. Grey* (h), the Lord Chancellor said, "If a father makes his son a joint purchaser with him, and receives all the profits, and disposes of the rents, this is no evidence of a trust; but the son takes the whole by advancement, if he survives." And in that case a purchase by a father in the joint names of himself and his son was even treated as a stronger case in favor of an advancement, than a purchase in the son's name alone, where the father entered into possession and exercised acts of ownership over the estate.(h)

But a purchase by a father in the names of himself and his son as joint-tenants was afterwards considered, not to be so strong a case for an advancement. In the case of *Pole v. Pole*(i), Lord Hardwicke observed, "No doubt where a father takes an estate in the name of his son, it is to be considered an advancement. So if the estate be taken jointly, so as the son may be entitled by survivorship, that is weaker than the former case, and still depends on the circumstances." In that case his lordship decided against the claim of advancement, but mainly on the ground of the son having been previously provided for.(i)

On another occasion(k), where a father purchased an estate in the joint names of himself and his son, and had no other estate, to which a judgment creditor could resort, the creditor was relieved in equity against the survivorship at law; the settlement being considered as voluntary and fraudulent against creditors. In his judgment in that case Lord Hardwicke says, "Here the purchase is in the names of the father and son, as joint-tenants. Now this does not answer the purpose of an advancement, for it entitles the father to the possession of the whole till a division, and to a moiety abso-

(s) *Scroope v. Scroope*, 1 Ch. Ca. 27.

(i) *Pole v. Pole*, 1 Ves. sen. 76.

(g) *Back v. Andrew*, 2 Vern. 120;

(k) *Stileman v. Ashdown*, 2 Atk. 477, 480.

(h) *Grey v. Grey*, 2 Swanst. 599.

advancement to the son of a moiety; and that the father having subsequently procured the deed to be made to himself, became thereby a trustee for the son for the moiety. *Thompson v. Thompson*, 1 Yerg. 97.

lutely even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety: nay if the son had died during his minority, the father would have been entitled to the whole by survivorship, and the son could not have prevented it by severance, he being an infant."(*k*)

*With reference to the distinction, thus attempted to be introduced, Sir E. Sugden observes, "There does not appear [*100] to be much weight in the reasons above stated. It is evident that a moiety of some estates may be a much better provision than the entirety of others. The chance of survivorship, which the father takes, is an incident to the tenancy, and extends equally to the son, who, after he attains his majority, may sever the joint-tenancy. If he die during his minority, it is as well that the estate should survive to the father, who paid the purchase money, and perhaps took the conveyance to himself and son as joint-tenants, with the express view of advancing him only in the event of his attaining that age, at which the law considers a man capable of managing his fortune. During the son's minority, and the life of his father, upon whom should he be dependent if not upon his own parent? If the father die during the son's minority, the estate will survive to him; so that, perhaps it is impossible to contend with success, that a purchase by a parent in the name of himself and child as joint-tenants, is not so strong a case for an advancement as a purchase in the name of a child solely. Fraud is of course an exception to every rule."(*l*)

It may be remarked that although the observations of Lord Hardwicke, in *Stileman v. Ashdown*, certainly tend to create a doubt, whether a purchase in the joint names of a father and son ought to be considered an advancement; yet all that case decided was, that under the circumstances the transaction was fraudulent and void against creditors: therefore the previous cases of *Scroope v. Scroope* and *Back v. Andrew* must still be considered as authorities on the general question in favor of the advancement.

At all events it would seem that this distinction is not applicable, where the conveyance is taken to the father and son as "tenants in common:" although this latter case does not appear to have anywhere arisen in practice.

Where by the custom of a manor, copyholds are granted for lives *successivè*, it was once held, that if the father pay the fine, a grant to him and his children, or his children only, as his nominees, should not be an advancement for them, but a trust for the father.(*m*) And Sir E. Sugden observes, "that there seems some ground to support

(*k*) *Stileman v. Ashdown*, 2 Atk. 477, 480.

(*l*) 2 Sugd. V. & P. 145, 9th ed.

(*m*) *Dickinson v. Shaw*, cited in *Dyer v. Dyer*, 2 Cox, 95, 6, and stated in 1 Watk. Cop. 222.

this distinction ; because the father could not have taken the whole estate in his own name.”(n)

This decision however has been overruled, and it is now settled, that upon such a purchase, where the children are named to take in succession after their father, according to the general rule this will be, not a trust for the father, but an advancement for the children, who will take *successivè* after the father’s death in the order mentioned in the grant.(o)

For this purpose it is immaterial, that the estate given to the children is reversionary to take effect in succession upon the death of a stranger, and not of the father himself;(p) and *à fortiori* this rule [*101] will prevail in *favor of the children, where the grant is to them immediately without the interposition of the life of the father, or any other life.(q)

In the case of a “wife,” it is clear that the presumption in favor of an advancement arises equally, whether the purchase be made by a husband in the joint names of himself and his wife, or in her name solely. In the former case a joint-tenancy is created, and the wife, if she survive her husband, will take the whole estate by survivorship.(r) However some stress seems to have been laid upon the fact, that a wife cannot be a trustee for her husband.

In like manner, where a man purchased a copyhold, and took the surrender to himself and his wife and *Elizabeth his daughter* and their heirs. It was held, that the husband and wife as one person took one moiety by entirety, and the daughter the other moiety ; and the court after the husband’s death refused to give effect to an incumbrance created by him, as to any part of the estate against the title of the wife and daughter.(s)

The general rule respecting an advancement will not be affected by the fact, of the purchase being made in the name of a *stranger* jointly with that of the wife or child ; but in such a case the legal estate, thus vested in the stranger, will be held by him as a trustee for the party, for whose advancement the purchase was made.(t) But if the child, in whose name a purchase is made jointly with that of

(n) 2 Sugd. V. & P. 141.

(o) *Dyer v. Dyer*, 2 Cox. 92 ; *Murless v. Franklin*, 1 Swanst. 13, 18 ; *Skeats v. Skeats*, 2 N. C. C. 9.

(p) *Finch v. Finch*, 15 Ves. 51 ; *Murless v. Franklin*, 1 Sw. 13 ; *Skeats v. Skeats*, 2 N. C. C. 9.

(q) *Murless v. Franklin*, 1 Sw. 13 ; 2 Sugd. V. & P. 141.

(r) *Kingdom v. Bridges*, 2 Vern. 67 ; *Back v. Andrew*, ib. 120, and Pre. Ch.

1 ; *Christ’s Hospital v. Budgin*, 2 Vern. 683 ; *Dummer v. Pitcher*, 5 Sim. 35, and 2 M. & K. 262 ; *Benger v. Drew*, 1 P. Wms. 780.

(s) *Back v. Andrew*, 2 Vern. 120 ; S. C. 1 Pre. Ch. 1.

(t) *Benger v. Drew*, 1 P. Wms. 780 ; *Lamplugh v. Lamplugh*, 1 P. Wms. 111 ; *Crabb v. Crabb*, 1 M. & K. 511, 518 ; *Kilpin v. Kilpin*, ib. 542.

the trustee, be of tender years, and do not live to enjoy the estates, it seems that the trustee would hold in trust for the father.^(u) And where a purchase was made by a husband, and the conveyance taken to himself and his wife *and a stranger* for their lives, and the life of the longest liver of them; it was held after the death of the husband, that the stranger was a trustee for the wife during her life, and *after her death*, in case he survived her *for the executors of the husband*.^(x) However it might be questionable, whether these last two decisions would now be followed.

It seems that if a father and another person make a purchase jointly in the name of the child of one of them, that will not be an advancement for the child; for the presumption, which arises from the act of the father alone, will not naturally arise from a joint payment.^(y)

From what has gone before, it is clear, that a purchase of this nature in the name of a wife or child will be established as an advancement in favor of the nominee in opposition to any claim of the purchaser himself or his representatives, or of any *volunteer* deriving under him. However it is not quite so accurately ascertained, to what extent the title of the wife or child will be suffered to prevail against the *creditors* of the husband or father.¹

In the case of *Christ's Hospital v. Budgin*^(z) it was said by the Lord Keeper, that such a purchase might be fraudulent against creditors.^(z) *And on one occasion, where the only property available for judgment creditors, had been purchased by the debtor in the joint names of himself and his son, Lord Hard-

(u) *Lamplugh v. Lamplugh*, 1 P. Wms. 112.

(y) Per Lord Eldon, in *Finch v. Finch*, 15 Ves. 51.

(x) *Kingdom v. Bridges*, 2 Vern. 67.

(z) *Christ's Hospital v. Budgin*, 2 Vern. 684.

¹ A purchase by one indebted, in the name of a child or wife, for the purpose of defrauding creditors, creates a resulting trust in him, so far as to subject it in equity to the claims of his creditors. *Guthrie v. Gardner*, 19 Wend. 414; *Doyle v. Sleeper*, 1 Dana, 531; *Newell v. Morgan*, 2 Harr. Del. 225; *Demaree v. Driskill*, 3 Black. 115; *Bell v. Hallenbach*, Wright, 751; *Edgington v. Williams*, Id. 439; *Parrish v. Rhodes*, id. 339; *Cutter v. Griswold*, Walker Ch. 437; *Croft v. Arthur*, 3 Desaus. 223; *Jencks v. Alexander*, 11 Paige, 619; *Watson v. Le Row*, 6 Barb. S. C. 487; *Elliott v. Hart*; *Abney v. Kingsland*, 10 Alab. 355; *Rucker v. Abell*, 8 B. Monroe, 566; *Kimmell v. McRight*, 2 Barr. 38; and in Pennsylvania the land may be levied on in the hands of the trustee. *Kimmel v. McRight*. At law, however, such a conveyance is not within the 13th Eliz., *Crozier v. Young*, 3 Monr. 158; *Gowing v. Rich*, 1 Ired. Rep. 553. If the parent be not indebted at the time, subsequent insolvency will not affect the grantees title. *Dillard v. Dillard*, 3 Humph. 41; *Knouff v. Thompson*, 4 Harris (Penna.), 357. In New York, though resulting trusts have been abolished, an exception is made in favor of the creditors of the party paying the money, ante, p. 91.

wicke considered the transaction to be fraudulent as against the creditors, and relieved against the son's claim to the estate by survivorship.(a)

These decisions would seem to place a purchase of this nature upon the same footing, as a settlement of property *actually vested in the settlor*, and therefore coming within the statute 13 Eliz. c. 5, against fraudulent conveyances. But even in that case, from the analogy of the decisions upon that statute, the transaction could not be impeached, unless it be proved, that the purchaser at the time of the purchase and conveyance was indebted, if not to the extent of insolvency, at any rate to so large an amount, as to show that the object of the transaction was to defeat or to delay his creditors.(b)

However Sir E. Sugden states it to be the better opinion, that such a purchase is *not* within the statute of 13 Eliz. ; for, as the purchaser may give the money to the object of his bounty to purchase the estate for himself, he may by the same reason direct a conveyance to be made to him.(c)

It seems, that a purchase of real estate in the name of a child solely, or jointly with the father's name, is not within the statute 27 Eliz. c. 4 ;(d) and that statute does not apply to personal property ;(e) consequently a subsequent purchaser, although *bona fide*, from the father will not be relieved against an advancement of this description.(d)

If such a purchase were made by a person, not being at the time a trader, or owing debts ; the advancement would be good against the creditors, although the purchaser afterwards engaged in trade, and became bankrupt.(f)

But a transaction of this nature came expressly within the statute of 21st Jas. I. c. 15, s. 5 : and if the purchaser were a trader at the time of the purchase, his being then solvent would not have protected it against the claims of his creditors, in case of his subsequent bankruptcy.(g)

The law however in this respect was partially altered by the 6 Geo. IV. c. 16, s. 73, which only gives the creditors the benefit of the purchase, where the bankrupt is insolvent at the time of making it.(h)

Sums voluntarily expended by a husband for the benefit of his

(a) *Stileman v. Ashdown*, 2 Atk. 477, 81 ; and see *Reddington v. Reddington*, 3 Ridg. P. C. 176.

(b) *Lush v. Wilkinson*, 5 Ves. 384 ; *Richardson v. Smallwood*, Jac. 552 ; *Townshend v. Westacott*, 2 Beav. 340.

(c) 2 Sugd. V. & P. 147 ; *Fletcher v. Sidley*, 2 Vern. 490 ; 2 Fonbl. Eq. Ch. 5, s. 2, n.(d).

(d) 2 Sugd. V. & P. 146, citing *Lady*

George's case, stated 3 Cro. 550. [*Stanley v. Brannon*, 6 Blackf. 193.]

(e) *Jones v. Croucher*, 5 Mad. 315 ; *Bill v. Cureton*, 2 M. & K. 512.

(f) *Lilly v. Osborn*, 3 P. Wms. 298.

(g) *Fryer v. Flood*, 1 Bro. C. C. 160 ; *Glaister v. Hewer*, 8 Ves. 195 ; and see *Walker v. Burrows*, 1 Atk. 93.

(h) 2 Sugd. V. & P. 146.

wife's estate, for instance in the redemption of the land tax, the enfranchisement of copyholds, or in building on her estate, will not create a trust for the benefit of his creditors within the principle now under consideration, although he was insolvent at the time. Such sums cannot therefore be recovered by them from her estate.(i)

*As the presumption in favor of the advancement of the child or wife in these cases proceeds only upon the supposed [*103] intention of the purchaser, it may be rebutted by evidence manifesting an intention on his part, that the nominee should take as trustee.(k)¹ It now remains for us to consider, what will be sufficient evidence for this purpose.

It is clear, that the fact of the nominee being the child, &c., operates merely as a *circumstance of evidence*, to rebut the resulting trust, that would otherwise arise in favor of the purchaser, who pays the money. Lord Chief Baron Eyre, who goes fully into the point in his judgment in the case of *Dyer v. Dyer*,(l) says, "that it would be disturbing land-marks, to suffer that proposition to be called in question;" and as the same learned judge goes on to say, "considering it as a circumstance of evidence, there must be of course evidence admitted on the other side."(l)

Written declarations made at any time by the nominee, or made by the purchaser himself, *in contemplation of, or contemporaneously with* the purchase, obviously constitute the best, and most complete evidence to prove the trust; and where such proofs exist, no question can arise on the point.(m) Similar declarations by parol have been admitted for this purpose.(n) However it has been said that parol evidence is improper against the legal operation of a deed:(o) and where such declarations are conflicting and inconsistent the court will not act upon them.(p)

There is no doubt, but that parol evidence is good *in support of* the claim of the nominee in such cases: for it concurs with the legal

(i) *Campion v. Cotton*, 17 Ves. 263.

(k) *Sidmouth v. Sidmouth*, 2 Beav. 454. [*Dudley v. Bosworth*, 10 Humph. 13; *Jackson v. Matsdorff*, 11 John. 91.]

(l) *Dyer v. Dyer*, 2 Cox, 93, 4; 1 P. Wms. 112, S. C.

(m) *Grey v. Grey*, 2 Sw. 600.

(n) *Grey v. Grey*, 2 Swanst. 594-6;

Kilpin v. Kilpin, 1 M. & K. 520; *Sidmouth v. Sidmouth*, 2 Beav. 455; *Scawin v. Scawin*, 1 N. C. C. 65.

(o) *Taylor v. Taylor*, 1 Atk. 386; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Reddington v. Reddington*, 3 Ridg.

P. C. 182.

(p) *Grey v. Grey*, 2 Sw. 597.

¹ In *Dudley v. Bosworth*, 10 Humph. 12, where on a purchase in the name of the son it appeared that the object of the conveyance was to guard against the improvidence of the father, who moreover, was utterly unable to make any provision for his other children, and had always remained in possession of the land, it was held the presumption of an advancement was rebutted. See also *Taylor v. Taylor*, 4 Gilm. 303; *Tremper v. Barton*, 18 Ohio, 418. Subsequent declarations of the father are not, however, sufficient. *Tremper v. Burton*, *ub supr.*

title.(q) But where a trust of some shares, purchased by a father in his son's name, had been clearly proved by the parol admission of the son, Sir K. Bruce, V. C., refused to admit a bare declaration of the son, for the purpose of rebutting the trust. In the same case his Honor received with some doubt a similar declaration, which was supported by a corroborative fact, but under the circumstances he did not consider that evidence sufficient to rebut the trust, and decreed in favor of the father's claim.(r)

It was said by the Lord Chancellor in *Grey v. Grey*,(s) that, "where a father intends a trust, he ought to see it declared in writing, or supported by direct proof, and not rest upon constructions;"(s) and Lord Eldon has observed that "this principle of law and presumption," (*viz.* in favor of the advancement of a child,) "ought not to be frittered away by nice refinements."(t) However it is not essential to have an actual declaration or admission of the trust either in writing or by parol; there may be other circumstances, which, when established in evidence, will support the inference, that the nominee was intended to take as a trustee for the purchaser, and not for his own benefit.

Thus where a father had already fully provided for a son, a further [*104] *purchase in his name has been considered not to be an advancement;(u) more especially if there are other children unprovided for.(x) But if the child be provided for and emancipated only *in part*, that will not be sufficient to rebut the presumption of advancement.(y) And a younger son, on whom a revision had been settled by his father expectant on his mother's death, has been considered unadvanced; "The father is the only judge as to the question of the son's provision," and if he consider a child unadvanced, though some provision may have been made for him, that will be sufficient to prevent the trust. Indeed from the state of the authorities on the point, there seems to be much force in the observation of the Lord Chief Baron, in *Dyer v. Dyer*, "that the distinction, of the son being provided for or not, is not very solidly taken, or uniformly adhered to."(z) (1)

(q) *Taylor v. Taylor*, 1 Atk. 386; *Shales v. Shales*, 2 Freem. 252; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Reddington v. Reddington*, 3 Ridg. P. C. 176. [See *Steere v. Steere*, 5 J. Ca. 10.] *Dudley v. Bosworth*, 10 Humph. 12.]

(r) *Scawin v. Scawin*, 1 N. C. C. 65.

(s) *Grey v. Grey*, 2 Sw. 600.

(t) In *Finch v. Finch*, 15 Ves. 50.

(u) *Elliott v. Elliott*, 2 Ch. Ca. 231;

(x) *Pole v. Pole*, 1 Ves. sen. 76.

(y) *Reddington v. Reddington*, ubi supra; *Grey v. Grey*, 2 Swanst. 600.

(z) *Reddington v. Reddington*, ubi supra; *Dyer v. Dyer*, 2 Cox, 94.

(1) In the case of *Kilpin v. Kilpin*, it was said by the Lord Chancellor (Lord Brougham), that it was a material circumstance, if a provision had been previously made for the child or not, but that was far from being decisive. *Kilpin v. Kilpin*, 1 M. & K. 542.

Possession of the estate taken by the father, and acts of ownership exercised by him during his life, are circumstances of evidence as to his intention, although by no means conclusive.(a)

Where the child, in whose name the purchase was taken, was an infant at the time, possession taken by the father, and the receipt of the rents by him during his life, will not be deemed subversive of the child's claim; but such acts will be considered, as done by the father in his character of guardian:(b) although it was observed by Lord Chief Baron Eyre, "that it would be pretty difficult for a son to succeed in a bill against the father for those rents."(c)

Moreover in such a case, the unfitness of an infant to be a trustee is an additional ground, for presuming an intention on the part of the father, that he should take beneficially.(d)

In one case a distinction was taken on the ground, that the parent exercised acts of ownership *after the infant had come of age*, and had become competent to assert his rights; in which case, it was said, that the child should be trustee for the father.(e)

This distinction however, cannot be depended on. It seldom happens that the father gives the son possession during his life. Yet in *Grey v. Grey*, the court clearly did not recognise any difference on that ground; for, said the Lord Chancellor in his judgment, "If the son suffer the father, who purchased in his name, to receive the profits, &c.; this act of reverence and good manners will not contradict the nature of things, and turn a presumptive advancement into a trust."(f) And in the late case of *Sidmouth v. Sidmouth*,(g) where the father during his life had received *the dividends of stock purchased in his son's name; Lord Langdale, M. R., observed, that the circumstance of the son's being adult did not appear to him to be material.(g) [*105]

Acts done by the child, authorizing the enjoyment by the father of the beneficial interest in the property; such as receipts for rent for the father's use, or a power of attorney for him to receive the dividends of stock, will not of themselves, or when joined with the fact of the father's possession, be sufficient to convert the child into a trustee.(h)

Where the estate purchased is reversionary, possession can afford no evidence, until the determination of the previous estate.(i) And

(a) *Murless v. Franklin*, 1 Sw. 17; (e) *Lloyd v. Reap*, 1 P. Wms. 608.
Scawin v. Scawin, 1 N. C. C. 67. (f) *Grey v. Grey*, 2 Swanst. 600; 2

(b) *Mumma v. Mumma*, 2 Vern. 19; Sugd. V. & P. 143.
Lamplugh v. Lamplugh, 1 P. Wms. (g) *Sidmouth v. Sidmouth*, 2 Beav. 111; *Taylor v. Taylor*, 1 Atk. 386. 456.

(c) *Dyer v. Dyer*, 2 Cox, 95. (h) *Taylor v. Taylor*, 1 Atk. 386;

(d) *Lamplugh v. Lamplugh*, 1 P. *Sidmouth v. Sidmouth*, 2 Beav. 447.
 Wms. 112. (i) *Murless v. Franklin*, 1 Sw. 18.

in the case of a purchase in the joint names of the father and son, the father's possession being consistent with the deed is no evidence of a trust.^(k)

So the circumstance of the parent paying fines, or laying out money in repairs or improvements of the estate will not of itself make the child a trustee.^(l) However in a late case Sir K. Bruce, V. C., seems to have laid some stress on the fact, of the father having paid the subsequent calls on shares, purchased by him in his son's name, in order to assist him to the conclusion, that the purchase was a trust for the father's benefit.^(m)

In like manner any *contemporaneous act*, which is wholly inconsistent with the notion, that the child was intended to take beneficially, will make him a trustee. For instance a surrender at the same court made by a father to the use of his will of a copyhold taken in his son's name;⁽ⁿ⁾ or where it appears, that the object of the transaction was to effect some particular purpose, *e. g.*, to sever a joint-tenancy, or to avoid a liability, attaching upon the owner of the legal estate.^(o) And where a father put in his own life and the lives of his two sons, and *at the same court* took a license to himself, to lease for 70 years, that was held sufficient to show, that he did not intend his sons to take beneficially.^(p)

Any evidence however, which is used for the purpose of displacing the title of the nominee, unless it be founded on his own admission or declaration of the trust, must be contemporaneous with the purchase. *Subsequent* acts, or declarations of the purchaser, or any other matter arising *ex post facto* cannot be admitted for this purpose: although they be of the most unequivocal and conclusive description.^(q) On this ground a subsequent mortgage or devise, or other disposition, by the purchaser of the property will not affect the rights of the child, if the original transaction can be established as an advancement in his favor.^(r)

It is however quite clear, that according to the general rule of equity, if a father devise to another the estate bought in the name of a child, and make other provisions for the child by his will, the child would be put to his election.^(s) Nevertheless in the early case

(k) *Grey v. Grey*, 2 Sw. 599.

(l) *Mumma v. Mumma*, 2 Vern. 19.

(m) *Scawin v. Scawin*, 1 N. C. C. 67.

(n) *Prankerd v. Prankerd*, 1 S. & S. 1.

(o) *Baylis v. Newton*, 2 Vern. 28;
Birch v. Blagrove, Ambl. 264; 2 Sugd.
V. & P. 144.

(p) *Swift d. Farr v. Davis*, 8 East,
354, n.

(q) *Finch v. Finch*, 15 Ves. 51; *Mur-*
less v. Franklin, 1 Sw. 13; *Prankerd v.*

Prankerd, 1 S. & S. 1; *Crabb v. Crabb*,
1 M. & K. 519; *Sidmouth v. Sidmouth*,
2 Beav. 455.

(r) *Back v. Andrew*, 2 Vern. 120;
Dyer v. Dyer, 2 Cox, 92; 1 P. Wms.
112; *Finch v. Finch*, 15 Ves. 51; *Mur-*
less v. Franklin, 1 Sw. 13; *Skeats v.*
Skeats, 2 N. C. C. 9.

(s) *Dummer v. Pitcher*, 5 Sim. 35;
S. C. 2 M. & K. 262; 2 Sugd. V. & P.
144.

of *Shales v. Shales*, a *child under such circumstances was not put to his election.^(t) And in order to raise a case of [*106] election against the child the disposition of the estate by the will must be distinct and explicit.^(u)

The presumption as to the intention of the parties with regard to a purchase of one estate cannot be affected by circumstances, connected with similar purchases of other estates by the same parties.^(x)

II.—WHERE THERE IS A VOLUNTARY CONVEYANCE WITHOUT ANY DECLARATION OF TRUST.

It has been laid down broadly by Mr. Cruise in his Digest, that, where the legal estate in lands is conveyed to a stranger, without *any* consideration, there arises a resulting trust to the original owner; in conformity to the old doctrine, that where a feoffment was made without consideration, the use resulted to the feoffor.^(y) And in support of this doctrine that learned writer cites the case of *Duke of Norfolk v. Browne*,^(z) in which case the duke had executed a grant of the next avoidance of a church to a clergyman; but the grantee *knew nothing of it*, and deposed that he did not purchase it of the duke; and it was decreed to be a resulting trust for the grantor, there being no trust declared.^(z)

However notwithstanding the authority of a statement coming from such a quarter, it is conceived that the proposition, as stated above, cannot be supported. It was distinctly laid down by Lord Hardwicke in the case of *Young v. Peachy*,^(a) that it was by no means the rule of the court, that, where a voluntary conveyance is made, a trust shall arise by implication.^(a) And it has long been the settled doctrine of the court, continually recognised, and acted upon, by a series of eminent judges, that a voluntary conveyance, or assignment, of real or personal estate, if duly executed and acted upon, will be valid and binding upon the original owner, and subsequent volunteers claiming under him.^(b) However it is scarcely necessary to add, that such a disposition of property will not affect the rights of creditors, or subsequent purchasers for valuable con-

(t) *Shales v. Shales*, 2 Freeman, 252. and see *Fordyce v. Willis*, 3 Bro. C. C.

(u) *Dummer v. Pitcher*, 2 M. & K. 585.
262.

(b) *Clavering v. Clavering*, 2 Vern. 473; *Boughton v. Boughton*, 1 Atk. 625; *Cook v. Fountain*, 3 Sw. 590; see

(y) 1 Cruise, Dig. tit. 12, Ch. 1, s. 52.
(z) *D. of Norfolk v. Browne*, Prec. Cecil v. Butcher, 2 J. & W. 573; *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; Ch. 80. [But see 2 Spence Eq. 198.]

(a) *Young v. Peachy*, 2 Atk. 256; *Dummer v. Pitcher*, 2 M. & K. 262.

sideration.(c) With regard to the case of *Norfolk v. Browne*, which appears to be relied upon by Mr. Cruise as an authority for his statement of the law on this subject, we shall presently see, that the view of the law taken above is not at all controverted by that decision.(1)

It may therefore be stated as the clear result of the authorities, that where a person, being a stranger in blood to the donor,(d) and [*107] *à fortiori* *if connected with him by blood,(e) is in possession of an estate(2) under a voluntary conveyance, duly executed, the mere fact of his being a volunteer will not of itself create any presumption that he is a trustee for the grantor;¹ but he will be considered entitled to the enjoyment of the beneficial interest, unless that title is displaced by sufficient evidence of an intention on the part of the donor to create a trust: and, as was observed by the Lord Chancellor in the case of *Cook v. Fountain*,(f) he need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it from him.(f)

It is to be observed, that deed may be founded on *some* consideration, and yet still come within the technical definition of a voluntary instrument. In equity the statement of a mere nominal pecuniary consideration certainly would not be allowed to affect the construction or operation of a deed.(g) But if the consideration be that of *blood*, that amongst other circumstances would probably have some weight with the court in deciding whether or not a resulting trust were created, on a voluntary conveyance.

However, the title of a volunteer is never favored in a court of equity;(h) and proper evidence will always be admitted in these

(c) See stat. 13 Eliz. c. 5, and 27 35; and 2 M. & K. 262, 273. [See *Bank U. S. v. Houseman*, 6 Page, C. Eliz. c. 4. R. 526; *Miller v. Wilson*, 15 Ohio, 68.]

(d) *Cook v. Fountain*, 3 Sw. 585.

(f) *Cook v. Fountain*, 3 Sw. 590.

(e) *Williamson v. Codrington*, 1 Ves. 511; *Lord Townshend v. Wyndham*, 2 Ves. 10; *Dummer v. Pitcher*, 5 Sim. (g) See *Young v. Peachy*, 2 Atk. 256.

(h) *Cook v. Fountain*, 3 Sw. 591.

(1) It may be observed that where a gift is made by *will*, that of itself supposes a consideration; and though no use or trust be expressed, both the estate, and the use, will pass to the donee; and it cannot be averred to be to any other use, than to the use of the donee. See 1 Pow. Jarm. Dev. 208.

(2) It is scarcely necessary to repeat here, that as a general rule, equity will not recognise the title of a volunteer unless it be completely executed; and therefore if the grant be not formally and legally executed, or if owing to its loss or destruction or any other reason it becomes necessary to have recourse to equity to put him in possession of the estate, the court will not interfere. See *Cook v. Fountain*, 3 Sw. 591, 3; *Cecil v. Butcher*, 2 J. & W. 565; and see this subject considered ante, Part I., Div. I., Chap. II., Sect. 5.

¹ *Philbrooke v. Delano*, 29 Maine, 410. Here the grantee was father-in-law to the grantor; but no stress was laid on the connexion.

cases to establish a trust against him, by showing, that it was the intention of the parties at the time, that he should take as a trustee for the grantor, and not for his own benefit.(i)

For this purpose the best and most complete evidence will be either a written admission of the trust by the volunteer, or a similar declaration of trust by the donor made either previously to or contemporaneously with the transaction. Where the deed contains no power of revocation, no *subsequent* disposition or declaration by the grantor is admissible for the purpose of establishing the trust.(k)

But parol declarations cannot be received in evidence with this object; for in these cases there exists no resulting or presumptive trust, and the admission of such evidence would be for the purpose of contradicting the written instrument, and establishing a trust by parol in the very teeth of the Statute of Frauds.(l)

However where the case is grounded upon the existence of actual or constructive fraud, allegations of which are contained in the bill, we shall see hereafter, that parol declarations will be received in support of those allegations.(m)

*And where parol evidence has once been resorted to by the defendant, with a view of disproving the plaintiff's case; [*108] then, according to the general rules of evidence the plaintiff in his turn may have recourse to similar proofs for the purpose of rebutting that evidence.(n)

In the absence of any direct admission or declaration of the trust, a variety of circumstances, arising from the nature of the transaction and the conduct and relative situation of the parties, will constitute ingredients of evidence, from which the court will infer it to have been the intention of the party, not to divest himself of the beneficial ownership by the execution of a voluntary conveyance.

Thus the deed being made *ex parte*, and not being communicated to the donee, is a circumstance, to which much attention will be paid.(o) And it will be observed that this circumstance occurred in the case above mentioned of *Duke of Suffolk v. Browne*, and that decision may therefore thus be well accounted for. But in truth the very meagre and imperfect report of the case renders it impossible to examine, or ascertain the principles, on which the Lord Keeper

(i) *Hutchins v. Lee*, 1 Atk. 449; *Cook v. Fountain*, 3 Sw. 585; *Young v. Peachy*, 1 Atk. 256. *v. Whitley*, 4 Russ. 423. [*Philbrook v. Delano*, 29 Maine, 410; *Rathbun v. Rathbun*, 6 Barb. S. C. 105.]

(k) *Clavering v. Clavering*, 2 Vern. 473; *Lady Hudson's case*, cited *ib.* 476; *Birch v. Belgrave*, Ambl. 266. (m) See next chapter, *Young v. Peachy*, 2 Atk. 256; *Pitcairne v. Ogbourne*, 2 Ves. 375.

(l) *Taylor v. Taylor*, 1 Atk. 386; and see *Fordyce v. Willis*, 3 Bro. C. C. 576; see *Dyer v. Dyer*, 2 Cox. 93, 4; *Leman v. Steere*, 5 J. C. R. 1.] (n) *Dyer v. Dyer*, 2 Cox. 93, 4. [*Steere v. Steere*, 5 J. C. R. 1.] (o) *Cecil v. Butcher*. 2 J. & W. 573.

rested his decision; and it therefore cannot be looked upon as a very sufficient authority on the general principle of law involved in it.(p)

So where the grantor continues in possession of the property, and to exercise acts of ownership over it;(q) and more especially if the grantee recognise him as the owner;(r) or acquiesce for a long period in being deprived of the benefits, conferred on him by the deeds;(s) all these facts will tend materially to establish the presumption, that a trust was intended.

Evidence of this nature will be admitted for the purpose of establishing a trust against the volunteer, though connected by relationship with the grantor; but in those cases, especially where the relationship is a near one, such as between father and son or husband and wife, it seems that the presumption in favor of the grantee's title is stronger, than where he is an entire stranger; and the evidence to displace it must therefore be also proportionably stronger.(t)

But even where the voluntary grant was from a father to a child, the fact of the child having been previously advanced, when joined with other circumstances, has been considered to indicate an intention, that the child should take only as a trustee.(u)

In like manner where it is proved, that a voluntary conveyance was made; only to answer a particular purpose; that even as between a parent and child exclude the presumption, that an advancement was intended for the child; and a trust will result for the benefit of the grantor.(x)

Thus in an early case, a father being seised in joint-tenancy of one-third of a real estate, conveyed his third in consideration of natural love and affection to himself for life, with remainder to his wife for life, and then to his own son the defendant in fee: *it was proved* [*109] *that the object of the conveyance was to sever the joint-tenancy.*

The bill was filed by a daughter, who claimed a legacy, charged on the same real estate by a will, made by the father subsequently to the conveyance. And the Lord Chancellor declared that if *the entire fee* had been conveyed to the son *he would have taken it to be a trust in the son*; but as it was limited *to the father and mother for life*, and then to the son in fee he could not take it to be a trust.(y) This decision evidently proceeded upon the conclusion,

(p) Prec. Ch. 80.

(q) Barlow v. Heneage, Prec. Ch.

211; Birch v. Blagrave, Ambl. 264;

Cook v. Fountain, 3 Sw. 593.

(r) Cook v. Fountain, 3 Sw. 593.

(s) Platamore v. Staple, Coop. 253;

(t) See George v. Howard, 7 Price,

646; Drummer v. Pitcher, 2 M. & K.

273; and Dyer v. Dyer, 2 Cox, 93.

(u) Birch v. Blagrave, Ambl. 265.

(x) Cecil v. Butcher, 2 J. & W. 565,

and cases cited.

(y) Baylis v. Newton, 2 Vern. 28.

that those limitations showed, that the conveyance was not executed *solely* for the purpose of severing the joint-tenancy.

In like manner where a bond for a sum of money was executed by a father in favor of one of his daughters, *for the purpose of avoiding the tax on his property*, and that purpose seems to have been recognised by the daughter, who was provided for equally with the other children without the bond: and the bond had always remained in the father's possession. The Lord Keeper held it to be a trust for the father, and decreed the bond to be set aside.(z)

So in another case a father made a secret conveyance of real estate to his daughter in fee; but retained possession of the deed, and also of the estate, and subsequently devised it to the plaintiffs. The daughter had been previously provided for on her marriage; and it was proved, *that the conveyance was made by the father in order to disqualify himself from being Sheriff of London*. However this purpose was not acted upon, and the father afterwards paid the fine for not serving the office of sheriff. Under these circumstances Lord Hardwicke held, that the conveyance could not prevail against the father's intention; that the will passed the trust, and the plaintiffs were therefore entitled to a conveyance of the legal estate from the heirs at law of the daughter.(a)

If however the purpose, for which a conveyance is proved to have been made, be illegal; and the court, by giving effect to a trust in favor of the conveying party, would assist in defeating the policy of the law; it will refuse to interfere, and will leave the parties to the remedies, if any, which they may have at law.

Therefore in the preceding case (*Birch v. Blagrove*), if the father in consequence of the conveyance had taken the oath, that he was not worth £15,000, and had thereby obtained exemption from serving as sheriff, the court would have refused to establish the trust, for "that would have been against conscience, and in fraud of the law."(b)

And where a conveyance is executed for the purpose of creating a colorable qualification to sit in the House of Commons;(c) or to kill game;(d) if that purpose has been answered, the court will refuse to interfere on either side; either for the purpose of enforcing a trust in favor of the father, or establishing the conveyance on behalf of the son.(e)

(z) *Ward v. Lant*, Prec. Ch. 182.

(d) *Roberts v. Roberts*, Daniel, 143;

(a) *Birch v. Blagrove*, Ambl. 264; *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Cecil v. Butcher*, ib. 565.
and see *Gaskell v. Gaskell*, 2 Y. & Jerv. 502.

(e) See *Brackenbury v. Brackenbury*, ubi supra; *Cecil v. Butcher*, ubi supra.

(b) *Birch v. Blagrove*, Ambl. 266.
[See ante, 93, note 2.]

[See *Fields v. Lonsdale*, 13 Beav. 787.]

(c) *Col. Pitt's case*, cited Ambl. 266;
Curtis v. Perry, 6 Ves. 747.

The case of *Ward v. Lant* may perhaps appear at first sight not to be in accordance with this doctrine; but it will be seen on examination that the daughter there had recognised the purpose for which [110] the bond had *been executed, and it would therefore have been fraudulent and inequitable for her to have enforced payment of it to herself.(f)

Where however the purpose contemplated by the deed, though illegal, or such as the court would not sanction, *is abandoned, or not acted upon by the parties*; it seems that the court will not recognise that purpose, as evidence of an intention, that the donee should not take beneficially; and on that ground will establish the trust in favor of the grantor. Or at any rate it will interpose so far, as to grant an injunction against suing on the deed at law until the hearing of the cause.(g)

It very frequently happens that the voluntary deed remains in the possession of the party, by whom it is made, and is not acted upon during his life. This when joined with other circumstances as in *Birch v. Blagrove* will assist, and very materially assist, the court to the conclusion, that the party did not intend to divest himself of the beneficial interest in the property by the execution of the deed; but whether it will *of itself* have this effect, appears to be a matter of doubt.¹

In the case of *Naldred v. Gilham*,(h) where a woman made a voluntary settlement in favor of a nephew without power of revocation *but she kept it in her own possession*, and subsequently burned it, and made another settlement of the same property on a different nephew and delivered it to him; Lord Chancellor Parker refused to establish the first deed against the party claiming under the second. And this decision seems to have proceeded principally on the ground, that, the aunt's having kept possession of the first deed, showed that she did not intend to be bound by it. However it is to be remarked, that the only evidence of the first deed was a copy surreptitiously obtained by the plaintiff, and the fraudulent nature of that proceed-

(f) *Ward v. Lant*, Prec. Ch. 182.

(h) *Naldred v. Gilham*, 1 P. Wms. 577.

(g) *Birch v. Blagrove*, Amb. 262;

Platamore v. Staple, Coop. 250.

¹ In *Souverby v. Arden*, 1 J. C. R. 240, it was held by Chancellor Kent after a full discussion of the authorities cited in the text, that a voluntary settlement was always binding on the grantor, when fairly made, unless there were clear and decisive proof that he never parted or intended to part with the possession of the deed; and that there must be other circumstances besides the mere fact of retention, to show that it was not intended to be absolute. So in *Tolar v. Tolar*, 1 Dev. Eq. 456, it was held that where a voluntary deed to a son fairly obtained, afterwards gets out of the donor's possession and is destroyed, that equity would compel a second conveyance to be executed.

ing had evidently considerable influence upon the Lord Chancellor's judgment.^(h)

So in *Cotton v. King*,⁽ⁱ⁾ Lord Chancellor King said, "that if Lady Cotton had executed the deeds, and kept them in her own custody, *and they had been got from thence*, I do not think she should have been bound by them." This however was a mere dictum, as the case went off on another point:^(j) and it will be observed in this case also, that fraud in obtaining possession of the deed formed a material item in the Lord Chancellor's proposition.

In *Uniacke v. Giles*,^(k) an aunt made a voluntary deed, assigning a chose in action to a trustee for her nephew to take effect after her death. The nephew was made acquainted with the transaction; *but the deed remained in the possession of the donor*, who afterwards destroyed it, and made a new one giving the interest to another person. The bill was filed by the nephew against the representative of the trustee to establish the first deed. But the Lord Chancellor of Ireland held, that whether the deed contained a power of revocation or not, and however formally it was executed, its retention in the custody of the donor made it revocable, and he therefore dismissed the bill.^(l)

In all these cases it will be observed, that the party claiming under the *first voluntary deed was a plaintiff seeking the aid of equity to enforce his claim: without entering therefore [*111] into the question of the validity of the deed, the court may well have refused to grant the relief prayed, on the general principle that equity will not interfere, to enforce or complete the title of a volunteer.^(l)

On the other hand authorities are to be found of a contrary tendency; and which show that the retention of the deed by the grantor will not of itself affect its operation. Thus in *Barlow v. Heneage*,^(m) a voluntary settlement by a father on his daughters was established against a subsequent will, although the deed had remained in his possession, and the profits of the estate had been received by him up to his death.^(m)

And in *Clavering v. Clavering*,⁽ⁿ⁾ where a voluntary settlement had been made in favor of a grandson, and some years afterwards another settlement of the same estate in favor of a son; the court refused to relieve the son against the first settlement; although that deed had never been published, and was only discovered after the death of the settlor amongst his papers: and he had frequently recognised the second deed as the settlement of the property.⁽ⁿ⁾

(h) *Naldred v. Gilham*, 1 P. Wms. 577.

(i) *Cotton v. King*, 2 P. Wms. 358; *King v. Cotton*, ib. 674.

(k) *Uniacke v. Giles*, 2 Moll. 267.

(l) See *Cook v. Fountain*, 3 Sw. 591; *Cecil v. Butcher*, 2 J. & W. 565, 573.

(m) *Barlow v. Heneage*, Prec. Ch. 211.

(n) *Clavering v. Clavering*, 2 Vern. 473.

So in *Boughton v. Boughton*,^(o) Lord Hardwicke decided, that a voluntary settlement without a power of revocation, which had been kept by the settlor in his possession, was not revoked by a subsequent will.^(o) In the case of *Roberts v. Roberts*,^(p) in the Exchequer the observations of the Lord Chief Baron tend strongly to the same effect.^(p) And in *Brackenbury v. Brackenbury*,^(q) Lord Eldon refused to relieve a devisee against the effects of a voluntary settlement, which had remained in the possession of the grantor without being made use of up to the time of his death; although the party claiming under the deed had fraudulently obtained possession of it from the devisee.^(q)

In these cases also it is to be remarked, that the question was raised and the relief sought by the volunteers claiming under the subsequent disposition against the prior volunteers, and the refusal of the court to interfere may therefore be also referred to the same rule against interposing in favor of volunteers.

It may be observed, that wherever the circumstances of the case are such as to create a resulting trust upon a voluntary grant, the relief will be given equally whether the bill to establish the trust be filed by the grantor himself,^(r) or by his heir or devisees or his personal representatives after his death.^(s) The whole of the authorities on this subject have been collected, and the principles on which they proceed, considered by Sir Thomas Plumer, M. R., in his judgment in the case of *Cecil v. Butcher*.^(t) That learned judge there says, "they have not depended singly upon the question, whether the party has made a voluntary deed; not merely upon whether, having made it, he keeps it in his own possession; not merely upon whether, it is made for a particular purpose; but when [*112] all *these circumstances are connected together; when it is voluntary, when it is made for a purpose, that has never been completed; and when it has never been parted with; then the courts of equity have been in the habit of considering it as an imperfect instrument. If it was understood between the parties, that it should only be kept in readiness to be used, if wanted; or if it is made *ex parte*, and never intended to be divulged to the grantee, unless the particular purpose requires it; the question is, whether there is not a *locus penitentiae*; if under such circumstances, the grantee furtively gets possession of the deed, though it is good at law, yet he has obtained it contrary to the intention of the grantor, who never

(o) *Boughton v. Boughton*, 1 Atk. 625.

(p) *Roberts v. Roberts*, Daniel, 143.

(q) *Brackenbury v. Brackenbury*, 2 J. & W. 391.

(r) *Cook v. Fountain*, 3 Sw. 565.

(s) *D. of Norfolk v. Browne*, Prec. Ch. 80; *Young v. Peachy*, 2 Atk. 254;

Birch v. Blagrove, Ambl. 264.

(t) *Cecil v. Butcher*, 2 J. & W. 565, 73.

meant him to have it; and will not a court of equity, at least refuse him its assistance? This principle will be found to pervade all the cases. It may perhaps, when the transaction is known to both parties, rest upon the supposition of a collateral agreement between them, that the deed should not be used—should not be called forth into life, unless wanted for the special purpose, and that the deed being executed on the faith of that agreement, it is contrary to good conscience and equity to call for it, and apply it beyond the purpose for which the grantee knew it to be intended.” In the case, with reference to which these observations were used, a conveyance had been made by a father to his son, to qualify him to shoot. The deed remained in the father’s possession, was never communicated by him to the son, and was afterwards lost. On that ground the son filed his bill to establish the conveyance; but the court refused to interfere, and left him to what remedy he might have at law.(t)

It is to be observed, that if the intention of the party at the time of making the deed was to benefit the person taking under it, a subsequent change of that intention cannot have the effect of altering the nature of the transaction, so as to convert the donee into a trustee for the author of the deed, for volunteers subsequently claiming under him.(u) However a subsequent disposition of the property by will would raise a case for election against the donee, if he claimed any benefit under the will.(x)

Where any valuable consideration is expressed in the deed itself the court will not look narrowly into the consideration; and especially between father and son the slightest consideration (such as a person joining in a conveyance), will be sufficient to support a conveyance even against creditors; and *à fortiori* will suffice to prevent a resulting trust.(y)

Where the conveyance is expressed in the deed to be for a valuable consideration, parol evidence cannot be received for the purpose of showing that the purchaser was intended to be merely a trustee for the vendor. But if it be proved, that the purchase money was not paid, the vendor will have a lien on the property for the amount.(z)¹

(t) Cecil v. Butcher, 2 J. & W. 565, 73. (y) Middleton v. Ld. Kenyon, 2 Ves.

(u) Lady Hudson’s case, cited 2 jun. 410; 2 Sugd. V. & P. 262. Vern. 476; Birch v. Blagrove, Ambl. 266. (z) Leman v. Whitley, 4 Russ. 423.

(x) Cecil v. Butcher, 2 J. & W. 578; [See the remarks of Judge Story on Dummer v. Pitcher, 2 M. & K. 262. this case. Eq. Jur. § 1999, note 2.]

¹ Wilkinson v. Wilkinson, 2 Dev. Eq. 376; Philbrooke v. Delano, 29 Maine, 410; Rathbun v. Rathbun, 6 Barb. S. C. 98. In the last case it was also held, that a covenant of warranty would estop the grantor in an alleged voluntary deed from claiming a resulting trust, even if parol evidence were admissible in such case. Squire v. Harder, 1 Paige, Ch. 494, accord.

According to the circumstances of the case as established in evidence, a resulting trust for the donor may be supported as to part of the property, which is the subject of a voluntary grant, and not supported as to the remainder.(a)

[*113] *And where the grantor has made out in evidence a case for a trust against the grantee, it is of course open to the latter to rebut that case, if he can, by counter evidence of his own. And for this purpose parol declarations are clearly admissible; for their object is, to support and not to contradict the legal title and the deed.(b) Such evidence may also be drawn from other circumstances such as the nature of the property, and the conduct, and situation of the parties, and also the provisions of the deed.

Thus in *Cook v. Fountain*,(c) a voluntary grant of a rent-charge *de novo* to a stranger was considered to be inconsistent with an intention, that it should be held in trust; and the deliberation with which the grant was executed in that case, seems also to have influenced the court in deciding against the existence of any trust, although a trust was established in the same case with respect to a grant of leases.(c) And in *Baylis v. Newton*,(d) a father being seised in fee of an undivided third of an estate, made a voluntary conveyance *to himself for life*, with remainder to his wife for life, and then to his son *in fee*. It was proved, that the conveyance was made in order to sever the joint-tenancy, which according to a principle above stated, was sufficient to create the presumption of a trust against the son; but on the other hand the express limitation by the father *to himself for life*, was considered to be inconsistent with an intention on his part to take the *whole* by a resulting trust, and the son was consequently held to be beneficially entitled.(d)

However proof of the affection entertained by the grantor for the grantee, and of his intention to provide for him, or other general proofs of that nature, are of too vague and loose a description to displace a trust, which has been otherwise previously established in evidence upon a voluntary grant.(e)

It may be observed that the court will not give effect to any trust upon a voluntary conveyance, in evasion of an act of parliament, such as the Ship Registry or Bankruptcy Acts, or otherwise in contravention of public policy.(f)

(a) *Cook v. Fountain*, 3 Sw. 585.

(b) *Lake v. Lake*, Ambl. 127.

(c) *Cook v. Fountain*, 3 Sw. 596, 7.

(d) *Baylis v. Newton*, 2 Vern. 28.

(e) *Cook v. Fountain*, 3 Sw. 590, 1.

(f) *Curtis v. Perry*, 6 Ves. 746.

III.—WHERE THERE IS A VOLUNTARY DISPOSITION OF PROPERTY UPON TRUSTS, WHICH ARE NOT DECLARED, OR ARE ONLY PARTIALLY DECLARED, OR FAIL.

There is no equitable principle more firmly established, than that, where a voluntary disposition⁽¹⁾ of property by deed¹ or will is made to a person as trustee; and the trust is not declared at all;² or is ineffectually declared;³ or does not extend to the whole interest given to the trustee;⁴ *or it fails either wholly or in part by lapse or otherwise;⁵ the interest so undisposed of will be held by [*114] the trustee not for his own benefit, but as a resulting trust for the donor himself or for his heir-at-law or next of kin according to the nature of the estate. And to this head by far the most usual cases of resulting trusts are to be referred.^(g)

In all these cases all that the court requires, for the purpose of establishing the resulting trust, is a plain declaration on the face of the instrument, that the person to whom the property is given is to take it in trust. Where the gift is expressly "in trust;" or the donees are mentioned in the instrument as "trustees;" the point is clear against them: so clear indeed that parol evidence would be inadmissible in support of their claim to the beneficial interest.^(h) However any other expressions clearly indicating an intention, that the party should take as trustee, will be sufficient. "If the whole frame of the will," says Lord Eldon, "creates a trust, for the particular purpose of satisfying which the estate is devised, the law is the same, though the word 'trust' is not used."⁽ⁱ⁾ (2)

(g) *Morice v. Bishop of Durham*, 10 Wms. Exors, 904, 1 Jarm. Pow. Dev. Ves. 537; *Paice v. Archbp. of Canterbury*, 14 Ves. 370.

(i) *Morice v. Bishop of Durham*, ubi supra; *King v. Denison*, 1 V. & B. 273; vide supra, Division I., Ch. II., S. 2.

(1) Where there is a conveyance or settlement for *valuable consideration*, this principle will not be applied so as to defeat the operation of the deed. Therefore, where in a marriage settlement a term of ninety-nine years was limited to trustees, but no trusts were declared, and subsequently to the term an estate tail was given to the settlor's son, Lord Hardwicke held, that there was no resulting trust of the term for the settlor and his creditors, as that would render worthless the son's estate tail; but that the term was in trust to attend the inheritance. *Brown v. Jones*, 1 Atk. 188.

(2) The legal title of an executor to the residue, remaining undisposed of by the will, was never favored by courts of equity, and the slightest circumstance would be taken hold of for the purpose of converting him into a trustee for the next of kin. The law on this subject has been altered within the last few years

¹ See *Stevens v. Ely*, 1 Dev. Eq. 493.

² Post, 114.

³ Post, 116.

⁴ Post, 118.

⁵ Post, 134.

And first with respect to those cases, where the trust is not declared at all. It has been said by Lord Eldon, that "if a testator expressly says, he gives upon trust, and says no more, it has been long established, that the next of kin will take."^(k) And it seems that this rule of construction will apply with equal or even greater force to gifts by deed, as well as those by will.^(l)

The same rule prevails, where the gift is upon trusts or for purposes *to be thereafter declared*; and no declaration is made:^(m) although Lord Eldon has said, that in such cases it would perhaps originally have been as well to have held, that the person, to whom the property was given, should take it.⁽ⁿ⁾ (1)

In these cases it is immaterial that the subject of such a gift is a particular or partial interest, reserved or created out of a larger estate, as for instance, a term of years, or a specified sum of money.^(o)

[*115] *And it is to be observed, that, as between the heir-at-law and next of kin of the donor, there will be no equitable conversion of the property, which thus remains undisposed of. Therefore where it consists of a term of years carved out of the fee, or of a portion of the money to arise from the sale of real estate, even where that money is directed to be treated as personal estate, the heir-at-law and not the next of kin of the testator will be entitled to the trust.^(p)

Thus where a person by deed conveyed his real estates to trustees,

(k) 10 Ves. 527; *Goodere v. Lloyd*, 3 6 Hare, 148; *Flint v. Warren*, 12 Jur. Sim. 538; 2 Phill. 793. 810; 16 Sim. 124.]

(l) *Brown v. Jones*, 1 Atk. 101; *Sidney v. Shelley*, 19 Ves. 359; see *Emblyn v. Freeman*, Prec. Ch. 542. (n) *Morice v. Bishop of Durham*, 10 Ves. 537.

(m) *Emblyn v. Freeman*, Prec. Ch. 542; *Sheldon v. Barnes*, 2 Ves. jun. 447; *Collins v. Wakeman*, ib. 683. (o) *Emblyn v. Freeman*, ubi supra; *Collins v. Wakeman*, ubi supra.

(p) *Emblyn v. Freeman*, ubi supra; *Collins v. Wakeman*, ib.; 2 Pow. Dev. [Taylor v. Haygarth, 14 Sim. 8; Onslow 32, &c., by Jarman; *Sidney v. Shelley*, v. Wallis, 13 Jur. 1085; *Fitch v. Weber*, 19 Ves. 358, vide post.

by the statute 1 Will. IV. c. 40, which provides, that in future executors are to be deemed trustees of any residue, not expressly disposed of, for the next of kin, unless otherwise directed by the will. See 2 Wms. Exors. 898, 1st edit. Where the executor claims under a direct gift or limitation to himself *personally*, and not merely as executor; the case is totally different, and the question, whether he will or will not take as a trustee, will depend on the general principles to be considered in the text. [See post, 123; n. 1.]

(1) In the early case of *Martin v. Douch and Overton*, a testator ordered 40*l.* to be paid to P. M., to be disposed of for certain uses, which he should in a private note acquaint him with, and died without giving any such note or direction; and it was held by Sir Harbottle Grimstone, M. R., that P. M. should have the 40*l.*, as the testator did not intend it to come to the executors, Cas. Ch. 198; 3 Hare, 146, n. However this decision and the reasoning, on which it was founded, is clearly overruled by the later authorities. See the observations of Sir J. Wigram, V. C., in the case of *Corporation of Gloucester v. Wood*, 3 Hare, 146, 7.

in trust to sell after his death for several purposes, and amongst others, that £200 should be disposed of as he should by a note appoint; and he died having made no appointment. It was held that there was a resulting trust of the £200 for the *heir-at-law*.(q)

And where a testator after giving several legacies, continued thus, "Item—after all my just debts and legacies paid, I give and bequeath the remainder of my estate real and personal and whatever shall be due to me for half-pay," &c., without saying more: it was considered that the intention thus manifested by the testator to dispose of the residue, though left inchoate, converted the executor into a trustee for the *next of kin*.(r)(1)

And so in another case, where a testator devised real estates to be sold, and the produce to be considered as part of his personal estate; and after giving several legacies gave thereout £1,000 to his executor, to be disposed of according to any instructions he might leave in writing: and he left no such instructions; *the heir* was held to be entitled to the £1,000.(s)

In like manner in the very recent case of *Corporation of Gloucester v. Wood*,(t) the testator James Wood made a codicil to his will in these words, "In a codicil to my will I give to the Corporation of Gloucester £140,000. In this I wish my executors would give £60,000 more to them *for the same purpose as I have before named*." No other codicil or declaration of the purpose alluded to was found. By the will the executors were made residuary legatees, subject to the payment of debts and legacies. And it was held by Sir J. Wigram, V. C., that the corporation were precluded from taking either the legacy of £60,000 or that of £140,000, which therefore sunk for the benefit of the residuary legatees: and his Honor considered, that the fact of the donee's being a corporation made no difference for the purpose of this construction.(t)

But where the disposition is by will, the court will not consider itself to be so strictly bound to adhere to the general rule; and accordingly it will refuse to decree a resulting trust even in favor of the heir, if it appear *to be contrary to the intention of the testator, as collected from the general scope of the will. [*116]

(q) *Emblyn v. Freeman*, Prec. Ch. 542. (s) *Collins v. Wakeman*, 2 Ves. jun. 683.

(r) *Bishop of Cloyne v. Young*, 2 Ves. sen. 91; see *Langham v. Sanford*, 17 Ves. 435. (t) *Corporation of Gloucester v. Wood*, 3 Hare, 131.

[See *Mapp v. Elcock*, 2 Phill. 796.]

(1) Upon the same principle, where a residuary bequest was cancelled by drawing a line through it, and other alterations indicating an intention to change, it was held that there was a resulting trust for the next of kin. *Mence v. Mence*, 18 Ves. 348; *Skrymsher v. Northcote*, 1 Swanst. 566.

Therefore where there was a devise to trustees for ninety-nine years upon the trusts thereafter expressed, and from and after the expiration or sooner determination of the term in strict settlement; and no trusts of the term were declared; Lord Eldon considered, that the intention was, to devise immediate estates subject to the term, and not future estates expectant on its determination, and he therefore refused to establish a resulting trust in the term for the heir, but decreed it to attend the inheritance according to the limitations of the will.(u)

2d. Where the trust is insufficiently or ineffectually declared, the effect will be the same, as if it had not been declared at all; and a resulting trust will be provided that the imperfect declaration, though insufficient to establish the particular purpose contemplated, sufficiently prove it to have been the intention of the donor, that the donee should in no event be entitled to the beneficial interest.(x)

In what cases the court will establish a resulting trust upon an imperfect declaration of this description in opposition to the claim of the donee; "is a question which must be decided upon the construction of the language of the instrument in each particular case."(y)

One of the leading cases on this subject is that of *Morice v. The Bishop of Durham*,(z) which came before Sir William Grant, M. R., and subsequently on appeal before Lord Eldon. In that case the testatrix bequeathed all her personal estate to the Bishop of Durham, his executors, &c., *upon trust* to pay her debts and legacies, &c.; and to dispose of the ultimate residue "to such objects of benevolence and liberality as the bishop in his own discretion, should most approve of;" and she appointed the bishop her sole executor. The Master of the Rolls held, that it was clear from the words of the will, that this was a gift upon some trust, and not for the personal benefit of the bishop; but that the trust was too indefinite for the court to execute even as a gift to charity, and that there was therefore a trust of the residue for the next of kin. And this decision was afterwards affirmed by the Lord Chancellor (Lord Eldon).(z)

The next case is *James v. Allen*,(a) also before Sir William Grant; there a testatrix bequeathed all her personal estate to three persons, whom she appointed her executors "*in trust* to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on." And the

(u) *Sidney v. Shelley*, 19 Ves. 352.

(z) *Morice v. Bishop of Durham*, 9

(x) *Morice v. Bishop of Durham*, 10 Ves. 527, 537.

Ves. 399; S. C. on Appeal, 10 Ves. 522.

(a) *James v. Allen*, 3 Mer. 17.

(y) Per Lord Cottenham in *Ellis v. Selby*, 1 M. & K. 298.

Master of the Rolls decided, that this was a trust in the executors; but that it was void for uncertainty, and therefore distributable among the next of kin.(a)

In *Vezey v. Janson*,(b) the testator gave the residue of his estate to his executors *upon trust*, in default of appointment by him, "to pay and apply the same in or towards such charitable or public purposes as the laws of the land would admit of, or to any person or persons and in such shares, &c., as his executors should in their discretion, will and pleasure think fit." The case came before Sir John Leach, V. C., who decided, *that the trust was too general and undefined to be executed by the court; that the executors could not take, *because the gift was expressly made to them in trust*; and the next of kin were therefore entitled. [*117]

So in *Fowler v. Garlike*,(c) the gift was to executors "*upon trust*, to dispose of the same at such times, and in such manner, and for such uses and purposes, as they shall think fit; it being my will, that the distribution shall be left entirely to their discretion." And Sir John Leach, M. R., was of opinion, that this was a plain trust, but too uncertain for the court too execute, and his Honor declared the next of kin entitled.(c)

To these succeeded the cases of *Ellis v. Selby*,(d) and *Stubbs v. Sargon*.(e) In the former case a testator gave a fund to his executors upon certain trusts, and declared it to be his will, that on the failure of those trusts (an event which happened), his said trustees should pay and apply the fund to and for such charitable or other purposes, as they should think fit, without being accountable to any person whomsoever for such their disposition thereof. It was held first by Sir L. Shadwell, V. C., and afterwards on appeal by Lord Cottenham, C., that a trust was created, but so indefinite an one, that it could not be executed. However there was no resulting trust, as the interest undisposed of fell into the residue.(d) In *Stubbs v. Sargon*,(e) the testatrix endorsed a promissory note for £2000 to Sarah Sargon, and sent it to her with a letter in the following terms: "The enclosed note of £2000 I have given to Sarah Sargon for her sole use and benefit independent of her husband, for the express purpose of enabling her to present to either branch of my family any interest or principal thereon, as the said Sarah Sargon may consider most prudent; and in the event of the death of Sarah Sargon by this bequest I empower her to dispose of the said sum of £2000 by will or deed to those or either branch of the

(a) *James v. Allen*, 3 Mer. 17.

(b) *Vezey v. Janson*, 1 S. & S. 69.

(c) *Fowler v. Garlike*, 1 R. & M. 232.

(d) *Ellis v. Selby*, 7 Sim. 352; S. C.

on Appeal, 1 M. & Cr. 286.

(e) *Stubbs v. Sargon*, 2 Keen, 255; S. C. on Appeal, 3 M. & Cr. 507.

family she may consider most deserving thereof. To enable Sarah Sargon my niece to have the sole use and power of the said sum of £2000 due to me by the above note of hand, I have specially endorsed the same in her favor." The case came before Lord Langdale, M. R., and afterwards on appeal before Lord Cottenham; and both those learned judges decided, that the gift was in trust, but such a trust as could not be executed, and that the sum secured by the note constituted part of the testatrix's estate.^(e)

In all the cases, that have been mentioned, the declaration of the particular trust was considered to be insufficient from the uncertainty of its nature and objects; but the intention that the donees should in no case be entitled to the beneficial interest was notwithstanding thought to be sufficiently apparent, and they were consequently decreed to take the property as trustees by resulting trust. However no resulting trust will be raised and established against the donees, unless the testator has sufficiently expressed his intention, that they should take *only* in trust for others.¹

Thus in *Gibbs v. Rumsey*,^(f) a testatrix gave "all the rest and residue of the moneys arising from the sale of my said estates, and all the residue of my personal estate, after payment of my debts, [*118] legacies, &c., *unto my said trustees and executors to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion shall think proper, and expedient." And Sir Wm. Grant, M. R., decided, that there was no sufficient indication of an intention on the part of the testatrix to create a trust, and that the residuary donees took the absolute beneficial interest to the exclusion of the heir-at-law and next of kin.

It is to be observed, that in all these cases, as the claim of the donee is in accordance with the legal title, parol evidence of declarations by the donor, &c., will be admitted in favor of the donee for the purpose of rebutting the resulting trust; and this even where the property is real estate; *à fortiori* such evidence is admissible,

(e) *Stubbs v. Sargon*, 2 Keen, 255; (f) *Gibbs v. Rumsey*, 2 V. & B. 294; S. C. on Appeal, 3 M. & Cr. 507. but see *Ellis v. Selby*, 1 M. & Cr. 297, 8.

¹ In *Hughes v. Evans*, 13 Sim. 496, a testator devised all his freehold estates to his most dutiful and respectful nephew, E., "upon the trusts and for the uses following;" but did not declare any use or trust except as to one of his estates; and the Vice Chancellor held that, from the context of the will and of a codicil, by which a personal charge in favor of the testator's son, was imposed on E., there was no resulting trust in favor of his heir. Where a testator gave the residue of his estate, after payment of debts and legacies, to his executors, "to be disposed of as they think proper," it was held, that the executors took beneficially, and that parol evidence was not admissible to show that they took in trust. *Ralston v. Telford*, 2 Dev. Eq. 253.

where the property consists of personal estate.(g) But if the donee be plainly and unequivocally declared a trustee in the instrument itself, then parol evidence will not be received for the purpose of contradicting that declaration.(h)

3d. Where a gift of property is expressed to be made for particular purposes, and those purposes do not exhaust the whole beneficial interest; the interest, *ultra* these purposes, will result to the donor; if it clearly appear, that the donee was intended to take only in a fiduciary character.(i)¹

However the authorities seem to establish, that this last is a somewhat stronger case in favor of the beneficial title of the donee, than those, where the gift is expressed to be upon trusts applying to the entire property, but which are either not declared at all, or are insufficiently and imperfectly expressed.(1)

(g) *Gainsborough v. Gainsborough*, 2 Gladding v. Yapp, 5 Mad. 59; Langham v. Sandford, 2 Mer. 17; vide post, 322; *Walton v. Walton*, 14 Ves. 322; *Langham v. Sanford*, 17 Ves. p. 94. 435; and S. C. 2 Mer. 17.

(i) 2 Jarm. Pow. Dev. 32.

(h) *Walton v. Walton*, 14 Ves. 322;

(1) Before the statute of 1 Will. IV. c. 40, the mere appointment of an executor gave him *prima facie* a beneficial title to all the personal estate undisposed of. By that act the executor is converted into a trustee of any residue, *not expressly disposed of*, for the next of kin, unless otherwise directed by the will. The act therefore does not apply to cases, where there is an *express disposition* of personal property upon trust or otherwise to a person, who is also appointed executor: and whether the gift in such case will or will not confer any beneficial interest must be determined according to the general principles of law, which are considered in the text. It is to be observed that Lord Eldon in the case of *Dawson v. Clarke* entirely discountenanced the position laid down by Sir Wm. Grant at the original hearing of that case: *viz.* that an Executor will be entitled *as such* to the surplus beneficial interest in personal property, which is expressly given either to himself or to some other trustee for purposes which do not exhaust the whole legal interest. See *Dawson v. Clarke*, 15 Ves. 415; S. C. 18 Ves. 254; and see *Mullen v. Bowman*, 1 Coll. N. C. C. 197; [*Mapp v. Elcock*, 2 Phill. 793; post, 123, n. 1; and *Elcock v. Mapp*, 3 H. L. Cas. 492, where Lord Eldon's doctrine is affirmed.]

¹ *Huston v. Moore*, 2 Binn. 387. In *King v. Mitchell*, 8 Pet. 326, a testator devised thus: "In case of having no children, I then leave and bequeath all my real estate at the death of my wife to W. K., son of my brother J. K., on condition of his marrying a daughter of W. and R. T., in trust for the eldest son or issue of said marriage, and in case such marriage should not take place" (then over). It was held that W. K. took no beneficial interest in the estate, but that there was a resulting trust for the heirs-at-law. In *Shaeffer's Appeal*, 8 Barr. 38, there was a devise to A. "for the sum of \$6000—\$1500 for her own legacy, and \$1500 to B. for life," and the residue was disposed of, with the exception of \$300. It was held that there was a charge of the whole amount, and that the undisposed of surplus, and the \$1500 after the death of B., went at law to the heirs of the testator.

The question, whether the donee will or will not be entitled to the unexhausted beneficial interest, depends upon the following principle, as laid down by Lord Eldon in *King v. Denison*.^(k) If the gift be to A. and his heirs, *charged* with the payment of debts, that is a gift to him for a particular purpose, but not for that purpose only. If the gift be *upon trust to pay* debts, that is a gift for the particular purpose, and nothing more. The former is a gift of an estate of inheritance, for the purpose of giving the donee the beneficial interest, *subject* to the particular purpose; the latter is a gift *for* a particular purpose, with no intention of giving any beneficial interest.

[*119] Where therefore the whole legal estate **is given for the purpose of* satisfying trusts expressed, which do not exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose with an intention to give to the devisee of the legal estate the beneficial interest; if the whole be not exhausted by that particular purpose, the surplus goes to the donee, as it is intended to be given to him.

In illustration of this distinction it will be necessary to state a few of the leading cases; showing first where a trust has been held to result, and secondly where not.

In *Hobart v. Countess of Suffolk*,^(l) a testator devised his lands to three persons to the use of them and their heirs upon the trusts after mentioned. He then directed them upon the death of his wife to convey to certain persons the estates for life; but made no disposition of the remainder in fee. It was contended for the devisees, that the devise, being to them and their heirs upon the trusts after mentioned, imported, that they should be trustees only for those purposes, and that when those estates were spent, it was to remain to them to their own use. But the Lord Chancellor held that a trust of the remainder in fee resulted to the heir.^(l)

In another case where a testator devised his manors, advowsons, &c. to trustees, to pay his son 1,000*l.* for life, and the rest of the profits to be laid out in land to be settled to certain uses after the son's death; Lord Hardwicke held, that the right of presentation arising from the advowsons during the son's life was a fruit undisposed of, and resulted to the heir.^(m)

The rule will be the same, though the interest thus partially disposed of consists of a particular portion, severed from the bulk of the property: as where a term of years is created for certain pur-

(k) In *King v. Denison*, 1 V. & B. 272. [See *King v. Mitchell*, 8 Peters, 349.]

(l) *Hobart v. Countess of Suffolk*, 2 Vern. 644.

(m) *Sherrard v. Ld. Harborough*, Amb. 165.

poses which do not exhaust it, the residue will result to the heir at law.(n)(1)

Where there is a devise in trust to sell for the payment of debts or other purposes and no more is said, it is clear that there will be a resulting trust of the residue for the heir. And this point is so clear at the present day against the trustees, that a claim by them is seldom made; but the question in such cases generally arises between the heir and next of kin or residuary legatee.(o)

In a late case a general gift of personal estate to A. B. and C., in trust to sell and apply the proceeds towards payment of debts, was followed by a devise of the real estate to the same persons on trust to pay debts, and subject thereto upon certain trusts for the benefit of B. and C. *and other persons; and A. B. and C. were appointed executors, *but there was no further disposition of the personal estate.* [120] It was held by V. C. K. Bruce, that A. B. and C. were not entitled beneficially to the personalty not required for payment of the testator's debts.(p)

However according to the observation of Lord Hardwicke, the general rule, that where land is given for a particular purpose, what remains after that particular purpose is satisfied, results, admits of several exceptions.(q)

Thus where it appears from the words of the instrument, that the property is given *subject* to the particular purpose expressed, and not for the discharge of that purpose *only* (according to the distinction of Lord Eldon previously adverted to), the donee will take beneficially what remains after the satisfaction of that purpose.

In *Hill v. Bishop of London*,(q) a testator devised a perpetual advowson to Grace Smith, "his honored mother-in-law," willing and desiring her to sell and dispose thereof to certain colleges. Upon the refusal of one, the offer was to be made to another in a prescribed order. Lord Hardwicke observed, that "the devise amounted to no more than this, the testator gives the advowson to Grace Smith,

(n) *Wych v. Packington*, 3 B. P. C. 44; *Levet v. Needham*, 2 Vern. 138. (p) *Mullen v. Bowman*, 12 Law Journ. N. S., Chanc. 342; S. C. 1 Coll. N. C. C. 197. [See *Mapp v. Elcock*, 2 Phill. 793; *Elcock v. Mapp*, 3 H. L. Car. 492.]

(o) *Countess of Bristol v. Hungerford*, 2 Vern. 645; *Holliday v. Hudson*, 3 Ves. 210; *Hill v. Cock*, 1 V. & B. 173; 2 Jarm. Pow. Dev. 34, 77; and cases there cited; *Robinson v. Taylor*, 2 Bro. C. C. 589. (q) In *Hill v. Bishop of London*, 1 Atk. 619; and see *Walton v. Walton*, 14 Ves. 322.

(1) And so where there is a devise upon a contingency, and no disposition of the intermediate or ulterior interest; the intermediate interest until the contingency happens, and, if it do not happen at all, the entire fee, will result to the heir-at-law. *Williams v. Chitty*, 3 Ves. 546; *Attorney-General v. Bowyer*, 3 Ves. 725; *Nash v. Smith*, 17 Ves. 29; *Chalmers v. Brailsford*, 18 Ves. 368.

but if such or such a college will buy it, then he lays an injunction on her to sell; and therefore there are two objects of the testator's bounty, Grace Smith and the Colleges;" and his lordship held that there was no resulting trust for the heir.(*r*)

In *King v. Denison*,(*s*) the general doctrine was much discussed. There a testatrix devised her real estate to her cousin, Mary A. wife of R. A., and to her cousin Arabella J., and their heirs and assigns for ever, subject nevertheless to, and chargeable with, the payment of the annuities thereafter mentioned; and she then proceeded to give several annuities. Upon the question whether the devisees were trustees, after paying the annuities, for the heir-at-law, Lord Eldon held they were not; his lordship considering the intention to be, that they took not merely for the purpose of paying those annuities, but beneficially subject to them.(*s*)

It will be observed, that these were cases of a devise of real estate; but the same rules will also be applied to bequests of personal property, or to a general devise and bequest of both real and personal property.(*t*)

In the case of *Walton v. Walton*(*u*) and *Dawson v. Clarke*,(*u*) Sir Wm. Grant decided in favor of the claim of executors to a residue undisposed of; but those decisions proceeded on the ground of their legal title;(u) and when the latter case was brought before Lord Eldon on appeal, his lordship, though he affirmed the decision of Sir William Grant, rested his judgment on the terms of the gift, and not on the claim of the executor *as such*; and the decision must therefore be regarded as an authority on the general question.(*x*)

[*121] *In *Dawson v. Clarke*, there was a general bequest to two persons, who were appointed executors, their heirs, executors, &c., *upon trust in the first place to pay, and charged and chargeable with* all the testator's debts, &c., and legacies after given. And Lord Eldon applying the same principle, as that laid down in *King v. Denison*, decided, that this was not a bequest to the executors upon a trust to pay, but a gift to them of the absolute property, subject only to a charge.(*y*)

In the recent case of *Wood v. Cox*,(*z*) a testatrix bequeathed all her personal estate to C., whom he appointed one of her executors, for his own use and benefit for ever, trusting and wholly confiding in

(*r*) *Hill v. Bishop of London*, 1 Atk. 618.

(*s*) *King v. Denison*, 1 V. & B. 260.

(*t*) *Southouse v. Bate*, 2 V. & B. 396; *Mullen v. Bowman*, 1 Coll. N. C. C. 197.

(*u*) *Walton v. Walton*, 14 Ves. 313; *Dawson v. Clarke*, 15 Ves. 247.

(*x*) See *Mullen v. Bowman*, 1 Coll. N. C. C. 197. [*Mapp v. Elcock*, 2 Phill. 793.]

(*y*) *Dawson v. Clarke*, 18 Ves. 247; and see *Southouse v. Bate*, 2 V. & B. 396.

(*z*) *Wood v. Cox*, 1 Keen, 317; S. C. on Appeal, 2 M. & Cr. 684.

his honor, that he would act in strict conformity to her wishes. Afterwards on the same day she executed another testamentary paper, containing a list of names of several persons with the sums to be given them, and concluding with a declaration, that such was her wish. Lord Langdale, M. R., at the original hearing held, that C. took no beneficial interest, but was a trustee of the residue for the next of kin; but this decision was reversed on appeal by Lord Cottenham, who decreed C. to take the personal estate for his own use absolutely, subject to the payment of the legacies.(z)

Where the gift contains expressions, importing an intention to confer a benefit on the donee, it seems that that circumstance will have considerable weight for the purpose of rebutting the resulting trust. Thus where a testator made and constituted his dearly beloved wife *his sole heiress* and executrix of his real and personal estate, to sell and dispose thereof at her pleasure, and to pay his debts and legacies, Lord Chancellor King held, that the wife was not a trustee for the heir-at-law as to the surplus of the real estate after payment of the debts and legacies. He said, that the terms of the devise in every respect placed the wife in the stead of the heir, and not as a trustee for him.(a)

So the words "*free and unfettered*" attached to the strongest expressions of trust have been considered to prevent a trust from attaching to the gift.(b) And in *Wood v. Cox*(c) the fact, of the gift being expressed to be made to the donee "*for his own use and benefit for ever*," appears to have had very considerable influence upon Lord Cottenham in arriving at the decision, that there was no resulting trust in that case.

Upon the same principle expressions of kindness and affection,—as where the gift is, to "*my dearly beloved wife*," have been considered to support the inference, that a beneficial gift was intended.(d) And even where the donee is merely described by the relationship, as "*my cousin*," or "*my brother*," it seems, that such a description will not be without its effect, as evidence of the intention to confer a benefit.(e) However, it is not probable that such a circumstance would of itself be allowed to have much effect at the present day.(f)

Personal circumstances, such as the relationship between the par-

(z) *Wood v. Cox*, 1 Keen, 317; S. C. on Appeal, 2 M. & Cr. 684.

(a) *Rodgers v. Rodgers*, 3 P. Wms. 193.

(b) *Meredith v. Heneage*, 1 Sim. 555.

(c) *Wood v. Cox*, 2 M. & Cr. 692.

(d) *Rogers v. Rogers*, 3 P. Wms. 193.

(e) *Cunningham v. Mellish*, Prec. Ch. 31; *King v. Denison*, 1 V. & B. 274.

(f) See 2 Jarm. Pow. Dev. 38. [*King v. Mitchell*, 8 Pet. 326.]

[*122] ties, *and the qualifications of the donee to discharge the office of trustee, will also be taken into consideration, for the purpose either of supporting or rebutting the trust in these cases.

Thus in *Hobart v. Countess of Suffolk*,^(g) the fact of the devise being to three persons, two of whom were relations to the testator, and the other a stranger, was adverted to by the court in deciding in favor of the trust.^(g)

And the donee's being an infant or married woman, and therefore unfitted to discharge the duties of a trustee, will have some weight with the court in a doubtful case.^(h) But where from the whole context of the instrument a trust is created, those circumstances alone will not have the effect of repelling it.⁽ⁱ⁾

In *Williams v. Jones*^(k) the fact, of a child being appointed executrix, was considered by Sir Wm. Grant, M. R., to be a very strong circumstance in favor of her claim, to take the residue beneficially. He there says, "A very little evidence in aid of that circumstance is sufficient. It is almost sufficient of itself, without any evidence, to justify the conclusion."^(k) And so in the recent case of *Cook v. Hutchinson*^(l) a father, an old man eighty years of age, made an indenture between himself and his son, which recited, that the father was desirous of settling the property therein comprised, so as to make the same a provision for himself during his life, and for his wife and her children by him after his decease, and then released and assigned the property to the son, his heirs, executors, &c., to hold upon to and for the trusts intents and purposes thereafter declared concerning the same. The father proceeded to declare the trust of part of the property in favor of his wife, a daughter, and a niece; but no trust was declared as to the surplus. And it was held by Lord Langdale, M. R., *considering the relation between the parties*, and the object and purport of the instrument, that the surplus did not result to the grantor, but belonged beneficially to the son.^(l) It will be observed that the question in this last case arose upon the construction of a *deed*. The presumption in favor of a resulting trust is stronger in the case of a deed, than of a gift by will, which of itself implies bounty, and will be treated with greater latitude of construction.^(m) The decision in *Cook v. Hutchinson* must therefore be looked upon as a strong authority against the existence of a resulting trust, in case of a partial disposition of the beneficial interest, where the donee is a child of the donor.

The fact, that one portion of the property is given to persons as

(g) *Hobart v. Countess of Suffolk*, 2 Vern. 644.

(h) *Blinkhorn v. Feast*, 2 Ves. sen. 27; *Williams v. Jones*, 10 Ves. 77.

(i) *King v. Denison*, 1 V. & B. 275.

(k) *Williams v. Jones*, 10 Ves. 83.

(l) *Cook v. Hutchinson*, 1 Keen, 42.

(m) *Sidney v. Shelly*, 19 Ves. 358.

trustees, does not necessarily involve a presumption, that the rest is to be held by them upon trust; where the gift of that part, which is clearly a trust, is separate and distinct from the gift of the residue.⁽ⁿ⁾

And so where distinct gifts of real and of personal estate are contained in the same will, and the circumstances are such, as to make the donees of the personalty trustees for the next of kin; it does not follow that the devisees of the real estate shall also hold in trust for the heir-at-law, although the same expressions may be attached to the gift in both cases.^(o)

*But where there is a gift jointly to several persons, and one of them is clearly a trustee, the others will also take in that character. For, as Lord Alvanley has observed, there is no instance of making one trustee, and the other not.^(p) [*123]

Before the recent statute of 1 William IV. c. 40, it had been long established, that an express legacy to an executor would make him a trustee of any residue undisposed of for the next of kin; the supposition being, that by giving him a part, the testator showed that he did not intend him to take the whole.^(q)¹

This last doctrine and the principle upon which it was introduced, was considered to be very unsatisfactory, and the courts have consequently endeavored as much as possible to pare down its application.^(r) Therefore although the reasoning, on which it proceeded, would seem to apply with equal force, whether the executor took the property, of which the legacy forms part, by express residuary gift, or by virtue of his appointment as executor, it has notwithstanding

(n) *Pratt v. Slacden*, 14 Ves. 193.

(o) *King v. Denison*, 1 V. & B. 277.

(p) *White v. Evans*, 4 Ves. 21; *Milnes v. Slater*, 8 Ves. 295; *Sadler v. Turner*, ib. 617; *Williams v. Jones*, 10 Ves. 77.

(q) *Faringdon v. Knightly*, 1 P.

Wms. 545; *Abbott v. Abbott*, 6 Ves. 343; *Langham v. Sanford*, 17 Ves. 435, and 2 Mer. 6; *Bull v. Kingston*, 1 Mer. 314.

(r) See Lord Eldon's observations, in *King v. Denison*, 1 V. & B. 277.

[Ante 118, note (1)]

¹ In several of the United States the common law doctrine, which gives to the testator the undisposed of residuary estate of his testator, has been repudiated; and he is declared merely trustee for the next of kin. *Wilson v. Wilson*, 3 Binney, 559; *Richardson v. Richardson*, 9 Barr. 431; *Hays v. Jackson*, 6 Mass. 153; *Hill v. Hill*, 2 Hayw. R. 208; *Donn v. Allen*, 1 Penning. 44, 2 Lomax Exr. 184, &c.; *Pamp v. Mingo*, 4 Leigh, 163. In Pennsylvania, (Act of 1807, Dunlop, 241), New York (Rev. Stat. Part II., tit. III., art. 3, § 79), and Delaware (Rev. Code (1852), No. 1843), there are express statute provisions which exclude the executor. And it may be doubted whether in general in any of the states, under their statutes of distribution, he would be permitted to take beneficially without express words. Story, Eq. Jur. § 452. In *Darrah v. McNair*, 1 Ashm. 240, it was held under the Pennsylvania act, that where there were no next of kin the executor took as trustee for the commonwealth; which, indeed, is also the rule in England. *Taylor v. Haygarth*, 14 Sim. 8; *Powell v. Marett*, 2 E. & J. Ch. 408.

been expressly decided that a legacy to persons, who are appointed executors, though given to them expressly "for their care and trouble," will not exclude the claim of those persons to take the residue beneficially; if they claim *not in the character of executors, but under a direct disposition to them personally as residuary legatees*.

Thus in *Gibbs v. Rumsey*,^(s) a testatrix devised and bequeathed her real and personal estate to two persons their heirs, executors, &c., upon trust to sell; and out of the money to arise from the sale, as well as her other money, &c., she gave several legacies, and among them £100 to each of her trustees for their care and trouble: and she gave and bequeathed all the rest and residue of the moneys arising from the sale of her said estates and of her personal estate after payment of debts, legacies, &c., unto her said trustees and executors by name, to be disposed of unto such person and persons and in such manner, &c., as they in their discretion should think proper. And she appointed the same two persons her executors. The next of kin of the testatrix contended that there was a resulting trust of the residue for their benefit: but Sir Wm. Grant, M. R., in deciding against that claim, said, "this testatrix, having created a trust to sell, gives many particular legacies, and among them £100 to each of her two trustees for their care and trouble in the execution of the trusts of the will. That is undoubtedly sufficient to exclude any claim as executors; but they claim *not in that character but under a direct disposition to them as residuary legatees*," and his Honor held that the residuary legatees took the residue for their own benefit.^(s)

Moreover there can be no doubt, but that the court would extend to the executor, taking by a substantive bequest, the benefit of all the distinctions that have been taken in favor of the executor, who takes merely by virtue of his appointment. Therefore where the legacy is given to the executor by the will, and the general gift in trust by a subsequent codicil:^(t) *or where the legacy is [*124] contingent and reversionary:^(u) or specific,^(x) there would be room to contend that the gift of the legacy did not affect the claim of the legatee to the ulterior beneficial interest, which is left undisposed of.

And it would seem that a similar distinction might be maintained, where the particular legacy is something excepted out of an inte-

(s) *Gibbs v. Rumsey*, 2 V. & B. 294.

(t) *Langham v. Sanford*, 2 Mer. 21.

(u) *Lynn v. Beaver*, T. & R. 63; but see *Seley v. Wood*, 10 Ves. 71; and *Oldman v. Slater*, 3 Sim. 84.

(x) *Blinkhorn v. Feast*, 2 Ves. sen.

27; *Nisbett v. Murray*, 5 Ves. 149, 158;

but see *Southcott v. Watson*, 3 Ark. 226;

and *Martin v. Rebow*, 1 Bro. C. C. 154.

rest given to another person : (y) or an aliquot part, the other parts being given to other persons : (z) or a bequest for life with remainder over. (a) But if there be no such ulterior imitation, a bequest for life will have the same effect in raising the presumption of a trust as any other legacy. (b)

So where the gift is to several persons jointly, a legacy to *one* or *some* of them only, or *unequal* legacies to all of them, will raise no equity for the next of kin. (c) But where *equal* pecuniary legacies are given to all, the presumption against them will be the same, as in the case of a legacy to a single donee. (d)

The same reasoning, *viz.*, that a person cannot be intended to take a part and the whole, evidently has no application to a devisee of real estate, to whom a pecuniary legacy is also given. Accordingly Mr. Jarman in his edition of Powell on Devises observes, that "it is clear upon principle, that a legacy to a devisee will not make him a trustee; unless perhaps where it is given out of a fund, to be formed out of the devised estate; though even this is not free from doubt." (e)

On the other hand it is clear, that the converse case, of a gift of a legacy to the next of kin, will not of itself operate to exclude them from taking by virtue of a resulting trust. (f) And so a legacy to the heir-at-law, though given expressly out of the money, to arise from the sale of the devised estate, will not prevent the trust of the residue resulting to him. (g) However in *Rogers v. Rogers*, (h) Lord Chancellor King, in deciding in favor of the claim of a devisee in opposition to that of the heir, seems to have attached no little importance to the fact of a legacy having been given to the heir. (h)

Unless the gift, whether of real or personal property, be such as to create a presumption against the title of the donee to its beneficial enjoyment, parol evidence will not be admitted for the purpose of establishing a resulting trust in favor of the heir-at-law or next of kin in opposition to the claim of the donee.¹ This was decided

(y) *Griffith v. Rogers*, Prec. Ch. 231.

(z) *Jones v. Westcomb*, 1 Eq. Ca. Abr. 245, pl. 10.

(a) *Granville v. Beaufort*, 1 P. Wms. 114; see *Nourse v. Finch*, 1 Ves. jun. 344.

(b) *Touch v. Lambert*, 4 Bro. C. C. 326.

(c) *Blinkhorn v. Feast*, 2 Ves. sen. 27; *Sadler v. Turner*, 8 Ves. 617; *Rawlins v. Jennings*, 13 Ves. 39. [Russell v. Clowes, 2 Coll. C. C. 648.]

(d) *Petit v. Smith*, 1 P. Wms. 7; *Gibbs v. Rumsey*, 2 V. & B. 294.

(e) 2 Jarm. Pow. Dev. 40. [See *Hennerthoty's estate*, 4 Harr. (Penn.) 406.]

(f) *Farington v. Knight*, 1 P. Wms. 545; *Rutland v. Rutland*, 2 P. Wms. 213; *Andrews v. Clark*, 2 Ves. sen. 162; *North v. Pardon*, ib. 495.

(g) *Starkey v. Brooks*, 1 P. Wms. 390; *Randal v. Bookey*, 2 Vern. 425; and Prec. Ch. 162; *Kellett v. Kellett*, 1 Ball & B. 543; S. C. on appeal, 3 Dow. P. C. 248.

(h) *Rogers v. Rogers*, 3 P. Wms. 194.

¹ *Ralston v. Telford*, 2 Dev. Eq. 253, stated ante, page 107, note.

in the case of the survivor of several executors, to whom unequal legacies had been given. The surviving executor in virtue of his appointment claimed the whole of the residue *undisposed of. [*125] The representative of the testator's widow, who had been also one of his executors, for the purpose of displacing this claim, offered parol evidence of the testator's intention to dispose of this residue in favor of his wife. But Sir Wm. Grant, M. R., held, that no presumption existed against the legal title of the defendant (the surviving executor), and rejected the evidence.⁽ⁱ⁾ And the principle established by this decision will *à fortiori* be applied to the rejection of parol evidence; where the legal title which it is the object of such evidence to impugn, is founded upon an *express gift or limitation* to the donee, unaffected by any adverse presumption.

On the other hand, where the presumption of a resulting trust in these cases is once created, parol evidence will be admitted, in support of the legal title of the donee, to rebut the trust.⁽¹⁾ The admissibility of parol evidence for this purpose has been so long and firmly established, that in the train of cases on the subject, the question has not been raised on the principle itself, but on the application of it; the doubt being whether on the whole, and sometimes the conflicting, evidence, the intention in favor of the donee is clearly made out. For it is settled, that parol evidence being once let in, in support of the legal title, it may be opposed by similar evidence on the other side; and if upon the whole evidence the intention remains doubtful, the equity in favor of the heir-at-law or next of kin will prevail, the presumption not being rebutted.^(k)

It is to be observed however; that the rule, which admits this evidence, has been viewed with great disapprobation; and in modern

(i) *White v. Williams*, 3 V. & B. 72; *Wms.* 7; *Nourse v. Finch*, 1 Ves. jun. and see *Langham v. Sanford*, 2 Mer. 344; *Walton v. Walton*, 14 Ves. 318; 17. *Langham v. Sanford*, 2 Mer. 6; *Glad-*

(k) *Docksey v. Docksey*, 3 Bro. P. *ding v. Yapp*, 5 Mad. 56; see 1 Jarm. C. 39; *Mallabar v. Mallabar*, Cas. Pow. Dev. 499, and note 2. *Temp. Talb.* 79; *Petit v. Smith*, 1 P.

(1) The statute 1 Will. IV. c. 40, enacts that executors shall be deemed to be trustees of any residue not expressly disposed of, *unless it shall appear by the will or any codicil thereto*, that they were intended to take such residue beneficially. It is conceived therefore, that since that statute, parol declarations or any other evidence *dehors* the will, cannot under any circumstances be received in support of the claim by an executor *as such* to the residue undisposed of. We have seen before that the statute does not apply to cases, where there is an *express disposition* of the residue to an executor personally. [And so it was held in *Love v. Gage*, 8 Beav. 472; 9 Jur. 910.]

times, it has scarcely ever been received, without eliciting some expressions of animadversion.^(l)

It seems not to be absolutely necessary that the evidence should be contemporaneous with the will: although the contrary seems to have been thought by Lord Macclesfield;^(m) and Lord Alvanley in one case was strongly disposed to disregard altogether evidence of expressions declaratory of what the testatrix intended to do.⁽ⁿ⁾

But it is now settled, that parol declarations subsequent, or even anterior to the will are admissible.^(o) Such declarations however are not all entitled to equal weight. Lord Eldon in *Trimmer v. Bayne*,^(p) *addressing himself to this subject, said, “ I fear there is no possibility of saying, parol declarations, previous [*126] and subsequent, are not admissible (though Lord Coke would hardly have been brought to let them in), as well as declarations at the time; but there is a great difference on the point, whether they are all alike weighty and efficacious. A declaration at the time of making the will is of more consequence than one afterwards; and a declaration after the will, as to what he had done (I am speaking as to the time merely), is entitled to more credit, than one before the will as to what he intended to do; for that will may very well be altered; but he knows what he has done, and is much more likely to speak correct as to that, than as to what he proposes to do. Though these parol declarations are all alike admissible; whether consisting of conversation with people, who have nothing to do with it; people making impertinent inquiries, and drawing from him angry answers, or in whatever form; they are all evidence. But they are entitled to very different credit and weight according to the time and circumstances.”^(p)

So in *Langham v. Sandford*,^(q) Lord Eldon reiterated his opinion, “that in such cases the best evidence is the contemporaneous evidence, and that all the rest weighs very little in the scales.”^(q)

In like manner, where the gift is to two or more persons jointly, and the presumption of their all being trustees arises from the circumstance of the trust being established against one of them; parol evidence will be admitted on behalf of the others to rebut the trust.^(r)

(l) See the observations of Mr. Justice Buller, in *Nourse v. Finch*, 1 Ves. jun. 357; of Lord Alvanley, in *Clenell v. Lewthwaite*, 2 Ves. jun. 475; of Lord Eldon, in *Trimmer v. Bayne*, 7 Ves. 518; and in *Langham v. Sandford*, 2 Mer. 16; and see 1 Jarm. Pow. Dev. 505, n.

(m) In *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 215.

(n) In *Clenell v. Lewthwaite*, 2 Ves. jun. 474.

(o) *Lake v. Lake*, 1 Wils. 313; and *Ambler*, 126; *Walton v. Walton*, 14 Ves. 318, 323; *Gladding v. Yapp*, 5 Mad. 56.

(p) *Trimmer v. Bayne*, 7 Ves. 520.

(q) *Langham v. Sandford*, 2 Mer. 23.

(r) *Williams v. Jones*, 10 Ves. 77.

Previously to the statute of 1 Will. IV. it seems, that if an executor could show evidence of the testator's intention to exclude the next of kin, that would have been sufficient to establish his claim to the residue, without any evidence of a direct intention in favor of the executor.^(s) The case would be doubtless stronger for an executor claiming under an express gift to himself; and it would seem from analogy to be applicable to a similar question between a devisee and the heir-at-law.

But those cases, which raise against the donee a presumptive trust, which may be rebutted by parol evidence, are carefully to be distinguished from those, in which the instrument contains clear demonstrative evidence of an intention, that he should take only as trustee. For in the latter cases, to admit evidence in opposition to the trust, would be to contradict the terms of the instrument.

Therefore where there is a devise of real estate or a gift of a residue of personal estate expressly *in trust*, or coupled with directions that are held to be equivalent to the declaration of a trust, parol evidence is inadmissible in support of the claim of the trustee to the beneficial interest.^(t)

In questions respecting the claim of executors *as such* to the residue undisposed of, before the statute of 1 Will. IV., it seems to have been a point of considerable nicety to determine, what would or would not be such a conclusive declaration of a trust, as to exclude parol evidence in support of the claim of the executor. A legacy to an executor "for ^{*}his care and trouble," has been con-
[*127] sidered conclusive against the executor for this purpose:^(u) but an inchoate residuary clause;^(x) or a direction to keep an account;^(y) was held not to exclude the executor, from offering parol evidence in support of his claim.

However since that statute such questions cannot again arise upon the claim of an executor to a residue merely in virtue of his appointment. And the decisions just mentioned do not apply to the case of an *express gift* to an executor personally, which is the only case, that can arise in future. For in *Gibbs v. Rumsey*,^(z) Sir William Grant, M. R., decided, that, where the residue is *expressly given* to the executors, a legacy to them, though *for their care and trouble*, will not exclude them from taking that residue beneficially.

It is to be observed that in all these cases, where there is a direc-

(s) *Batcheller v. Searl*, 2 Vern. 737; and 2 Mer. 17; *Gladding v. Yapp*, 5 Brassbridge v. Woodroffe, 2 Atk. 68; Mad. 59.

in *Langham v. Sandford*, 2 Mer. 10, (u) *Langham v. Sandford*, 17 Ves. 443; see 1 Jarm. Pow. Dev. 507, n. this point was raised, but not decided.

(t) *Walton v. Walton*, 14 Ves. 322; (x) *Nourse v. Finch*, 1 Ves. jun. 344.

Langham v. Sandford, 17 Ves. 442; (y) *Gladding v. Yapp*, 5 Mad. 56.

(z) *Gibbs v. Rumsey*, 2 V. & B. 294.

tion in the will to convert real estate into money, which is then left wholly or partially undisposed of; the unexhausted interest, whether the estate be actually sold or not, will result to the heir as real estate, and not to the next of kin as personalty. The heir is excluded not by the direction to convert, but by the disposition of the converted property, and so far only as that disposition extends.^(a)¹ And the right of the heir in these cases will not be affected by the produce of the real estate being blended with the personal estate in a joint fund, which is made the subject of the attempted or partial disposition.^(b)

However a material distinction has been established between the conversion of money into land, and that of land into money. For it has been held, that where money has been directed *to be laid out in land*, which is disposed of for a limited interest only; the money, or, if the money be laid out, the land *ultra*, that interest goes, as real estate undisposed of, to the heir-at-law.^(c)

Thus where a testator directed £1,000 to be laid out in the purchase of lands, that the rents and profits might come to his nephew for life, but made no ulterior disposition of the lands; it was held, that the reversion after the nephew's death resulted to the testator's heir-at-law.^(d)

It has been remarked by Mr. Jarman in his edition of Powell on Devises, that it seems to be an anomaly, that the heir should be held to be entitled to the ulterior interest in land, directed to be converted into money, and also in money directed to be laid out in land, as was decided in *Chapman v. Fletcher*.^(d) It is blowing hot and cold in

(a) *Hill v. Cock*, 1 V. & B. 173; 2 Pleasants, 4 Ired. Eq. 321; *Wood v. Jarm. Pow. Dev.* 77, and cases cited; *Cone*, 7 Paige, Ch. 472.]
Wilson v. Major, 11 Ves. 205; *Berry v.* (c) 2 Jarm. Pow. Dev. 74. [*Thorn v. Usher*, 11 Ves. 87; *Smith v. Claxton*, 4 Coles, 3 Edw. Ch. 330; see *Hawley v. Mad.* 484. *James*, 5 Paige, 323.]

(b) *Hill v. Cock*, ubi supra; *Robinson* (d) *Fletcher v. Chapman*, 3 Bro. P. v. Taylor, 2 Bro. C. C. 589; *Dixon v.* C. 1.
Dawson, 2 S. & S. 327. [*Lindsay v.*

¹ See *Burley v. Evelyn*, 16 Sim. 200, 12 Jur. 712; *Craig v. Leslie*, 3 Wheat. 564; *Burr v. Sims*, 1 Whart. 252; *Lindsay v. Pleasants*, 4 Ired. Eq. 320; *Morrow v. Brenizer*, 2 Rawle, 185; *Pratt v. Taliaferro*, 3 Leigh. 419; *North v. Valle*, Dudley, Eq. 212; *Smith v. McCrany*, 3 Ired. Ch. 204; *Wood v. Cone*, 7 Paige, Ch. 472; *Tilghman's estate*, 5 Whart. 44; *Owens v. Cowan*, 7 B. Monroe, 152; *Snowhill v. Snowhill*, Ex'r. 1 Green. Ch. 30; *Bogert v. Hertell*, 4 Hill, 501. An express provision in a will that on the sale of real estate which was directed, the trustees should stand possessed of the proceeds as a fund of personal and not of real estate, for which purpose such proceeds or any part of them, should not in any event, lapse or result for the benefit of the heir-at-law, will not affect the right of the heir to an undisposed of surplus. *Fitch v. Weber*, 6 Hare, 45. Att.-Gen. v. *Henchman*, 2 R. & M. 221; *Gordon v. Atkinson*, 1 De Gex. &c. 478. See *Blackman v. Gordon*, 2 Richardson, Eq. 42.

favor of the heir ; for the principle, which would entitle him to the ulterior interest in the one case, would exclude him in the other.(e)

The principle of *Chapman v. Fletcher*(d) will not, as we shall see presently, be applied to cases, where the particular disposition of the money, directed to be invested in land, *wholly fails* ; for in such cases it has been held, that the interest thus lapsing belongs to the next of kin, *and not to the heir-at-law.(e)¹ It seems very difficult [*128] upon principle to draw any distinction between an interest originally undisposed of, and one becoming undisposed of by subsequent failure or lapse ; and it is therefore submitted, that if the question decided in *Chapman v. Fletcher*, should occur at the present day, it is not improbable that the recent decisions in *Hereford v. Ravenhill*, and *Cogan v. Stephens*, as being more in accordance with the true principle, would be followed as authorities in preference to that of *Chapman v. Fletcher*.(1)

We must not omit to mention the important exception that exists with respect to the general doctrine of resulting trusts on an imperfect or partial disposition of property, where the gift is to a charity.

If property, whether real or personal, be effectually given either by deed or will to trustees for charitable purposes *generally*, it has been long established, that there will be no resulting trust for the heir-at-law or next of kin of the donor ; although the particular purpose, to which the property is to be applied, is not declared at all, or if declared, does not extend to exhaust the whole beneficial interest, either at the time, or in consequence of a subsequent increase in the value of the property, in such cases the donees will take the interest

(d) *Fletcher v. Chapman*, 3 Bro. P. C. 1. (e) *Hereford v. Ravenhill*, 1 Beav. 487, n. ; S. C. 5 Beav. 51 ; *Cogan v. Stephens*, ib. 486.
(e) 2 Jarm. Pow. Dev. 75 ;

(1) The case of *Hereford v. Ravenhill* came subsequently before the court on further directions, and on that occasion Lord Langdale, M. R., decided that a bequest of personal estate to be invested in the purchase of land, and held on trusts *that became exhausted*, was on the same footing as one, where the trusts *were void*, and that the residuary legatee and not the heir was entitled in both cases. It is to be observed however that in that case the fund *had not been actually invested* in land. *Hereford v. Ravenhill*, 5 Beav. 51.

¹ *Hawley v. James*, 5 Paige, 323. See *Wharton v. Shaw*, 3 W. & S. 124. But in *Thorn v. Coles*, 3 Edw. Ch. 330, where there was a total failure of the purposes for which money was directed to be invested in land, this distinction was not noticed ; and the money was held to result as real estate to the heirs. The money, however, in this case would appear from the opinion of the court to have been the proceeds of real estate.

undisposed of as trustees for charitable purposes to be ascertained and determined by the Court of Chancery.^(f)¹

Thus it was laid down in a case in Freeman "that if a man devises a sum of money to such charitable uses, as he shall direct by a codicil, to be annexed to his will, or by a note in writing; and afterwards leaves no direction, neither by note, nor codicil; the Court of Chancery hath power to dispose of it to such charitable uses as the court shall think fit."^(g) And in *Att.-General v. Syderfen*,^(h) which was a case of similar description, the court held the property to be applicable in charity to be declared by the king's sign manual.^(h)

So where a testator having given all his estate for charitable purposes generally, proceeded to declare a particular scheme, which did not exhaust the whole income of the estate, it was held that there was no resulting trust of the surplus, but that the whole was applicable in charity.⁽ⁱ⁾

And though there may not be any such general declaration devoting the whole estate in charity, yet if there be a disposition either by deed or will, by which every portion of the property is applied and exhausted *at the time* in favor of some charitable purpose: a surplus, arising from a subsequent increase in the value of the property, will not result to the heir-at-law, or next of kin of the donor, and still less will it belong to the donees in trust, but it will also be applicable to charitable purposes.^(k) And it is immaterial, that the property is given to trustees with directions to apply a certain specified sum yearly to charitable purposes, if that particular sum at the time of such direction exhaust the whole income of the

(f) *Cook v. Dunkensfeld*, 2 Atk. 567; Thetford School case, 8 Co. 130; *Att.-Gen. v. Arnold*, Show. P. C. 22; *Moggridge v. Thackwell*, 7 Ves. 73; *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 308; *Mills v. Farmer*, 1 Mer. 55; *Att.-Gen. v. Haberdasher's Comp.* 4 Bro. C. C. 103.

(g) 2 Freem. 261, stated in 7 Ves. 73; and 1 Mer. 59.

(h) *Att.-Gen. v. Syderfen*, 1 Vern. 224; S. C. 7 Ves. 43 n.; *Mills v. Farmer*, 1 Mer. 94; *Commissioners of Chancery Donations v. Sullivan*, 1 D. & W. 501.

(i) *Att.-Gen. v. Arnold*, Show. P. C. 22; and see *Att.-Gen. v. Coopers' Comp.* 3 Beav. 34; *Mills v. Farmer*, 1 Mer. 55; *Pieschell v. Paris*, 2 S. & St. 384.

(k) *Att.-Gen. v. Caius Coll.* 2 Keen, 150; *Att.-Gen. v. Johnson*, Ambl. 190; *Att.-Gen. v. Sparks*, ib. 201; *Att.-Gen. v. Haberdashers' Comp.* 4 Bro. C. C. 103; *Att.-Gen. v. Coopers' Comp.* 3 Beav. 34; *Att.-Gen. v. Catherine Hall*, Jac. 381; *Att.-Gen. v. Drapers' Comp.* 4 Beav. 67; *Att.-Gen. v. Christ's Hospital*, id. 73.

¹ The principles of the statute of Elizabeth, so far as they are applicable in this country, are in force in many of the United States. But the doctrine of *Cypres* stated in the text, has never been adopted, from a want of power in the courts of equity to apply it in practice. See ante, note ~~66~~ page 66. 79

estate.(l) And although the trustees are made answerable for the payment of the specified sum to the charity, in case the value of the estate should prove insufficient for that purpose; yet it does not necessarily follow on that account, that they will be entitled to take the surplus for their own benefit, in case of the subsequent increase in the value of the property.(m)

It has been observed both by Lord Hardwicke(n) and Lord Eldon,(o) that at the time this doctrine with respect to charities was established, the right of the heir-at-law under a resulting trust was not sufficiently understood, or it could never have been adopted. Both those great judges however acknowledged it to be a principle, that could not then be shaken.

However if a man give an estate to trustees, and take notice, that the payments are less than the amount of the rents; no case has gone so far as to say, that the *cestui que trust*, even in the case of a charity, is entitled to the surplus. There would either be a resulting trust, or it would belong to the person to whom the estate is given.(p)

And if the trustees, to whom the property is given for the purpose of being applied in charity, be themselves specified as objects of the donor's charity, it seems, that they will themselves be entitled to a surplus, arising from the increased value of the estate.(q) But this will be the case, only where the donees in trust come clearly within the charitable purposes contemplated by the donor; and if that be not the case, the donees, though themselves a charitable institution, cannot sustain any claim to the increased value, which will be applicable for the benefit of the original objects according to the ordinary rule.(r)

And if a specified portion of the income of the estate be given beneficially to the donees in trust themselves, they will not be entitled to the whole of the surplus occasioned by the improved value, but will benefit rateably with the other objects of the testator's bounty.(s)

But if there be a gift to a company or to individuals, in trust to [*130] apply *certain specified sums to charitable purposes, and there is an express or implied disposition of the residue, after making those payments, to the donees for their own benefit; the

(l) Att.-Gen. v. Christ's Hospital, 4 Beav. 73; Att.-Gen. v. Mayor of Coventry, 2 Vern. 397; S. C. 2 J. & W. 305, n.; Att.-Gen. v. Johnson, Ambl. 190; Att.-Gen. v. Tonner, 2 Ves. 1; Att.-Gen. v. Minshull, 4 Ves. 11; Att.-Gen. v. Caius Coll. 2 Keen, 150.

(m) Att.-Gen. v. Merchant Vent. Society, 5 Beav. 338.

(n) In Att.-Gen. v. Johnson, Ambl. 190.

(o) In Att.-Gen. v. Mayor of Bristol, 2 J. & W. 307.

(p) Per Lord Eldon, in 2 J. & W. 307; and see 2 Russ. 241.

(q) Att.-Gen. v. Mayor of Bristol, 3 Mad. 319; S. C. 2 J. & W. 294.

(r) Att.-Gen. v. Christ's Hospital, 4 Beav. 73.

(s) Att.-Gen. v. Caius Coll. 2 Keen, 150; Att.-Gen. v. Drapers' Comp. 4 Beav. 67.

particular payments will not be increased out of the improved value, but the surplus will belong beneficially to the donees.^(t)

Where there is a general gift for charitable purposes, but the particular purpose expressed is such, that by the law of England it cannot take effect, the rule will be the same, as if there had been no declaration of the particular purpose, and the property will be applied in charity, to be determined by the sign manual of the crown.^(u)

However cases of this last description, must be distinguished from particular gifts to superstitious uses, within the statute 1 Edw. VI. c. 14, such as gifts for the maintenance of obits or prayers for the dead; which by the express term of the statute are forfeited to the crown.^(x) And also from similar devises to charity, which are void by the Statute of Mortmain, and in which case a trust will result for the heir.^(y)

In the great case of *Moggridge v. Thackwell*,^(z) Lord Eldon has distinguished the principle of the cases, where property, given generally to charitable purposes, will be applied, under the direction of the royal sign manual, and where the application will be under the immediate administration of the Court of Chancery. "Where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual: but where the execution is to be by a trustee with general or some objects pointed out, there the court will take the administration of the trust."^(z)

Thus, to illustrate this rule, in *Frier v. Peacock*,^(a) which is reported in Levinz under the name of *Attorney General v. Matthews*,^(b) a testator gave his residue "for the good of poor people for ever." The court at the original hearing assumed the power of modifying the bequest, and directed the property to be applied for the benefit of forty poor boys; but Lord Keeper Finch reversed that decision, and held that the disposal was in the king by his sign manual; and the king directed it to be applied for the benefit of Christ's Hospital.^(c)

(t) *Att.-Gen. v. Grocers' Comp.* 12 Law. Journ. N. S., Chanc. 196; S. C. 6 Beav. 526; *Att.-Gen. v. Skinners' Comp.* 2 Russ. 407, 442; *Att.-Gen. v. Gascoigne*, 2 M. & K. 647.

(u) *Att.-Gen. v. Todd*, 1 Keen, 803; *Cary v. Abbott*, 7 Ves. 490; *Att.-Gen. v. Green*, 2 Bro. C. C. 492; *Da Costa v. De Paz*, Ambl. 228; S. C. 2 Sw. 487; n. [Martin v. Margham, 14 Sim. 230.]

(x) See *Att.-Gen. v. Fishmongers' Comp.*, 2 Beav. 151.

(y) See the distinction taken by Lord

Hardwicke, in *Da Costa v. De Paz*, Ambl. 228, vide post. [Ayres v. Methodist Church, 3 Sandf. S. C. 352.]

(z) *Paice v. Archbishop of Canterbury*, 14 Ves. 372; *Moggridge v. Thackwell*, 7 Ves. 86; *Ommaney v. Butcher*, T. & R. 270. [Andrews v. N. Y. Bible and Prayr. Bk. Soc., 4 Sandf. S. C. 156; see 1 Am. Law Reg. 546.]

(a) Finch, 245.

(b) 2 Lev. 167.

(c) See 7 Ves. 69.

So in *Attorney-General v. Syderfen*,^(d) where a testator gave 1,000*l.*, to be applied to such charitable uses, as he had by writing formerly appointed; and no such writing could be found, the fund was applied to a charity appointed by the royal sign manual.^(d)

And on the same principle, where the general intention is in favor of *charity, but the law does not suffer the particular purpose to be carried into effect, the king will have the disposal by his sign manual.^(e)

But on the other hand, where the gift is to trustees, with directions to apply the income in support of particular charities; and a question arises as to the application of the fund; the court will assume the administration of the property, and will direct a scheme for that purpose.^(f) And the rule is the same where the trustees, designated by the testator, decline to act.^(g)

Even where the particular objects recommended are designated in so vague a manner, as to render some authoritative interpretation of the testator's intention indispensable; the court will notwithstanding exercise this jurisdiction. Thus in *Moggridge v. Thackwell*,^(h) a testatrix gave the residue of her personal estate, to James Paston his executors, &c., "desiring him to dispose of the same in such charities, as he shall think fit, recommending poor clergymen, who have large families and good characters." Lord Rosslyn at the original hearing considered, that the execution of this trust lay with the Court of Chancery, and accordingly directed a scheme for that purpose. The case was afterwards reheard before Lord Eldon, and most elaborately argued, and his lordship after a minute review of all the authorities, from which he collected the principle above stated, affirmed the decree of his predecessor.^(h)

Where the object of a testator is charity, a far less accurate and definite declaration of his intention will suffice to create a trust against his next of kin, than, as we have seen, would be required in other cases for that purpose.⁽ⁱ⁾

Thus in the case of *Moggridge v. Thackwell*,^(k) which we have just considered, it is beyond all question, that the terms of the residuary bequest were by far too indefinite, and uncertain, to have ex-

^(d) *Att.-Gen. v. Syderfen*, 1 Vern. 224; and 7 Ves. 43, n.

^(e) *Cary v. Abbott*, 7 Ves. 490; *Att.-Gen. v. Todd*, 1 Keen, 803.

^(f) *Attorney-General v. Tonner*, 2 Ves. jun. 1; *Attorney-General v. Coopers'* Comp. 3 Beav. 29.

^(g) *Attorney-General v. Reeve*, 3 Hare, 191.

^(h) *Moggridge v. Thackwell*, 1 Ves. jun. 464; S. C. on rehearing, 7 Ves. 36.

⁽ⁱ⁾ See *Morice v. Bishop of Durham*, 9 Ves. 405; *Mills v. Farmer*, 1 Mer. 94, 98, 100.

^(k) *Moggridge v. Thackwell*, 1 Ves. jun. 464; S. C. on rehearing, 7 Ves. 36.

cluded the claim of the next of kin, if the object of the testatrix's bounty had been any other than charity.(l)

And the claim by the trustee himself to the beneficial enjoyment of the property would be regarded with less favor, where the purpose of the gift is charitable, than in other cases.(m) However where by the express direction of the testator, although the property is devoted generally to charity, its distribution, and the selection of the objects, are left entirely in the power and at the discretion of the trustee, the court will not control him in the exercise of that discretion by directing a scheme, unless some case of misconduct is established against him.(n)

But even where the object is charity, the terms of the gift must create an imperative direction to the trustee, to apply the property to *some* charitable purpose, or otherwise the court will refuse to interfere. Sir Wm. *Grant has laid down the rule on this [*132] head in the following terms: "The question is, not whether the trustees *may* not apply it upon purposes wholly charitable, but whether he is *bound* so to apply it."(o) And in another case the same learned judge says, "If the property might consistently with the will be applied to other, than strictly charitable purposes, the trust is too indefinite for the court to execute."(p)

Thus in *Coxe v. Bassett*,(q) where a testator "*authorized and empowered*" his trustees, to continue his charities and benefactions, or to bestow any other, as they in their discretion should think fit, so as not to exceed 1,000*l.*: the Master of the Rolls held, that the charity could not be established by reason of its uncertainty, observing, that the testator meant to recommend only; it was not mandatory. It was to exempt the trustees from being called to account for doing it.(q)

And so in the recent case of *Williams v. Henshaw*(r) the testator directed his trustees to apply the residue of the dividends and income of a fund "to and for such benevolent and charitable and religious purposes, as they in their discretion should think most advantageous and beneficial, and to and for no other use trust intent or purpose whatsoever:" and Sir C. Pepys, M. R., held that there was a discretion in the trustees to apply the fund, and that the trust for charity did not therefore take effect.

(l) See Lord Eldon's observations, in *Mills v. Farmer*, 1 Mer. 100.

(m) *Moggridge v. Thackwell*, 1 Ves. jun. 475; *Bishop of Hereford v. Adams*, 7 Ves. 324.

(n) *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 M. & K. 59.

(o) In *Morice v. Bishop of Durham*, 9 Ves. 406.

(p) In *James v. Allen*, 3 Mer. 19.

(q) *Coxe v. Bassett*, 3 Ves. 155, 164.

(r) *Williams v. Kershaw*, Rolls, 11th

Dec. 1835; stated in *Ellis v. Selby*, 1 M. & Cr. 298.

And in the subsequent case of *Ellis v. Selby*,^(rr) where the gift was to trustees "to pay and apply the fund to and for such charitable or other purposes, as they should think fit, without being accountable to any person or persons whomsoever for such their disposition thereof." Lord Cottenham recognised and adopted his decision in *Williams v. Kershaw*, and affirmed the decree of Sir L. Shadwell, V. C., declaring the trust to be void.

It will be observed, that in this last case the bequest was to charitable or other purposes, and on that circumstance the Vice-Chancellor appears mainly to have founded his judgment. An alternative bequest of that nature evidently excludes the possibility of its being supported as a valid trust for charity. In *Vezey v. Janson*(s) the gift was, to trustees "to dispose of it at their pleasure, *either for charitable or public purposes, or to any person or persons in such shares, &c., as they in their discretion should think fit.*" And Sir John Leach, V. C., in deciding that there was a resulting trust for the next of kin said, "The testator has not fixed upon any part of this property a trust for a charitable use, and I cannot therefore devote any part of it to charity."^(s) In a very late case, there was a gift of a residue to trustees, to be applied by them for the relief of domestic distress, assisting indigent but deserving individuals, or *encouraging undertakings of general utility*, in such mode or proportions as their own discretion might suggest. Lord Langdale, M. R., adopted the *above rule as laid down by Sir Wm. Grant [*133] in *Morice v. Bishop of Durham*, and stated, that if the trust had ended with the direction to assist "indigent but deserving individuals," he should have said it was a good charitable purpose, because of the word "indigent," but as the testator went on to empower the trustees to apply the fund to encourage undertakings of "general utility," words which comprised purposes that were not charitable, they had an option of applying the fund to purposes, which were not charitable, and consequently that this could not be enforced as a charitable trust. In this case the suit was instituted by the testator's heir and next of kin, and the trustees do not appear to have raised any claim to the beneficial interest.^(t)

The court, in determining what will be such a "charitable purpose," as it will support, and carry into execution, will treat any legal public or general purpose as one coming within the equity of the statute 43 Eliz. c. 4, as well as those expressed in that statute:^(u) but it will refuse to recognise any objects, not enumerated by or

(rr) *Ellis v. Selby*, 7 Sim. 352; S. C. on Appeal, 1 M. & Cr. 286; and see *Down v. Worrall*, 1 M. & K. 561.

(s) *Vezey v. Janson*, 1 S. & S. 71; but see *Johnston v. Swan*, 3 Mad. 457.

(t) *Kendall v. Granger*, 5 Beav. 300.

(u) *Att.-Gen. v. Heelis*, 2 S. & St. 76.

coming within the spirit of that statute, although such may be a charitable object in the ordinary meaning of the term.^(x)¹

Therefore where the bequest was, in trust "for such objects of benevolence and liberality, as the trustee in his own discretion shall most approve of:"^(y) or for "such benevolent purposes as the trust-

(x) *Morice v. Bishop of Durham*, 9 Ves. 405; and 10 Ves. 540: see *Nash v. Morley*, 5 Beav. 177; and *Kendall v. Granger*, ib. 300. (y) *Morice v. Bishop of Durham*, 9 Ves. 399; S. C. on Appeal, 10 Ves. 522.

¹The decisions in the United States with regard to the validity of devises and legacies to charitable uses have been frequent, but not entirely consistent. Where the principles of the statute of Elizabeth are in force, considerable latitude of construction has been adopted, with regard to the certainty requisite in the description of the intended objects of charity.

Thus a devise of property "*to the cause of Christ, for the benefit and promotion of true evangelical piety and religion,*" which was to be "*distributed in such divisions, and to such societies and religious and charitable purposes,*" as the trustees "might think fit and proper;" *Going v. Emery*, 16 Pick. 107; a bequest to "the treasurer for the time being of the *American Bible Society, or of any other charitable association, for the use and purposes of said Society;*" *Burr v. Smith*, 7 Verm. 241; a bequest of money to a church "*to be laid out in bread yearly, for ten years, for the poor of the congregation;*" *Witman v. Lex*, 17 S. & R. 88; a devise to the poor of a particular county, or parish, or town; *State v. Gerard*, 2 Ired. Eq. 210; *Overseers v. Taylor*, Gilmer, 336; *Shotwell v. Mott*, 2 Sandf. Ch. 46; a devise to be applied to the "*dissemination of the gospel at home and abroad;*" *Attorney-General v. Wallace*, 7 B. Monr. 611; a bequest to the *New York Yearly Meeting of Friends called Orthodox, for the use of its ministers in straitened circumstances;*" *Shotwell v. Mott*, 2 Sandf. Ch. 46; a devise of real and personal estate to an unincorporated religious association, "*to be applied as a fund for the distribution of good books among poor people in the back part of Pennsylvania, or for the support of an institution or free school in or near Philadelphia;*" *Pickering v. Shotwell*, 10 Barr, 23: have all been supported as against the heir-at-law or next of kin.

School and educational purposes generally have been held to be charities. *Vidal v. Girard*, 2 How. S. C. 127; *Wright v. Linn*, 9 Barr. 433; *Hadley v. Hopkins's Academy*, 14 Pick. 240; *State v. McGowan*, 2 Ired. Eq. 9; *Griffin v. Graham*, 1 Hawks. 96. So of a legacy to a town for town purposes. *Coggeshall v. Pelton*, 7 J. C. R. 292; though see *Wheeler v. Smith*, 9 How. U. S. 55. So too fire companies, though unincorporated, are charities. *Magill v. Brown*, *Brightly's Rep.* 350; *Thomas v. Ellmaker*, 1 Pars. 98.

But a bequest for "*some promising young man of the Baptist order;*" *Hester v. Hester*, 2 Ired. Eq. 330; or to be applied to "*foreign missions and poor saints;*" *Bridges v. Pleasants*, 4 Ired. Eq. 26, is void for uncertainty. So in New York, a devise to a corporation not capable of taking, in trust to apply the rents and profits to the maintenance and support of "one or more worthy and moral persons of the age of sixty years and upwards, every one of whom shall be a resident, or live in a town or village, where there shall be at least one place or house of public worship," is void. *Ayres v. Methodist Church*, 3 Sandf. S. C. 135.

As to charitable uses in Virginia and Maryland, where the statute of Elizabeth is not recognised, see *Baptist Association v. Hart*, 4 Wheat. 1; *Dashiell v. Attorney-General*, 5 H. & J. 392; 6 H. & J. 1. *Literary fund v. Dawson*, 10 Leigh. 147; *Gallego v. Attorney-General*, 3 Leigh. 450; *Wheeler v. Smith*, 9 How. U. S. 55.

tees in their integrity and discretion may unanimously agree on:"(z) the court refused to enforce the trust. Upon the same principle it is now decided, that a gift to "private charity" is not such an one as can be recognised by the court:(a) although in some cases this does not seem to have been regarded as an objection to the trust.(b) And so "undertakings of public utility" is too general and vague a description to be enforced as a charitable trust.(c)

However a trust for "such religious and charitable institutions and purposes, as in the opinion of the testator's trustees should be deemed fit" is a valid charitable trust.(d) And so is a trust "for the benefit of such societies subscriptions or purposes (having regard to the glory of God in the spiritual welfare of his creatures), as the trustees shall in their discretion see fit."(e)

However in all these cases the declaration of trust, although incapable of taking effect in favor of the particular object, will nevertheless operate to exclude the trustee from taking the beneficial interest; and the trust will result to the heir-at-law or next of kin, unless the bequest be so framed as to fall into the residuary clause.(f)

In like manner where the gift is for a particular charitable purpose, *which is void as being contrary to the policy of the [134] law, we have seen, that if the property be devoted generally to charity, it will be applied, upon the failure of the particular purpose, under the direction of the royal sign manual.(g) This however will not be the case, where the particular object expressed appears to have been the only one contemplated by the testator, for then upon the failure of the particular trust, there will be a resulting trust for the donor or his heir-at-law or next of kin.(f)

Thus in *De Themmines v. De Bonneval*(g) a deed had been executed, by which it was declared, that a sum of stock, which had been transferred by the plaintiff into the joint names of himself and three other trustees, was in trust to pay the dividends to the plaintiff for life, and after his death to apply the same in printing and circulating a treatise, inculcating the supremacy of the Pope in

(z) *James v. Allen*, 3 Mer. 17.

(a) Vide post, *Ommaney v. Butcher*, T. & R. 270; *Nash v. Morley*, 5 Beav. 177.

(b) *Waldo v. Caley*, 16 Ves. 206; *Jemmitt v. Perril*, Ambl. 585, n.; *Johnston v. Swan*, 3 Mad. 457; *Horde v. Earl of Suffolk*, 2 M. & K. 59; See *Ellis v. Selby*, 1 M. & Cr. 292.

(c) *Kendall v. Granger*, 5 Beav. 300.

(d) *Baker v. Sutton*, 1 Keen, 224.

(e) *Townsend v. Carus*, 13 Law Journ. N. S. 169.

(f) *Morice v. Bishop of Durham*, 10 Ves. 522; *James v. Allen*, 2 Mer. 17; *Ommaney v. Butcher*, T. & R. 260; *Ellis v. Selby*, 1 M. & Cr. 286. [*Haywood v. Craven*, 2 Car. L. R. 557.]

(g) Vide supra, 130.

(f) Post.

(g) 5 Russ. 288.

ecclesiastical matters: and the deed contained a proviso, that if any court of law or equity should declare any of the trusts to be void, the trustees should hold the stock in trust for the plaintiff's executors and administrators. The cause came before Sir John Leach, M. R., who held the trusts after the plaintiff's death to be void as being contrary to the policy of the law. But his Honor considered that the subsequent proviso showed, that the gift was only for the particular purpose, and that there was no general intention to give to charity, and that the plaintiff was therefore entitled to have the stock retransferred to him.^(h)

And in another case where the testatrix directed several sums to be paid to certain Roman Catholic priests and chapels, that she might have the benefit of their prayers and masses. Sir C. Pepys, M. R., held that those legacies, though not within the statute of Edward VI., were void on account of the general illegality of their object; but that there was no gift to charity generally, for the intention of the testatrix was, not to benefit the priests or support the chapels, but to secure a supposed benefit for herself, and that the next of kin was therefore entitled.⁽ⁱ⁾

Where there is a gift of property to a corporation for the purpose referred to, but that purpose cannot be discovered, or is not expressed; although it is very improbable, that the gift to the corporation was in trust for a private person, yet the court cannot on that account presume, that the purpose so referred to was a trust for charity, to which the uncertainty of the object would be no objection; and the gift will therefore be void for uncertainty, and it will sink for the benefit of the residuary legatee, if there be one: or otherwise will result to the next of kin.^(k)

4th. The last description of resulting trusts, which now remains for our consideration, is; where a disposition of real or personal property fails altogether or partially, either from being void *ab initio*, or from becoming so from some subsequent event. In either of these cases, the trust, if not otherwise disposed of, will result for the benefit of the donor's heir-at-law, or next of kin.^(l)¹

^(h) *De Themmines v. De Bonneval*, 5 Russ. 288.

⁽ⁱ⁾ *West v. Shuttleworth*, 2 M. & K. 684, 698.

^(k) *Corporation of Gloucester v. Wood*, 3 Hare, 131.

^(l) 2 Jarm. Pow. Dev. 32; 1 Rop. Lega. 627. [*Dashiell v. Att.-Gen.*, 6 H. & J. 1; 5 H. & J. 392; *Hawley v. James*, 5 Paige, 318; *Lemmond v. Peoples*, 6

Ired. Ch. 137.]

¹ Where there has been a valuable consideration on a conveyance, there will be no resulting trust to the grantor, on the failure of the trust, even in the case of a charity. *Gibson v. Armstrong*, 7 B. Monr. 481; *Kerlin v. Campbell*, 3 Harris, (Penn.) 500.

[*135] *Thus where the gift is rendered void by statute; as for instance a disposition of real estate in favor of a Papist^(l) before the late acts for the relief of persons of that persuasion; or in violation of the Mortmain Acts,^(m) or the Thelluson Act (39 & 40 Geo. III. c. 98);⁽ⁿ⁾ or where the trusts are invalid at the time of their creation, or subsequently become so; as tending to a perpetuity;^(o) or where they fail by the death of the donee in the testator's lifetime;^(p) in all these cases the rule as stated above will apply, and a resulting trust will be created according to the nature of the property for the heir-at-law, or next of kin of the donor.

Where the interest which thus fails, is a partial or particular estate only, upon the determination of which subsequent remainders are limited; those remainders will not be accelerated by the failure of the preceding estate, but the beneficial interest in the property will result, as undisposed of, until the event happens, upon which the remainders are limited to take effect.¹

Thus where real estate was settled by deed, in trust after the death of the settlor for a Papist for life, with remainders over after his death. The life estate given to the Papist being void, the effect was, not that the remainders were accelerated, but that the rents and profits belonged to the settlor's heir-at-law during the life of the Papist, or real estate undisposed of.^(q)

And so where lands were devised to trustees for a term of years, to raise a sum of money for certain purposes (which became void for perpetuity), with remainders over after the raising of that sum, or the determination of the term; it was held by the House of Lords on appeal, that the trusts of the term resulted for the benefit of the heir.^(r)

And upon the same principle it has been decided, that where property is tied up by a series of limitations, and the income directed to be accumulated beyond the period allowed by the Thelluson Act (39 & 40 Geo. III. c. 98); the excess of accumulations, which is void, will not belong to the party, to whom the first estate in possession is

(l) *Carrick v. Errington*, 2 P. Wms. 361; *Davers v. Dewes*, 3 P. Wms. 43.

(m) *Att.-Gen. v. Lord Weymouth*, Amb. 20; *Jones v. Mitchell*, 1 S. & S. 294; *West v. Shuttleworth*, 2 M. & K. 684.

(n) *Eyre v. Marsden*, 2 Keen, 564; *McDonald v. Bryce*, ib. 276.

(o) *Tregonwell v. Sydenham*, 3 Dow. 194; *Leake v. Robinson*, 2 Mer. 363.

(p) *Ackroyd v. Smithson*, 1 Bro. C. C. 503.

(q) *Carrick v. Errington*, 2 P. Wms. 361.

(r) *Tregonwell v. Sydenham*, 3 Dow. 194.

¹ But a legacy to A. for life, with remainders over, does not lapse, on A.'s death in the testator's lifetime. *Dunlap v. Dunlap*, 4 Desaus. 303, 314; *Richmond v. Vanhook*, 3 Ired. Ch. 581. See *Mahomer v. Hooe*, 9 S. & M. 247.

limited, but will result as undisposed of to the heir-at-law or next of kin of the settlor according to the quality of the estate.(s)

A residuary bequest, it is well known, operates upon all the personal estate, of which a testator is possessed at his death, and consequently includes all bequests failing, either from their illegality, or from the death of the legatee in the testator's lifetime.(t)¹ "It must be a very peculiar case indeed," said Sir Wm. Grant, "in which there can be at once a residuary clause, and a partial intestacy, unless some part of the residue itself be ill given." (u)

*It follows therefore, that where the subject of the disposition, that fails, is personal estate, a resulting trust will arise [*136] for the next of kin, in those cases only, where there is no general residuary gift; or where it is the whole or part of *the residuary gift itself* that fails. And accordingly on examination of the cases, in which the next of kin have been held entitled to a void or lapsed bequest of personal estate, notwithstanding the existence of a residuary clause, it will be found, that in all of them the bequest, thus failing, formed part of the residue itself.(x)²

But previously to the recent statute 1 Vic. c. 26, a devise of real estate, though residuary in its terms, was in reality a mere specific disposition of the real estate, not before expressed to be given by the will.(y) Therefore if a devise of real estate, or any interest therein, failed on account of its being illegal, or lapsed by the death of the

(s) McDonald v. Bryce, 2 Keen, 276. Eyre v. Marsden, ib. 564; and S. C. 4 M. & Cr. 231.

(t) Jackson v. Kelly, 2 Ves. jun. 285; Brown v. Higgs, 4 Ves. 708; Cambridge v. Rous, 8 Ves. 12; Leake v. Robinson, 2 Mer. 363; Bland v. Bland, 2 J. & W. 406; Jones v. Mitchell, 1 S. & S. 298; 2 Wms. Exors. 896.

(u) In Leake v. Robinson, 2 Mer. 392.

(x) Skrymsher v. Northcote, 1 Sw. 566; McDonald v. Bryce, 2 Keen, 276; Eyre v. Marsden, ib. 564; [Woolmer's Est. 3 Whart. 479.]

(y) Howe v. Earl of Dartmouth, 7 Ves. 147; Broome v. Monck, 10 Ves. 605; Hill v. Cock, 1 V. & B. 175; 2 Jarm. Pow. Dev. 102; Cook v. Stationers' Comp. 3 M. & K. 262. [4 Kent, Comm. 541, &c. See in New York, Van Kleeck v. Dutch Church, 20 Wend. 458.]

¹ King v. Woodhull, 3 Edw. Ch. 79; Marsh v. Wheeler, 2 Edw. Ch. 156; Com. v. Nase, 1 Ashm. 242; Woolmer's Estate, 3 Whart. 479; Johnson v. Johnson, 3 Ired. Eq. 427; Taylor v. Lucas, 4 Hawks. 215; Bryson v. Nickols, 2 Hill. Ch. 113; Vick v. McDaniel, 3 How. Mis. 337; Hamberlin v. Perry, 1 Sm. & M. Ch. 589. Where a legacy is payable out of real estate, in consequence of a deficiency in the personal property, it will in case of a lapse go to the heir-at-law; otherwise, if the personal estate be sufficient. King v. Strong, 9 Paige, Ch. 94. See Van Kleeck v. Dutch Church, 20 Wend. 458.

² Where one of several residuary legatees dies during the lifetime of the testator, his legacy lapses for the benefit of the next of kin, and not for that of the other legatees. Floyd v. Barker, 1 Paige, Eq. R. 480; Frazier v. Frazier, 2 Leigh, 642. See Tripps v. Frazier, 4 H. & J. 446. But see Hogan v. Hogan, 3 Dana, 572.

devisee, the subject of such a devise would not pass by the residuary clause, however ample, but resulted to the heir-at-law.^(z) If the residuary devise itself were the subject of the lapse, that was of course *à fortiori* a case for a resulting trust in favor of the heir.^(a)

However the recent statute of 1 Vict. c. 26, has done away with this distinction between a residuary disposition of real and personal estate: the 24th Section of that act enacts, that every will made after the 1st of January, 1838, shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect, as if made at the death of the testator: And by the 25th section such real estate, or interest therein, as is comprised in any devise, in such will contained, which shall fail or be void or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

In future therefore a residuary devise of real estate will have the same effect in excluding the claim of the heir-at-law to a lapse or void devise, as a residuary gift of personal estate would have had on a similar claim on the part of the next of kin: and it becomes unnecessary to enter into the consideration of that long and intricate class of cases, which have arisen upon the conflicting claims on the part of the heir-at-law on the one hand, and the residuary legatees on the other, to gifts lapsing or becoming void; where it was doubtful whether the subjects of those gifts had so far been invested with the character of personal estate, as to pass by the residuary bequest.^(b)

Where the failure or lapse of a particular devise or bequest is an event expressly contemplated by a testator, and provided for by a gift by way of substitution to some other person, such a disposition will unquestionably exclude the claim of the heir-at-law or next of kin to take by resulting trust.^(c)

It is clear, that where the disposition, which fails, applies to a defined *and ascertained portion, or interest in the property, [*137] which is excepted and separated from the rest, and devoted to the purpose, which cannot take effect; the person taking the property, subject to the disposition so failing, will hold as a trustee for the heir-at-law or next of kin to the extent or during the continuance of the partial interest thus created: unless that interest is otherwise disposed of by the will.^(d)

(z) Cook v. Stationers' Comp. 3 M. & K. 262; Watson v. Earl of Lincoln, Ambl. 328; Oke v. Heath, 1 Ves. sen. 141; Cambridge v. Rous, 8 Ves. 25; Jones v. Mitchell, 1 S. & S. 290. [Van Kleeck v. Dutch Church, 20 Wend. 457; 6 Paige, 600; Ligan v. Carroll, 3 H. & McH. 333.]

(a) Eyre v. Marsden, 2 Keen, 564; Salt v. Chattaway, 3 Beav. 576.

(b) See 2 Jarm. Pow. Dev. 77, &c.

(c) Rose v. Rose, 17 Ves. 347; Price v. Hathaway, 6 Mad. 304.

(d) See the principle stated by Sir J. Leach, in Cooke v. Stationers' Comp. 3 M. & K. 264, 5.

Where however the gift is of a sum of money, which is directed to be raised out of the estate, and applied to certain purposes, which fail or cannot take effect: it frequently becomes a question of extreme nicety to determine, whether the charge has been so distinctly created by the testator and excepted from the *corpus* of the estate, as to convert the person taking the property into a trustee for the heir-at-law or next of kin to the extent of the charge; or whether the failure of the particular purposes declared shall enure for the benefit of the donee of the estate, so as to cause the charge to sink for his benefit.

It is at any rate clear, that where an estate is given charged with a sum of money upon a contingency, which does not happen, the charge sinks for the benefit of the donee.^(e) As in the case put by Lord Eldon^(f) of a devise of land to A., charged with a legacy to B., provided B. attain the age of twenty-one. Then the devise is absolute to A., if B. do not reach twenty-one. In that case the will is to be read, as if no such legacy were given, and the heir-at-law cannot come in, because the whole is given absolutely to the devisee.

However it seems, that if the contingency, on which the charge is to be raised, once happen, and the interest subsequently lapses: as in the case last put, if B. reached twenty-one, and then died in the testator's lifetime, the ordinary rule would prevail, and the heir would be entitled by a resulting trust.^(g)

It has been decided, that where there is an absolute gift of property, to which is annexed a *condition* to apply part of the property, or to pay a sum of money for an illegal purpose; there will be no resulting trust as to that portion, which is the subject of the condition, but the donee will take the whole absolutely for his own benefit.

Thus in a case where there was an absolute bequest of leaseholds, with a *condition* to assign part to a charity; it was contended, that the legatee was a mere trustee as to that part, and, the trust being void, that it belonged to the next of kin: but Sir John Leach, V. C., held, that it was the same, as if the illegal condition had been to pay a sum of money to a charity, in which case it was clear that the legatee would have retained the whole without payment of the money, and that therefore in the case in question he was entitled to retain the whole, without the assignment of a part.^(h)

However it seems very difficult upon principle to support any dis-

(e) Attorney-General v. Milner, 3 Atk. 112; Croft v. Slee, 4 Ves. 60. [Stone v. Massey, 2 Yeates, 369; Smith v. Wiseman, 6 Ired. Eq. 540.] (f) In Sydenham v. Tregonwell, 3 Dow. 212. (g) 2 Jarm. Pow. Dev. 43. (h) Poor v. Mial, 6 Mad. 32.

inction in favor of the donee, merely on the ground, that the particular trust, which fails, is created in the form of a *condition*. And [*138] this *difficulty is yet greater, when, as in *Poor v. Mial*, the condition is applied to a specified portion of the estate; for then that portion would seem to be necessarily excepted out of what is given to the donee, so as to be brought within the general rule as stated above. Where the condition is for the payment of a sum of money, the decision in favor of the donee taking absolutely would probably be supported upon the general doctrine laid down in *King v. Denison*, that such a condition operates, not as an *exception* out of the gift to him, but as a *charge* upon it.⁽ⁱ⁾

In *Bland v. Wilkins*,^(k) lands were given to E. N. in fee, *on condition* that her executors should pay 10*l.* to a charity, and Sir Thomas Sewell held, that the 10*l.* should go to the heir.^(k) Sir John Leach himself appears subsequently not to have adhered to his decision in *Poor v. Mial*, as to the effect of a gift upon an illegal condition, even where the condition was to pay a sum of money. In *Henchman v. Attorney-General*,^(l) there was a devise of copyholds in fee, *upon condition* that the devisee should within one month pay 2000*l.* to the executor to be applied for charitable purposes. The testator left no customary heir or next of kin, and Sir J. Leach, V. C. held, that the devisee took, *subject to the payment of the 2000*l.** which went to the crown, for want of an heir or next of kin.^(l)

This decision was afterwards reversed on appeal by Lord Brougham, C., who held that the devisee took the copyholds discharged of the legacy, on the ground that the court would not interfere against the devisee, to compel the performance of the condition *on behalf of the crown*, whatever it might do in support of a claim *by the heir-at-law*.^(m)

The case therefore as decided by Lord Brougham is certainly no authority on the general question between the devisee and heir-at-law; although it clearly establishes, that the *crown* or other *lord by escheat*, will not be entitled to a void or lapsed charge by virtue of a resulting trust, but that the devisee in such a case will hold as against those parties for his own benefit discharged from the trust.

It is clear, that if an estate be devised, *charged generally with legacies*; and any of the legacies fail, no matter how, there will be no resulting trust for the heir, but the devisee shall have the benefit

(i) See *Cooper v Stationers' Comp.*, 3 M. & K. 264.

(k) *Bland v. Wilkins*, 1 Bro. C. C. 61, n.

(l) *Henchman v. Attorney-General*, 2 S. & S. 498; and see *Cooke v. Sta-*

tioners' Comp., 3 M. & K. 266; where Sir J. Leach observes, "that a condition to pay legacies, is no more than a charge of the legacies."

(m) S. C. on Appeal, 3 M. & K. 435. [See *Taylor v. Haygarth*, 14 Simons, 8.]

of the failure.⁽ⁿ⁾ And this doctrine follows necessarily from the general principle. A general charge of legacies is in its effect only auxiliary to the personal estate; it is therefore uncertain what part, if any, of the devised estate will be required for satisfying the legacies, and such a disposition cannot operate to except and separate any particular portion of the estate from what is given to the devisee, so as to impress the gift of that portion with the character of a trust.^(o)

This reason does not seem to be applicable, where the legacies are charged *exclusively on the devised estates*; in which case the question, whether the devisee or heir-at-law will be entitled to the benefit of a *failure or lapse, must necessarily be governed by the same rules, which have been established with respect to other [*139] charges besides legacies.

With respect to the general question, whether charges becoming void or failing, belong to the heir or the devisee, Lord Eldon has stated the result of the decisions to be,—that if the estate is given to the devisees in such a way, that a charge is to be created by the act of another person, raising the question between that person and the devisees, the heir has no claim: but if the deviser himself has created the charge, and to the extent of that charge, the intention appears on the face of the will, not to give the estate to the devisees, it will to the extent of that charge, the particular object failing, go to the heir: a distinction, which his Lordship characterized “as extremely nice, perhaps not easy of application.”^(p)

It has been remarked by Mr. Jarman, that “even the adoption of this distinction with its acknowledged nicety, will not be found to reconcile all the cases, in which a deviser has himself created a specific definite charge on a devised estate in favor of another person.”^(q) But we will now proceed to consider some of the decisions on this subject: and first those in favor of the heir.

In *Arnold v. Chapman*^(r) a testator devised a copyhold estate to Chapman, “He causing to be paid to his executors the sum of 1,000*l.* ;” and after payment of debts and legacies, he devised the remainder of his estate to the Foundling Hospital. This being in effect a bequest of 1,000*l.* to the hospital out of the estate was void by the Statute of Mortmain, and a question arose, whether it should go to the heir, or sink for the benefit of the devisee. Lord Hardwicke decided, that the charge, being well made on the estate, but not well disposed of, was to be considered as part of the real estate undis-

(n) *Kennell v. Abbott*, 4 Ves. 811.

(q) 2 Jarm. Pow. Dev. 44.

(o) 2 Jarm. Pow. Dev. 44, 90.

(r) *Arnold v. Chapman*, 1 Ves. sen.

(p) In *Sidney v. Shelley*, 19 Ves. 108.

363. [Approved in *Shaeffer's Appeal*, 8 Barr, 42.]

posed of, and that the heir was therefore entitled by way of resulting trust.(r)

So in the case of *Bland v. Wilkins*,(s) which has been already mentioned, where there was a devise in fee on condition that the devisee's executors should pay 10*l.* to a charity, the bequest to the charity was held to result to the heir.(s)

The case of *Gravenor v. Hallum*,(t) which was decided in favor of the heir, arose upon the claim of the heir in opposition to that of the *residuary* devisees to void annuities given out of real estate. The particular devisees of the estate, out of which the payments were to be made, do not appear to have raised any claim for their own benefit; indeed in that case they were undoubtedly mere trustees.

In *Wright v. Row*,(u) the question seems to have arisen, but it does not distinctly appear from the report in *Brown*, what was the decision of the court, although the marginal note states it to have been in favor of the specific devisee.(u)

Legacies out of the produce of real estate which is directed to be sold, are to be regarded in the same light, and governed by the same rules as charges on the estate: therefore according to the general [*140] rule, where *such legacies are *excepted out of*, and not merely *charged* upon, the gift of the produce of the real estate, the heir and not the donee will be entitled to the benefit of a failure or lapse of the legacies; while on the contrary the donee and not the heir will be entitled, if the produce of the estate be given *subject to* or *charged with* the legacies that fail.(x)

Thus where there is a devise to trustees to sell, and out of the produce of the sale to pay legacies, which fail; and there is then a gift of the *residue* of the produce, or the residue *after payment* of the legacies to other devisees; those devisees will in no event take more than what remains over and above the amount of the legacies; and the amount of those legacies upon the failure of the original objects, will go to the heir-at-law by resulting trust.(y)

On the other hand, a series of decisions are to be met with in favor of the title of the devisee to take an interest, which lapses or fails, to the exclusion of the heir-at-law's claim by resulting trust.

Thus in *Jackson v. Hurlock*,(z) a testator devised lands to B. and her heirs, *charged* with the payment of any sum, not exceeding 10,000*l.*, to such persons as he by any writing should appoint. The

(r) *Arnold v. Chapman*, 1 Ves. Sen. 108.

(s) *Bland v. Wilkins*, 1 Bro. C. C. 61, n.

(t) *Ambl.* 643.

(u) *Wright v. Row*, 1 Bro. C. C. 61.

(x) *Cook v. Stationers' Comp.*, 3 M. & K. 264.

(y) *Hutcheson v. Hammond*, 3 Bro. C. C. 128; *Page v. Leapingwell*, 18 Ves.

463; *Gibbs v. Rumsey*, 2 V. & B. 294.

(z) *Jackson v. Hurlock*, *Ambl.* 487;

S. C. 2 Ed. 263.

testator by writing charged on the estate *inter alia* sums amounting to about 6,000*l.* to charitable uses. Lord Northington held that these void legacies must sink into the estate for the benefit of the devisee. It had been argued by counsel, he said, on a mistake, as if he intended at all events to take 10,000*l.* out of the estate, whereas he meant the reverse. A sum not exceeding 10,000*l.* had put a charge on the estate, which could not take place.(z)

In the case of *Barrington v. Hereford*,(a) and also in that of *Baker v. Hall*,(b) there was a devise of real estate *charged* with a yearly payment to charity, and in each case it was held, that the charge sunk for the benefit of the specific devisee. However it will be observed, that both those decisions were against the claim of the residuary devisees, and as the title of the heir does not seem to have come in question in either of those cases, they can neither of them perhaps be considered as an authority on the general question of the claim of the heir under such circumstances.(c)

But in *King v. Denison*,(d) as stated by Sir John Leach, M. R., in his judgment in *Cooke v. Stationers' Company*,(e) the testator devised her real estates subject to and chargeable with certain annuities for life, *but survived all the annuitants*; and Lord Eldon decided against the claim of the heir-at-law, holding that the devisees took the estate discharged of the annuities.

And in *Cooke v. Stationers' Company*,(e) where a testator devised his freehold and leasehold estates to his executors in trust, desiring, that they would sell so much as would purchase 10,700*l.* 3 per cent. consols; *and he then proceeded to give several legacies, among which was one of 2,500*l.* consols to the Stationers' [*141] Company, the interest thereof to be paid to his wife during her life, and one of 800*l.* to the parish of Beckenham, for charitable purposes; and he gave and devised to his wife the rest and residue of his estate, *on condition that all the legacies were paid*: the principal question was, whether those legacies being void should go to the heir-at-law or the devisee; and Sir John Leach after reviewing all the authorities, and stating the principle to be deduced from them, came to the conclusion, that those legacies were a charge upon and not an exception from the gift to the wife, and his Honor accordingly made a decree in favor of the wife.(f)

The case of *Henchman v. Attorney-General*,(g) and Lord Broug-

(z) *Jackson v. Harlock*, Ambl. 487; (d) 1 V. & B. 260.
S. C. 2 Ed. 263. (e) 3 M. & K. 266.

(a) 1 Bro. C. C. 61, n.; S. C. 3 Dow. (f) *Cooke v. Stationers' Comp.* 3 M.
212; and 4 Ves. 811. & K. 262.

(b) 12 Ves. 497.

(g) *Henchman v. Attorney-General*,

(c) See these cases considered in 2 2 S. & S. 498; and S. C. 3 M. & K. 485.
Jarm. Pow. Dev. 47, 9.

ham's decision of that case on appeal have been already considered; and we have seen, that the decision in that case in favor of the specific devisee against the claim of the crown or other lord by escheat, is no authority against the heir-at-law.(g)

In *Kennell v. Abbott*, (h) where a legacy which was given out of the produce of real estate directed to be sold, failed,—the decision was, that the property was absolutely converted into personal estate, and that the legacy therefore passed by the residuary gift. But Lord Alvanley observed, that “it is now settled, that if an estate is devised, charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it, and take the estate.”(h)

Amid these conflicting decisions, which all alike profess to be governed by the same general rule, it becomes extremely difficult to apply the general rule, so as to determine with accuracy, what would be considered an exception *out* of a gift, so as to entitle the heir in case of a lapse or failure, or what a mere charge *upon* the gift, which would sink for the benefit of the devisee.

The general intention to be gathered from the terms of the devise in each particular case will of course prevail. However the cases seem at any rate to decide, that where there is an express gift of an estate to a person *charged with*; or *subject to*; or *on condition of*; paying certain legacies, which lapse or are void; there will be no resulting trust in consequence of the failure, but the donee will be entitled to the benefit.(i)—Unless indeed there is a sufficient indication of a contrary intention: as where it appears, that the payment of the sum by the devisee at all events is the express condition on which the estate is given to him.(k)

But where the charges or legacies are in the *first place* expressly and distinctly made or given with directions to trustees for their appropriation, and payment, and *the remainder* of the estate is *then* given to *other devisees*; it seems that those devisees will take only what remains after the satisfaction of those charges, which must be raised for the benefit of the *heir-at-law, if the original ob-
[*142] jects contemplated by the testator cannot take.(l)(1)

(g) *Henchman v. Attorney-General*, 2 S. & S. 498; and S. C. 3 M. & K. 485.

(h) *Kennell v. Abbott*, 4 Ves. 811.

(i) *Jackson v. Hurlock*, Ambl. 487, and 2 Ed. 263; *King v. Denison*, 1 V. & B. 260; *Cooke v. Stationers' Comp.* 3 M. & K. 262; *Henchman v. Attorney-General*, ib. 493. [*King v. Mitchell*, 8 Peters, 326.]

(k) *Arnold v. Chapman*, 1 Ves. sen.

108; the circumstances of *Bland v. Wilkins* are not stated with sufficient minuteness, to enable any conclusion to be drawn from that case; see 1 Bro. C. C. 61, n.

(l) *Gravenor v. Hallam*, Ambl. 643; *Jones v. Mitchell*, 1 S. & St. 290; *Hutcheson v. Hammond*, 3 Bro. C. C. 128; *Gibbs v. Rumsey*, 2 V. & B. 294.

(1) The observations in the text are throughout based on the assumption that no distinction is to be made between charges void *ab initio*, and those failing by

Although the legacies be first expressly given, if there be a devise of the residue *charged with payment* of the legacies, it has been decided by *Cooke v. Stationers' Company*(*m*), that such a case comes within the first class of decisions stated above, and the legacies will sink for the benefit of the devisee.(*m*)

It is clear as a general rule, that where property real or personal is directed to be converted for purposes, which fail, either from being void *ab initio*, or by lapse, there will be no conversion of the interest thus becoming undisposed of, but that interest will result to the heir-at-law, if the subject of the direction be real estate, or to the next of kin, if it be personal estate.(*n*)

Thus where land is directed to be converted into money, and the produce applied to purposes, which are either illegal and void;(o) or which fail by lapse;(p) the trust will result as real estate to the heir-at-law, and not to the next of kin. And the same doctrine prevails with respect to legacies, charged on real estate, or given out of the produce of the sale, which fail from their illegality, or lapse.(q)

On the same principle money, given to be laid out in land for pur-

(m) 3 M. & K. 262.

v. Leslie, 3 Wheat. 583; Shaeffer's App.

(n) 2 Jarm. Pow. Dev. 75, 77. [See ante, 127 note.]

8 Barr, 42.]

(o) Howse v. Chapman, 4 Ves. 542; Gibbs v. Rumsey, 2 V. & B. 294; Eyre v. Marsden, 2 Keen, 564.

(q) Arnold v. Chapman, 1 Ves. sen. 108; Gravenor v. Hallam, Ambl. 643; Hutcheson v. Hammond, 3 Bro. C. C. 128; Page v. Leapingwell, 18 Ves.

(p) Cruse v. Barley, 3 P. Wms. 20; Williams v. Coade, 10 Ves. 500. [Craig

463; Jones v. Mitchell, 1 S. & S. 293. [Shaeffer's App. 8 Barr. 42.]

lapse. However the case of *Noel v. Ld. Henley* in the House of Lords would seem to be founded on a distinction of this nature, anomalous as it may appear. In that case Ld. Wentworth devised certain estates to trustees to sell, and out of the produce to pay amongst other sums the sum of 5,000*l.* to his wife, who afterwards died in the testator's lifetime; and after those purposes he directed the trustees to invest the residue upon certain trusts. One question was, whether the 5,000*l.* devolved upon the heir or next of kin, or belonged to the persons entitled to the residue. At the original hearing, Richards, C. B., held, that by the lapse the residuary devisees of the fund were entitled; and this decision was affirmed on appeal by the House of Lords. This case has been commented upon with great minuteness and ability by Mr. Jarman, who remarks, that neither *Hutcheson v. Hammond* nor any other decision was cited by Ld. Eldon or Ld. Redesdale in their judgments on this case in the House of Lords, although the principle of the decision is at direct variance with that established by *Hutcheson v. Hammond*, and the cases which follow it. However if the case of *Noel v. Ld. Henley* can stand as an authority consistently with the other line of cases, it has been remarked by Mr. Jarman, that it is introductive of this anomaly; that the gift of a residue of a fund, arising from real estate devised to be sold, includes specific sums out of that fund, void *in event* by the subsequent death of the devisee in the testator's lifetime, but not those, which are void *ab initio*. *Noel v. Ld. Henley*, 1 Dan. 322 and 211; S. C. 7 Pri. 240. And see 2 Jarm. Pow. Dev. 89, *et seq.*

poses which cannot take effect, will result to the next of kin, and not to the heir-at-law.(r) For as we have already seen, the doctrine established by *Chapman v. Fletcher*,(s) that money directed to be [*143] invested in land, and only *partially* disposed of, will result to the heir-at-law, will not be *extended to those cases, where there is a *failure* of the contemplated purpose.

So where real estate is directed to be sold, and the produce of the sale blended with the general personal estate, and the mixed fund is directed to be applied to purposes, which fail either wholly or in part, whether from lapse or from being originally void; the interest, thus becoming undisposed of, will result to the heir-at-law, so far as it is constituted by the real estate, and to the next of kin, so far as it is composed of personal estate.(t)

However if it appear from the will to have been the testator's intention, that the produce of his real estate directed to be sold, should for all purposes be considered as personal estate, the next of kin will be entitled to the whole benefit of the failure of a legacy given out of a mixed fund of real and personal estate, to the exclusion of the heir-at-law.(u)¹

Where the terms of a bequest render it doubtful, whether the purpose contemplated by the testator were illegal or not, evidence will be admitted for the purpose of establishing the legality of the bequest. But in such cases, the nature of the bequest must be such as of itself to create the presumption of its invalidity, as no evidence could be received for the purpose of *raising* such a presumption in

(r) *Durour v. Motteux*, 1 Ves. 320; (t) *Ackroyd v. Smithson*, 1 Bro. C. Mogg v. Hodges, 2 Ves. 52; Cogan v. C. 503; *Amphlett v. Parke*, 2 R. & M. Stephens, 1 Beav. 482, n.; *Hereford v.* 221; *Johnson v. Woods*, 2 Beav. 409; *Ravenhill*, id. 481; *Giblett v. Hobson*, 5 Salt v. *Chattaway*, 3 Beav. 576. Sim. 651; and 3 M. & K. 517.

(u) *Durour v. Motteux*, 1 Ves. sen. 108; *Phillips v. Phillips*, 1 M. & K. 649.

¹ See *Craig v. Leslie*, 3 Wheat. 383; *Burr v. Sims*, 1 Whart. 263. So where the proceeds of realty are directed to be divided for the general purposes of the will, as for instance, to form with the personalty a common fund, for all the purposes of the will, though it should happen, that some of them fail, it will be considered an absolute conversion. *Burr v. Sims*. But an express provision that the proceeds shall constitute a fund of personal property, and a direction that they should not in any case lapse, or will not exclude the heir as to an *undisposed of* surplus. *Fitch v. Weber*, 6 Hare, 145; *Attorney-General v. Henchman*, 2 R. & M. 221; *Gordon v. Atkinson*, 1 De G. & Sm. 478. *Phillips v. Phillips*, 1 M. & K. 649, above cited, was disapproved in these cases, and expressly overruled in *Taylor v. Taylor*, before the Lord Chancellor, 17 Jurist, 585. There the testator had directed his real estate to be sold, the proceeds to be joined to the personalty, and divided among certain nephews. One of these died after the date of the will, but before the testator's death, and it was held that his share went to the heir-at-law and not the next of kin. See also *Flint v. Warren*, 16 Sim. 124; 12 Jur. 810.

the first place. On this account the *onus probandi* will always rest on the parties, seeking to support the bequest, to rebut the presumption, that exists against it.(x)

*CHAPTER II.

[*144]

TRUSTEES BY VIRTUE OF A CONSTRUCTIVE TRUST.

WHEREVER the circumstances of a transaction are such, that the person, who takes the legal estate in property, cannot also enjoy the beneficial interest, without necessarily violating some established principle of equity; the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who in equity are entitled to the beneficial enjoyment.

These constructive trusts may be separately considered under two distinct classes of cases: one where the acquisition of the legal estate is tainted with fraud either actual or equitable. And the other, where the trust depends upon some general equitable rule, independently of the existence of fraud.(1)

I.—WHERE THE ACQUISITION OF THE LEGAL ESTATE IS AFFECTED WITH FRAUD.

In cases of fraud, whether constructive or actual, courts of equity have adopted principles extremely broad and comprehensive in the application of their remedial justice: and especially where there is any fraud affecting the acquisition of property, they will interfere and administer a wholesome justice, and sometimes even a stern justice in favor of innocent persons, who are sufferers by it without any

(x) *Giblett v. Hobson*, 3 M. & K. 517.

(1) "There is one good, general, and infallible rule, that goes to both these kinds of trusts. It is such a general rule, as never deceives; a general rule, to which there is no exception; and that is this: the law never implies, the court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for, if the chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate. And so at last every case in court will become *casus pro amico*." Per Lord Nottingham in *Cook v. Fountain*, 3 Swanston, 585.—T.

fault on their own side. And this is readily done by converting the offending party into a trustee¹ and making the property itself subservient to the proper purposes of recompense by way of equitable trust.(a)(1)

(a) 1 Story Eq. Jur. § 184, &c., [Robertson v. Robertson, 9 W. 32. See Peebles v. Reading, 8 S. & R. 492.]

(1) A deed may be avoided at common law on the ground of its being obtained by fraud; and indeed the question of fraud or no fraud in obtaining a will of real estate can be tried in a court of law only. The jurisdiction of courts of equity, therefore, in cases of fraud is merely concurrent with that of the courts of law. But the proceedings in courts of equity are much better adapted for the investigation and trial of such questions; and there are many cases of fraud, wholly beyond the reach of courts of law, of which equity will take cognizance. The consideration of these questions therefore, with the exception of wills, is in practice almost exclusively vested in the Court of Chancery. 3 Bl. Comm. 431; 1 Fonbl. Eq. B. 1, Ch. 2, s. 3; 1 Mad. Ch. Pr. 341; 1 Stor. Eq. Jur. § 184. [See note,(1) post, 150.]

A *feme covert* is answerable for an act of fraud in a court of equity, as much as if she were a *feme sole*. Jones v. Kearney, 1 Dr. & W. 134, 167. [So where an infant represented himself to another to be of full age, and executed a release on which the latter acted; it was held that he could not afterwards impeach the release on the ground of his minority. Wright v. Snowden, 2 De G. & S. 321. See Stoolfoos v. Jenkins, 12 S. & R. 399 *accord*. An infant may, it seems, be bound by an equitable estoppel. Hall v. Timmons, 2 Rich. Eq. 120; so of a *feme covert*. Davis v. Tingle, 8 B. Monr. 539. But at law a contract entered into through fraud of an infant cannot be enforced. Conroe v. Birdsall, 1 John. Cas. 127; Burley v. Russell, 10 N. H. 184; Brown v. Dunham, 1 Root. 272. Though the infant may perhaps be liable in an action of deceit. Fitts v. Hall, 9 N. H. 441.]

¹ In Massachusetts, where there is no distinct equitable jurisdiction on the ground of fraud, the court cannot, in order to give relief, convert a fraud into a trust, and thus support a bill in equity. Mitchell v. Green, 10 Metcalf, 101; Whitney v. Stearns, 11 Metcalf, 319. Where, however, the question of fraud arises incidentally in a matter of which the court has cognizance, it may proceed to inquire into and decide the same. *Ibid*. Goodrich v. Staples, 2 Cush. 258.

It may be here remarked, that the right to set aside a conveyance obtained by fraud, is not a mere right of entry, but constitutes an equitable estate in the land, and is therefore devisable. Stump v. Gaby, 22 L. J. Ch. 352. In this case, which was that of a conveyance obtained by an attorney, and a subsequent devise to him by way of confirmation by the grantor, the Chancellor, Lord St. Leonards says, "What then is the interest of a man in an estate which he has conveyed to an attorney in a manner in which the attorney cannot maintain it? In the view of this Court he is still owner of the estate, subject to the repayment to the attorney of the money he has received; and the consequence is that he may devise the estate as an equitable estate." This question of course could not arise in any state, where, as in Pennsylvania, (McKissick v. Pickle, 4 Harris, 140), rights of entry of all kinds are devisable. The principle of Stump v. Gaby, is, *a fortiori*, applicable to constructive trusts "in the absence of fraud" (see post, page 170, &c.), such as the equitable interest of a purchaser under a contract of sale of land, which it is well settled may be assigned or devised. Malin v. Malin, 1 Wend. 625; Clapper v. House, 6 Paige, 149; Cogswell v. Cogswell, 2 Edw. Ch. 231.

*The court has never ventured to lay down as a general proposition, what shall constitute fraud ;(b) nor can any invariable rule be established on this point. Fraud is infinite, and were the court to lay down rules, how far it would go in extending relief against it, the jurisdiction would be cramped, and perpetually excluded by new schemes, which the fertility of man's invention would contrive. Therefore if a case of fraud, or presumption of fraud, should arise, to which no case previously decided, or even no principle already established, can be applied, a new principle would be established to meet the fraud ; as the principles, on which former cases have been decided, have been from time to time established, as fraud contrived new devices.(c) [*145]

However, we will now proceed to consider some of the principal cases, in which a constructive trust has been established on the ground of fraud.

In *Chesterfield v. Jansen*,(d) Lord Hardwicke distinguished the cases of fraud, against which the court will relieve, into four classes. 1st, Fraud, arising from facts and circumstances of imposition, which is the plainest case. 2d, Fraud, apparent from the intrinsic value, and subject of the bargain itself ; such as no man in his senses, and not under delusion would make on the one hand, and as no honest or fair man would accept on the other. 3d, Fraud, which may be presumed from the circumstances, and condition of the parties contracting : a rule which is wisely established by the court to prevent taking surreptitious advantage of the weakness or necessity of another. And 4th, Fraud, collected from the circumstances of the transaction, as being an imposition or deceit upon other persons not parties to the fraudulent agreement.(d)

We will now proceed cursorily to consider these several species of fraud, so far as they bear on the subject now under discussion. And 1st, Of fraud arising from facts or circumstances of imposition.

Wherever a person is entrapped into the execution of an instrument through a conspiracy or combination for that purpose, or by surprise, oppression, intimidation, or any other practice at variance with fair dealing ; that clearly comes within the first and plainest class of cases for equitable relief ; and the court will not suffer the parties to avail themselves of the legal rights thus acquired, but will interpose and give redress.(e)

(b) Per Lord Eldon in *Mortlock v. Buller*, 10 Ves. 306 ; *Lawley v. Hooper*, 3 Atk. 279.

(c) 1 Mad. Ch. Pr. 341, 3d ed.

(d) *Chesterfield v. Jansen*, 2 Ves. 155. [*Hinchman v. Emans*, Saxt. Ch. 100.]

(e) *Earl of Bath and Montague's case*, 3 Ch. Ca. 56 ; *Bennet v. Wade*, 2 Atk. 324 ; *Neville v. Wilkinson*, 1 Bro. C. C. 546 ; *Evans v. Llewellyn*, 1 Cox, 340 ; *Willan v. Willan*, 16 Ves. 82 ; 1 Fonbl. Eq. B. 1, Ch. 2 ; 1 Mad. Ch. Pr. 342, &c. ; *Barnes v. Powell*, 1 Ves.

And so where a deed, or other instrument conveying an interest in property, however formally and solemnly it may be executed, is obtained by means of some misrepresentation, or concealment of facts, or more strongly still, by both of those means together; the party [*146] taking under such an instrument *will be treated as a trustee for the person, whom he has thus fraudulently induced to execute it; and at the suit of the injured party the instrument will be decreed to be delivered up, and a reconveyance executed.(f)

It has been laid down, that this equitable relief will be equally administered, whether the fraud consist of a positive misrepresentation, or of a wilful concealment of fact, whether it be by *suggestio falsi* or *suppressio veri*.(g) But first of those cases, where there has been *suggestio falsi*.

Where the devisee under a will, which was defectively executed, represented to the heir, that the will was duly executed, and thus induced the heir to execute a deed of conveyance of the devised estates to him for a small pecuniary consideration, the court relieved against the effects of the conveyance on the ground of the fraud.(h) So where an executor obtained a release from a legatee by means of a false representation to the legatee, that she had no legacy, the release was set aside.(i)

And on the same principle, the court will not recognise an interest under a contract which has been acquired by means of a false statement, that the party was acting for another person; if it be proved that the false statement induced the other party to enter into the contract, or occasioned him any loss or inconvenience.(k)

In like manner, where a party had obtained an agreement for an exchange of estates by a false representation as to part of the property, that the tenants consented to the exchange; it was held by

289; *Bridgman v. Green*, 2 Ves. 627; *Matthew v. Hanbury*, 2 Vern. 187; *Say v. Barwick*, 1 V. & B. 195; *How v. Weldon*, 2 Ves. 517. [Smith v. Richards, 13 Pet. 26; *Torrey v. Buck*, 1 Green, Ch. 366.]

(h) *Broderick v. Broderick*, 1 P. Wms. 239.

(f) 1 Fonbl. Eq. B. 1, C. 2; 1 Mad. Ch. Pr. 348; Mitf. Eq. Pl. 128, 4th ed.; 1 Story Eq. Jur. § 187, &c. [*Boyce v. Grundy*, 3 Pet. U. S. 210; *Lewis v. McLemore*, 10 Yerg. 206; *Spence v. Daren*, 2 Alab. 251; *Pitts v. Cottingham*, 9 Porter, 671; *Harris v. Williamson*, 4 Heyw. 124. See *Tyler v. Black*, 13 How. U. S. 231.]

(i) *Jarvis v. Duke*, 1 Vern. 19; and see *Murray v. Palmer*, 2 Scho. & Lef. 474; *James v. Greaves*, 2 P. Wms. 270; *Horseley v. Chaloner*, 2 Ves. 83.

(k) *Phillips v. Duke of Bucks*, 1 Vern. 227; *Harding v. Cox*, ib. n.; *Scott v. Langstaffe*, Lofft, 797, 8, cited *Fellows v. Lord Gwydyr*, 1 Sim. 63; S. C. 1 R. & M. 83; see 1 Sugd. V. & P. 211, 9th ed.

(g) *Jarvis v. Duke*, 1 Vernon, 19; *Broderick v. Broderick*, 1 P. Wms. 239.

Sir Thomas Plumer, M. R., that the agreement was altogether vitiated by this misrepresentation.^(l)(1)

It was decided moreover by this last case, that where a fraudulent misrepresentation applies to part only of the subject-matter of a transaction; the party affected with the fraud cannot support the transaction as to the remaining parts, but the fraud will operate, if at all, to vitiate and destroy the contract *in toto*.^(m)

It seems to be immaterial whether the misrepresentation be made with full knowledge of its being false, or in ignorance whether it be true or false; in either case, if it had the effect of deceiving the other party, it will equally affect the conscience of the party, by whom it is made;⁽ⁿ⁾ and it has even been decided to be immaterial, that the false statement is made innocently and by mistake, if the falsehood has been the inducement to the other party to act.^(o)¹

*The misrepresentation may be equally a matter of equitable cognizance, whether it be by deeds as by words; by artifices to mislead, or by positive assertions. A court of equity, said Lord Thurlow, would make itself ridiculous if it permitted a distinction between the two cases.^(p) [*147]

However it is not every misrepresentation, even though wilful or fraudulent, that will go to the extent of avoiding a conveyance or agreement: nor is it fitting; as that would occasion great uncer-

(l) *Clermont v. Tasburgh*, 1 J. & W. 112. (p) *Neville v. Wilkinson*, 1 Bro. C. C. 546; see *Chesterfield v. Jansen*, 2

(m) S. C. 1 J. & W. 120; but see *Ves.* 155; 1 Story Eq. Jur. § 192; *Huguenin v. Basely*, 14 *Ves.* 273. [See

(n) *Ainslie v. Meddicott*, 9 *Ves.* 21. *State v. Holloway*, 8 Blackf. 45.]

(o) *Pearson v. Morgan*, 2 Bro. C. C.

385; *Burrowes v. Lock*, 10 *Ves.* 470.

(1) In the case of *Turner v. Harvey* it was observed by Lord Eldon, that although a purchaser is not bound to give to a vendor information as to the value of the property, yet "if a word, if a single word be dropped, which tends to mislead the vendor, that principle will not be allowed to operate." *Turner v. Harvey*, Jac. 178.

¹ *Hough v. Richardson*, 3 Story, 659; *Harding v. Randall*, 15 Maine, 332; *Lewis v. McLemore*, 10 Yerg. 206; *Turnbull v. Gadsden*, 2 Strob. Eq. 74; *Roosevelt v. Fulton*, 2 Cow. 129; *Smith v. Babcock*, 2 Wood. & M. 246; *Thompson v. McCann*, 4 B. Monr. 601; *Lockridge v. Foster*, 4 Scamm. 570; *Hunt v. Moore*, 2 Barr, 105; *Joice v. Taylor*, 6 G. & J. 54; *Smith v. Richards*, 13 Pet. 26; *Champlin v. Leighton*, 6 Paige, 189. It is not material that the misrepresentation was merely by an agent (*Fitzsimmons v. Joslin*, 21 Verm. 129; *Brooke v. Berry*, 2 Gill. 83); or by a partner. *Blair v. Bromley*, 2 Phillips, Ch. R. 354; 11 Jur. 617. But if the agreement be fair between the parties, it is not invalid because brought about by a third person with the intent of benefiting himself. *Bellamy v. Sabine*, 2 Phill. Ch. 425. In the case of a written contract, *parol* representations, though erroneous, if made *bona fide*, must have been inserted in the instrument to be relieved against. *Turner v. The Navigation Co.*, 2 Dev. Eq. 236.

tainty. The fact misrepresented must be something material, and such as goes to the essence of the contract.(q) Moreover the truth or falsehood of the representation must lie *exclusively* within the knowledge of the person, by whom it is made; and it must have the effect of deceiving the other party into the transaction. Thus where the subject of the misrepresentation is merely a matter of opinion, as for instance as to the value of the property; or facts which lie equally within the knowledge of both parties; or statements, which it is mere folly on the part of a vendor to give credence to; for instance the amount, which other parties would give for the property, or other similar assertions; the court will not interfere to relieve a party from the consequences of his own folly or carelessness.(r)¹

It is to be observed, that the effect of misrepresentation in vitiating a transaction has been most frequently considered in suits *by the fraudulent persons for the specific performance of agreements*, which had been obtained by the misrepresentations of the plaintiffs themselves. It is an universal rule, that a party coming into equity to enforce a specific performance, must appear with clean hands; and very slight proof of improper conduct, in obtaining the agreement, will be sufficient for the court to refuse to enforce its execution.

But where the court is required to interfere actively against the legal or equitable rights of a party, claiming under a deed or agreement, a much stronger case must be established; and the subject and extent of the false representation, as well as its other circumstances and consequences, must be such, as according to the foregoing observations will clearly and unequivocally amount to a case of fraud.(s)

It is undoubtedly true that a concealment of facts, or *suppressio veri* will not of itself constitute so strong a case of fraud as where there has been *suggestio falsi*. Thus in the ordinary relation between a vendor and purchaser, it has been decided, that the mere

(q) 1 Fonbl. Eq. Ch. 2, s. 8; 1 Stor. Madd. Ch. Pr. 349; 1 Sugd. V. & P. 6; Eq. Jur. § 191, 195. [Hough v. Richardson, 3 Story R. 659; and see Morris Canal v. Emmett, 9 Paige, Ch. 168; Turnbull v. Gadsden, 2 Strobb. Eq. 14.]
 (s) Willan v. Willan, 16 Ves. 83; Cadman v. Homer, 18 Ves. 10; Mortlocke v. Buller, 10 Ves. 292.

¹ See 4 Kent. Comm. 483; notes to Woollam v. Hearne, 2 Lead. Cas. Eq. part i, 541; Warner v. Daniels, 1 W. & M. 90; Hough v. Richardson, 3 Story, 659; Eldridge v. Jenkins, Id. 181; Bell v. Henderson, 6 How. (Miss.) 311; Best v. Blackburne, 6 Litt. 51; Glasscock v. Minor, 11 Mis. 655; Jazin v. Toulmin, 9 Alab. 662; Smith v. Richards, 13 Pet. 26; Speiglemyer v. Crawford, 6 Paige, 254; Hutchinson v. Brown, 1 Clark, 408. Misrepresentations of value may sometimes become material, at least in resisting specific performance; (Best v. Stow, 2 Sand. Ch. 298; and see Tyler v. Black, 13 How. U. S. 231; Spalding v. Hedges, 2 Barr, 240;) or where there is a fiduciary relationship between the parties. Spence v. Whittaker, 3 Port. 297.

concealment by the purchaser of a fact, tending materially to enhance the value of the property, as for instance the existence of a mine, will not of itself avoid the transaction as fraudulent; although, as has been observed by Lord Eldon, a word, a single word, tending to mislead the vendor, will have that effect.(t)

But where the concealment amounts to a wilful suppression of facts by a party for his own benefit, and the consequent [*148] injury of another, under *circumstances, which render it his duty to have disclosed those facts to the other party, and in respect of which he could not innocently have remained silent, it is beyond all question, that such undue concealment will amount to a case of fraud, against the consequences of which the injured party will be relieved by a court of equity.(u)¹

Thus where a party, in treating for a purchase of a reversion after the determination of two estates for life; carefully suppressed the fact of the death of one of the tenants for life, and by that means obtained a much better bargain, Lord Eldon set aside the purchase.(x)

(t) *Fox v. Macreth*, 2 Bro. C. C. 420; *Turner v. Harvey*, Jac. 178; 1 Sugd. V. & P. 6. [*Bowman v. Bute*, 2 Bibb, 47; *Bean v. Herrick*, 3 Fairf. 262.] *Gordon v. Gordon*, 3 Swanst. 470, 7; *Bowles v. Stuart*, 1 Sch. & Lef. 209; *Turner v. Harvey*, Jac. 169; *Maddeford v. Austwick*, 1 Sim. 89; 1 Mad. Ch. Pr. 351; 1 Story Eq. Jur. § 204, 7.

(u) *Fox v. Macreth*, 2 Bro. C. C. 420; (x) *Turner v. Harvey*, Jac. 169.

¹ See *Halls v. Thompson*, 1 S. & M. 443; *Young v. Bumpass*, 1 Freem. Ch. 241; *Torrey v. Buck*, 1 Green, Ch. 366; *White v. Cox*, 3 Heyw. 79; *Topling v. Dooley*, 1 Yerg. 290; *Napier v. Elam*, 6 Yerg. 108; *Snelson v. Franklin*, 6 Munf. 210. It is difficult to define within what limits a concealment of material facts will be fraudulent. Mr. Justice Story, (Eq. Jurispr. § 207,) states it to be "the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate to the other: and which the latter has a right not merely in *foro conscientie*, but *juris et de jure*, to know;" and see *Laidlaw v. Organ*, 2 Wheat. 178. Chancellor Kent in an earlier edition of his Commentaries (2 Kent, 482) advanced the broader doctrine, "that each party is bound to communicate to the other his knowledge of material facts, provided he knows him to be ignorant of them, and they be not open or naked." This opinion he however subsequently modified. See the remarks in *Hall v. Thompson*, 1 Sm. & M. 482. In *Bowman v. Bates*, 2 Bibb, 47, 52, which was a bill to rescind a contract of sale, it appeared that the purchaser had discovered on the land of the vendor a salt spring, which greatly enhanced its value; that he had prevented the agent of the vendor (who was his brother) from giving information of the fact to his principal, and had concealed the discovery by various artifices. The Court of Appeals, Clarke, J., dissenting, held that the fraudulent concealment avoided the contract. This case comes very near that put by Lord Thurlow in *Fox v. Macreth*, of the mine discovered by the purchaser.

In order, however, to set aside a contract on the ground of fraudulent concealment, there must be direct personal fraud; no case of constructive notice, as through an agent, of the fact alleged to be concealed, can be set up. *Wilde v. Gibson*, 12 Jur. 527; 1 H. L. Cas. 605.

And in another case where the younger of two brothers disputed the legitimacy of the elder, an agreement between them for the division of the family estates was rescinded by the same eminent judge: the younger brother having been apprized at the time of the agreement, that the parents had been married before the birth of the elder brother, and not having communicated that fact to the elder brother.(y)

And in a later case a purchase by a managing partner of his copartner's share for a sum, which he knew to be inadequate from accounts which were in his possession, but which he did not communicate to his copartner, was set aside by the Vice-Chancellor (Sir John Leach), on the ground of fraud, and the decision was affirmed on appeal by Lord Brougham, C.(xx)

Where the parties to a transaction stand in a fiduciary relation the one to the other,—for instance where, as in the last two cases, they are members of the same family, or copartners,—the obligation to disclose material facts becomes more imperative, and the fraud of concealment proportionably more odious.(yy)

Imperfect information, given in a way calculated to produce a false impression, is equivalent to concealment. "He," says Lord Eldon, "who undertaking to give information, gives but half information, in the doctrine of this court conceals."(z)

The rules, which we have already seen to have been established with respect to cases of misrepresentation; viz., that the false statements must be of such facts as are material, and do not lie within the knowledge of the other party, and must have the effect of deceiving him into the transaction, apply *à fortiori* to cases of suppression or concealment.

Upon the same principle, where a party executes a conveyance or release, which is founded on entire ignorance or mistake of his rights, even though no fraudulent suggestion or practice be made use of to induce him to act, a court of equity will consider it to be against conscience to take advantage of the party's ignorance, and will relieve against the effects of the instrument. Thus in the case put by the Lord Chancellor in *Pusey v. Desbouverie*, if an heir-at-law through ignorance of his right to a lapsed devise convey away for a trifling consideration the estate, which is the *subject of the lapse, [*149] the conveyance would not be suffered to stand good: and

(y) *Gordon v. Gordon*, 3 Sw. 400.

(xx) *Maddeford v. Austwick*, 1 Sim. 89; S. C. on appeal, 2 M. & K. 279; and see *Popham v. Brooke*, 5 Russ. 8.

(yy) See *Gordon v. Gordon*, 3 Sw. 470, 7; *Cocking v. Pratt*, 1 Ves. 401.

[*Ogden v. Astor*, 4 Sandf. S. C. 312; *Farnum v. Brooks*, 9 Pick 234. So in the case of solicitor and client; *Higgins v. Joyce*, 2 Jones & Lat. 282.]

(z) In *Walker v. Symonds*, 3 Sw. 73.

many other instances in which this relief has been administered might be adduced.(a)

The equity in favor of the injured party will of course be stronger, where the person in whose favor the instrument is made, is possessed of more information as to the rights of the other party, than that party himself; for that would amount to a case of *suppressio veri*: (b) but it has been decided, that the same relief will be administered where both parties are in an equal state of ignorance.(c)

However it has been held in some cases, that where a transaction is founded on mutual ignorance or mistake, not of *fact* but of *law*, the court will not relieve the parties from the consequences: although it is extremely difficult to define with accuracy, what will be a mistake of law, and what one of fact, so as to reconcile those cases with the other decisions.(d) Where the object of a mutual conveyance under such circumstances is to arrange family quarrels, the court will do its utmost to support it, and will be very reluctant to disturb the arrangement solely on the ground of mere ignorance or mistake.(e)¹

Where a person is in the situation of a *bona fide* purchaser without notice, and has given the full value for the estate, it is clear, that ignorance or mistake of their rights on the part of the vendors, will not be suffered to turn to the prejudice of the purchaser, so as to convert him into a trustee.(f)

- (a) *Turner v. Turner*, 2 Ch. Rep. 81; *M'Carthy v. Decaix*, 2 R. & M. 622; *Pusey v. Desbouverie*, 3 P. Wms. 316; *Goymour v. Pigge*, 13 L. J. Ch. 322; *Bingham v. Bingham*, 1 Ves. 126; (c) *Willan v. Willan*, 16 Ves. 72; *Ramsden v. Hylton*, 2 Ves. 304; *M'Carthy v. Decaix*, ubi sup.; *Landsdowne v. Landsdowne*, Mose. 364; S. C. 2 J. & W. 205. (d) *Pullen v. Ready*, 2 Atk. 587, 591; *Ingham v. Child*, 1 Bro. C. C. 92; *Mildmay v. Hungerford*, 2 Vern. 242. [*Freeman v. Cook*, 6 Ired. Eq. 378.] (e) *Stockley v. Stockley*, 1 V. B. 23; *Gordon v. Gordon*, 3 Sw. 400; *Neale v. Neale*, 1 Keen, 672. [*See Hoghton v. Hoghton*, 12 Eng. L. & Eq. 139.] (b) *Cocking v. Pratt*, 1 Ves. 400; (f) *Molden v. Mennill*, 2 Atk. 8.

¹ A court of equity does not in general relieve for mistake of law. *Hunt v. Rousmaniere*, 1 Pet. S. C. 1; *Lyon v. Rich*, 2 J. C. R. 60; *Story Eq. Jur.* § 136, where is a full discussion of the cases; *Brown v. Armistead*, 6 Rand. 594; *Wintermute's Exr. v. Snyder's Administr.* 2 Green, Ch. 498; *Hinchman v. Eman's Adm. Saxt.* Ch. 100; *Gunter v. Thomas*, 1 Ired. Eq. 199; *Ferguson v. Ferguson*, 1 Geo. Dec. 135. Where, however, in a case in Kentucky the mistake was shown to be that of the party's counsel, he was relieved. *Fitzgerald v. Peck*, 4 Littell, 127. As to mistake in compromises, see *Currie v. Steel*, 2 Sandf. S. C. 542; *Bradley v. Chase*, 22 Maine, 524; and notes to *Stapilton v. Stapilton*, 2 Lead. Cas. in Eq. part ii. p. 265.

It is almost unnecessary to state, that in all these cases the fraudulent transaction will be binding on the guilty party himself; for no person is allowed to take advantage of his own fraud.

And a court of equity in decreeing relief in these cases always puts the party relieved upon the terms of returning any consideration or other benefit, which he may have derived from the fraudulent transaction, and this rule proceeds upon the most obvious principle of equity. Upon this ground therefore, where a party, who seeks to set aside a transaction on the ground of fraud, has so dealt with the property, as to render it impossible to replace the other party in the same condition, that he was in previously, the suit will be dismissed.^(h)¹

Upon the same principle of constructive fraud, a court of equity will interpose in cases, where a conveyance is so framed by mistake as to include property, to which it was not intended to apply. The court in such cases considers it unconscionable and fraudulent for the purchaser to take advantage of the mistake, and will not suffer him [*150] to assert a claim to the *possession of that, which he never bought, and which he was never intended to take.⁽ⁱ⁾

It is to be observed, that the Court of Chancery has no jurisdiction to entertain a question of fraud in obtaining a will, which where it relates to real estate, belongs to the consideration of a court of law;^(k) and if to personal estate, is exclusively decided upon in the

(h) *Anglesey v. Annesley*, 1 Bro. P. C. 289; see *King v. Hamlet*, 2 M. & K. 481.

(i) *Ramsden v. Hylton*, 2 Ves. 304; *Beaumont v. Bramley*, T. & R. 52; *Marquis of Exeter v. Marchioness of Exeter*, 3 M. & Cr. 321; *Lindo v. Lindo*, 1 Beav. 496; see *Underhill v. Horwood*, 10 Ves. 225. [*Richardson v. Bleight*, 8 B. Monr. 580; *Whaley v. Elliot*, 1 A.

K. Marsh, 343 (but see *Hyne v. Campbell*, 6 Monroe, 280); not however against a *bona fide* purchaser, *Whitman v. Weston*, 30 Maine, 285.]

(k) *James v. Greaves*, 2 P. Wms. 270; *Webb v. Claverden*, 2 Atk. 424; *Bates v. Graves*, 2 Ves. jun. 287; *Pemberton v. Pemberton*, 13 Ves. 297; but see *Goss v. Tracy*, 1 P. Wms. 288; S. C. 2 Vern 700.

¹ *Daniell v. Mitchell*, 1 Story, 173; *Harding v. Handy*, 11 Wheat. 103; *Dower v. Fortner*, 5 Porter, 9; *Jones v. Wing*, Harringt. Ch. 301; *Brogden v. Walker*, 2 H. & J. 285; *Martin v. Broadus*, 1 Freem. Ch. 35; *Waters v. Lemmon*, 4 Hamm. 229; *Lowry v. Cox*, 2 Dana, 469; *Cary v. Turner*, 3 Bibb. 54; *Pintard v. Martin*, 1 S. & M. Ch. 126; *White v. Trotter*, 14 S. & M. 30; *Keltner v. Keltner*, 6 B. Monr. 40; *Brown v. Witter*, 10 Ohio, 142; *Bruen v. Hone*, 2 Barb. S. C. 506; *Daggett v. Emerson*, 1 W. & M. 195; *Cunningham v. Fithian*, 2 Gilm. 650; *Shaeffer v. Slade*, 7 Black. 128. The party applying for the assistance of equity on the ground of fraud, must have been prompt on the discovery of the fraud; long delay will be sufficient, if unexplained, to occasion a refusal of that assistance. *Lawrence v. Dale*, 3 J. C. R. 23; *De Armand v. Phillips*, Walk. Ch. 186; *Davis v. James*, 4 J. J. Marsh, 8; *Barbour v. Morris*, 6 B. Monroe, 208; *Lacey v. McMillan*, 9 B. Monr. 523; *Outlaw v. Morris*, 7 Hump. 262; *Cunningham v. Fithian*, 2 Gilm. 650; *Ayres v. Mitchell*, 3 S. & M. 603.

spiritual court.(l)¹ But in some cases they appear to have interfered, so far as to declare the party, practising the fraud, a trustee for the party prejudiced by it.(m)(1)

We shall see presently, that parol evidence is undoubtedly admis-

(l) *Plume v. Beale*, 1 P. Wms. 388; *Devenish v. Baynes*, Prec. Ch. 3; *Kerrick v. Barnsby*, 7 Bro. P. C. 449; *Barnesley v. Powell*, 1 Ves. 287, 119; *Archer v. Mosse*, 2 Vern. 8; ex parte 1 Fonbl. Eq. B. 1, Ch. 2, s. 3, n. (u); *Fearon*, 5 Ves. 647; *Allen v. M'Pherson*, 1 Phill. 133; 1 Mad. Ch. & Pr. *Marriott v. Marriott*, 1 Str. 666; *Segrave v. Kirwan*, 1 Beatty, 157; *Buckley v. 344; Gingell v. Horne*, 9 Sim. 539. *Welford*, 2 Cl. & Fin. 102; 8 Bligh,

(m) *Herbert v. Lowmes*, 1 Ch. Rep. 111; *Podmore v. Gunning*, 7 Sim. 744; 13; *Thynn v. Thynn*, 1 Vern. 296; *Kennell v. Abbott*, 4 Ves. 802.

(1) The existence of this jurisdiction in equity has undergone much consideration in the recent case of *Allen v. Macpherson*; where a testator, having given some considerable legacies and benefits to the plaintiff by his will [and codicils], and made the defendant residuary legatee, by a subsequent codicil revoked the gifts to the plaintiff and others [giving him a small weekly allowance for life instead], who thereupon filed his bill, alleging, that the testator was induced to make this revocation by the fraudulent representations of the defendant, and seeking to have him declared a trustee for him to extent of the legacies so revoked. The will and codicils had been admitted to probate. The defendant put in a general demurrer to this bill for want of equity, which was overruled upon argument by Lord Langdale, M. R., thereby affirming the existence of this jurisdiction in the court. But this decision was reversed on appeal by Lord Lyndhurst, C., who allowed the demurrer. The plaintiff then appealed to the House of Lords against this last decision, and that appeal is still pending. *Allen v. Macpherson*, 5 Beav. 469; 1 Phill. 133. [On the appeal the House of Lords affirmed the decision of the Chancellor; Lord Lyndhurst, and Lords Brougham and Campbell, voting for the affirmation; Lords Cottenham and Langdale, for reversing. 2 H. L. Cases, 191. Lord Cottenham in a very able opinion endeavored to establish a distinction between fraud in obtaining particular provisions in a will, and fraud in obtaining the will itself; but it was alleged that the ecclesiastical courts had jurisdiction in either case, and the distinction was not sustained. Sir Edward Sugden, now Lord St. Leonards, "inclines to agree with the decision of the Lords," Law of Prop. H. L. 195, note.]

¹ The same doctrine has been held in the courts of equity in the United States, with reference to wills which have been established in the courts of probate, *Colton v. Ross*, 2 Paige, Ch. 396; *Hamberlin v. Terry*, 7 How. Miss. 143; *Hunt v. Hamilton*, 9 Dana, 90; *Blue v. Patterson*, 1 Dev. & Bat. Eq. 459; *Howell v. Whitechurch*, 4 Heyw. 49; *Lyne v. Guardian*, 1 Mis. 410; *Muir v. Trustees*, 3 Barb. Ch. 477; *McDougell v. Peyton*, 2 Desaus. 313; *Burrows v. Ragland*, 6 Hump. 489; *Hunter's Will*, 6 Ohio, 449; *Gaines v. Chew*, 2 How. U. S. 645; *Tarver v. Tarver*, 9 Pet. U. S. 180; *Gould v. Gould*, 3 Story, 516; *Watson v. Bothwell*, 11 Alab. 653; see *Johnston v. Glasscock*, 2 Id. 233; *Jones v. Adams*, 22 Verm. 50. Where, however, the party claiming against the will, is not in possession, and an impediment exists as to part, as, in the case of real estate, an outstanding trust term, which would prevent the contesting of the will by ejectment, he may come into equity, on the ground of inadequate remedy at law; and the jurisdiction, having attached as to part, may be retained as to all. *Brady v. McCosker*, 1 Comst. 214. The objection cannot be first raised on appeal. *Clarke v. Sawyer*, 2 Comstock, 498.

sible for the purpose of avoiding a written instrument on the ground of *fraud*. In the case of *Marquis of Townshend v. Stangroom* it was attempted to establish a distinction in this respect between cases of *fraud*, and of *mistake* or *surprise*; and the admission of parol declarations in support of the plaintiff's case was objected to on the part of the defendant; but Lord Eldon after reviewing all the authorities, as well as the general principles of the court in dealing with such cases, disallowed the objection and admitted the evidence.⁽ⁿ⁾

Where a person by means of his promises, or otherwise by his general conduct, prevents the execution of a deed or will in favor of a third party, with a view to his own benefit; that is clearly within the first head of frauds, as distinguished by Lord Hardwicke: *viz.*, that arising from facts or circumstances of imposition: and the person so acting will be decreed to be a trustee for the injured party, to the extent of the interest, of which he has been thus defrauded.¹

Therefore where a husband of the tenant in tail in remainder by force and management prevented the tenant in tail *in esse*, who was on his deathbed, from suffering a recovery, for the purpose of providing for other parties out of the estate by his will: it was held by Lord Thurlow, that the estate was to be considered exactly, [*151] as if the recovery had been *suffered, even as against the tenant in tail, in whom the legal estate was vested, and who was not a party to the fraud.^(o)

And so where the issue in tail promised his father the tenant in tail to provide for his younger children out of the estate, and thus prevented his father from suffering a recovery for that purpose; equity will compel the performance of the promise.^(p)

And in another case where the wife of a copyholder prevented her husband from vesting the copyhold in his son after his death, by promising herself to make it over to him, if he appointed her his successor instead of the son, she was decreed to be a trustee for the son, notwithstanding the Statute of Frauds, on the ground of the fraud.^(q)

(n) *Marquis of Townshend v. Stangroom*, 6 Ves. 328; see *Mortimer v. Shortall*, 2 Dr. & W. 363.

(p) Per Cur. in *Devenish v. Baines*, Prec. Ch. 5.

(q) *Devenish v. Baines*, Prec. Ch. 4.

(o) *Luttrell v. Olmins*, cited 11 Ves. 638; and 14 Ves. 290.

¹ *Miller v. Pearce*, 6 W. & S. 97; *Jones v. McKee*, 3 Barr, 496; 6 Barr, 428; *Jenkins v. Eldridge*, 3 Story, 181; *Howell v. Baker*, 4 J. C. R. 118; *Hoge v. Hoge*, 1 Watts, 213; in which last case is a full discussion of the question on principle and authority, by Chief Justice Gibson. In order to create the trust, however, there must have been some fraud active or passive, in procuring the deed or devise: the mere breach of a promise to convey is not sufficient. *Hoge v. Hoge*, ut supra.

And in like manner if an heir or devisee prevent a testator from charging his estate with annuities or legacies, by promising themselves to make the payments, they will be trustees for the annuitants or legatees notwithstanding the statute.(r) And the same principle will be applied where an executor or residuary legatee prevents a gift of a legacy by promising himself to pay it.(s)

Upon the same principle it is settled, that where an instrument is destroyed or suppressed by the defendant, relief may be obtained in equity.(t)

As if a will, by which a legacy is given, be destroyed or concealed by the executor; the legatee may obtain a decree for payment against him.(u)¹

And so where a deed or will is suppressed by the heir, the party claiming under the instrument has been decreed to enjoy the property, and the guilty party to convey.(x)

It was laid down as a principle by Lord Hardwicke in one case, that where a deed is destroyed, and the contents of the deed are proved, the party shall have the benefit of it:(y) and this proof seems to have been given in the majority of the cases.(z)

However, in one case, where there was no evidence of a deed, which a party confessed to have burned, he was ordered to be committed, until he admitted the deed, as stated in the bill.(a)

And in another case, where there was no exact evidence of a will,

(r) *Chamberlaine v. Chamberlaine*, 2 Freem. 34; *Oldham v. Lichfield*, 2 Vern. 506; *Mestaer v. Gillespie*, 11 Ves. 638; *Huguenin v. Basely*, 14 Ves. 290; and see *Griffin v. Nainson*, 4 Ves. 344.

(s) *Thynn v. Thynn*, 1 Vern. 296; *Reach v. Kennigate*, Ambl. 67; *Barrow v. Greenhough*, 3 Ves. 152; *Chamberlain v. Agar*, 2 V. & B. 250; *Podmore v. Gunning*, 7 Sim. 644.

(t) *Bates v. Heard*, Toth. 66, and 1 Dick. 4; 1 Madd. Ch. Pr. 424.

(u) *Tucker v. Phipps*, 3 Atk. 360; *Hayne v. Hayne*, 1 Dick. 18.

(x) *Eyton v. Eyton*, 2 Vern. 280, and Prec. Ch. 116; *Dalton v. Coatsworth*, 1 P. Wms. 731; *Woodroffe v. Burton*, stated 1 P. Wms. 734.

(y) *Saltern v. Melhuish*, Ambl. 249.

(z) *Cowper v. Cowper*, 2 P. Wms. 748; *Garteside v. Radcliffe*, 1 Ch. Ca. 292; *Hunt v. Matthews*, 1 Vern. 408; *Wardour v. Beresford*, ib. 452.

(a) *Sanson v. Rumsey*, 2 Vern. 561, cited 1 P. Wms. 733.

¹ That equity has jurisdiction in case of a lost, suppressed, or spoliated will was held in *Allison v. Allison*, 7 Dana, 90; *Bailey v. Stiles*, 1 Green. Ch. 220; *Buchanan v. Matlock*, 8 Humph. 390; *Meade v. Langdon's heirs*, cited 22 Verm. 59. See Story's Equity, § 254; *Legare v. Ash*, 1 Bay (S. C.), 464. In *Gaines v. Chew*, 2 How. U. S. 645, the question was raised but not decided; the court holding that the complainant was at least entitled to discovery. But in *Morningstar v. Selby*, 15 Ohio, 345, a different conclusion was arrived at after elaborate argument, and the power to establish such a will held to be exclusively in the probate courts. The correctness of the inference drawn from *Gaines v. Chew*, in this case, may, however, well be doubted. As to the jurisdiction to establish suppressed deeds. See *Ward v. Webber*, 1 Wash. Va. 274.

that had been suppressed, the devisee was decreed to enter and enjoy until the defendant produced the will, and until further order.(b)

[*152] *The recent case of *Spencer v. Smith*(c) was a suit by devisees against the heir-at-law, to obtain possession of the estate on the ground of the suppression of the will by the heir; it was held by Sir K. Bruce, V. C., that proof of the existence of the will was sufficient to entitle the plaintiffs to an inquiry, and an issue *devastavit vel non*, although no case of suppression was proved against the defendant.(c)

The court in all these cases acts upon the principle, that the instruments, which would have been executed, or would have existed, but for the fraud, are to be treated as if actually executed and existing.(d)

With respect to the second head of fraud as distinguished by Lord Hardwicke, viz., that apparent from the intrinsic value and subject of the bargain itself:—It is to be observed, that mere inadequacy of consideration of *itself*, and unaccompanied by other circumstances raising a presumption of fraud, will not in general induce the court to relieve from the consequences of an executed conveyance.(e)¹

If a person, said Lord Hardwicke, will enter into a hard and unconscionable bargain with his eyes open, equity will not relieve him upon that footing only.(f)

Where however the inadequacy of consideration is so gross and manifest, that, as Lord Thurlow has observed, “it is impossible to state it to a man of common sense, without producing an exclama-

(b) *Hampden v. Hampden*, cited 1 v. Bateman, 1 Bro. C. C. 22; *Griffith v. P. Wms.* 733; S. C. 3 Bro. P. C. 550. *Spratley*, 2 Bro. C. C. 179, n.; *Moth v.*

(c) *Spencer v. Smith*, 1 N. C. C. 75. *Atwood*, 5 Ves. 845; *White v. Damon*,

(d) *Middleton v. Middleton*, 1 J. & 7 Ves. 35; *Low v. Barchard*, 8 Ves. W. 99; *Saltern v. Melhuish*, Ambl. 249. 133; *Coles v. Trecothick*, 9 Ves. 246.

(e) *Wood v. Abrey*, 3 Mad. 423; (f) In *Willis v. Jernegan*, 2 Atk. *Floyer v. Sherrard*, Ambl. 18; *Stephens* 251.

¹ That mere inadequacy of consideration is not in general of itself, a sufficient ground of relief in equity, has been held in a number of cases in the United States. *Osgood v. Franklin*, 2 J. C. R. 1; *White v. Flora*, 2 Overt. 426; *Butler v. Haskell*, 4 Desaus. 651; *McCormick v. Malin*, 5 Blackford, 509; *Green v. Thompson*, 2 Ired. Eq. 365; *Dunn v. Chambers*, 4 Barb. S. C. 371; *Mann v. Betterly*, 21 Verm. 326; *Delafield v. Anderson*, 7 Sm. & M. 630; see *Farmer's Bank v. Douglass*, 11 Sm. & M. 469; *Holmes v. Nesh*, 9 Mis. 201; *Coster v. Griswold*, 4 Edw. Ch. 364; *Young v. Frost*, 5 Gill. 287; *Howard v. Edgell*, 17 Verm. 9; *Westervelt v. Matheson*, 1 Hoff. Ch. 37; *Forde v. Herron*, 4 Munf. 316; *Erwin v. Parham*, 12 How. U. S. 197. But where the inadequacy is very gross and manifest, so, as has been said, as to “shock the conscience,” the court will infer fraud or imposition. *Wright v. Wilson*, 2 Yerg. 294; *Butler v. Haskell*, 4 Desaus. 652; *Gest v. Frazier*, 2 Litt. 118; *Barnett v. Pratt*, 4 Ired. Eq. 171; *Deaderich v. Watkins*, 8 Humph. 520; *Juzan v. Toulmin*, 9 Alab. 662; *Seymour v. Delancy*, 4 J. C. R. 222.

tion at the inequality of it;"(g) the court will infer from that fact *alone*, that there must have been such imposition or oppression in the transaction, or such want of common understanding in the party, as to amount to a case of fraud, from which it will not suffer any benefit or advantage to be derived.(h) It has been remarked by Lord Eldon, that "this principle is loose enough; but it is one, by which judges in equity have felt themselves bound, and to act upon occasionally for the safety of mankind."(i)

But where there are other fraudulent circumstances, connected with a transaction, in addition to that of inadequacy of price, as where the parties stand in a fiduciary relation to one another;(k) or the vendor is in distress or ignorance;(l) or is not competent to protect his own interests;(m) the insufficiency of the consideration will materially assist the court to the conclusion, that such a case of fraud is established, as to demand redress.

Those cases also, where the subject of the bargain is a reversion or expectancy, seem to come directly under the head, which we are now considering.

*The sale by an heir of his reversionary or expectant interest is looked upon with peculiar jealousy and suspicion by [*153] the courts of equity. They discountenance such transactions, as opening a door to taking an undue advantage of the heir's necessitous circumstances, and also tending to weaken the due authority of a parent.(n) Such a sale therefore cannot be supported by the purchaser against the heir, unless it be perfectly fair in every respect, and untainted with actual or constructive fraud, and particularly,

(g) In *Gwynne v. Heaton*, 1 Bro. C. C. 8.

(h) *Heathcote v. Paignon*, 2 Bro. C. C. 175; *Underhill v. Horwood*, 10 Ves. 219; *Ware v. Horwood*, 14 Ves. 28; *Stilwell v. Wilkins*, Jac. 282.

(i) In *Gibson v. Jeyes*, 6 Ves. 273.

(k) *Herne v. Meeres*, 1 Vern. 465; *Gibson v. Jeyes*, 6 Ves. 266. [*Wright v. Wilson*, 2 Yerg. 294; *Brooke v. Gray*, 2 Gill, 83; *Shaeffer v. Slade*, 7 Blackf. 178.]

(l) *Herne v. Meeres*, *ubi sup.*; *Pickett v. Loggan*, 14 Ves. 215; *Murray v. Palmer*, 2 Sch. & Lef. 474; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Wood v. Abrey*, 3 Madd. 417. [*McKinney v. Pinckard*, 2 Leigh, 149; *Gasque v. Small*, 2 Strobb. Eq. 72; *Esham v. Lamar*, 10 B. Monroe, 43.]

(m) *Clarkson v. Hamway*, 2 P. Wms. 203; *Gartside v. Isherwood*, 1 Bro. C. C. 558; *How v. Weldon*, 2 Ves. 517; *Addis v. Campbell*, 4 Beav. 401. [*Crane v. Concklin*, 2 Saxt. 346; *Mann v. Beterly*, 2 Verm. 326; *Brooke v. Gray*, 2 Gill, 83; *Holden v. Crawford*, 1 Aik. 390; *Rumph v. Abercrombie*, 12 Alab. 64. It is not necessary that there should be actual lunacy in such case. *Ibid.*]

(n) *Call v. Gibbons*, 3 P. Wms. 290; *Barnadiston v. Lingood*, 2 Atk. 133; *Gwynne v. Heaton*, 1 Bro. C. C. 10; *Walmesly v. Booth*, 2 Atk. 28. [See *Jenkins v. Pye*, 12 Pet. 241, 257; notes to *Chesterfield v. Jansen*, 1 Lead. Cas. Eq. 393.]

unless the consideration be adequate.(o) And it rests upon the purchaser to prove the adequacy of the price, and the fairness of the transaction, and not upon the heir to show its unreasonableness or insufficiency.(p) And it seems that the heir having reached a mature age is immaterial in this respect.(q)

These rules, however, will not be applied with the same stringency to sales by auction, which carry in themselves *prima facie* proof of sufficiency and fairness,(r) or to cases, where the sale is effected with the sanction or knowledge of the parent of the heir, or the person standing *in loco parentis* to him;(s) or if the transaction has been subsequently recognised, or acted upon by the heir.(t)

The authorities appear to warrant the application of the foregoing observations to sales by those reversioners only, who combine the character of *heir*.(1) Although an anxious protection is also extended by equity to persons selling reversionary interests, who are not heirs; and several cases are to be found, in which relief has been afforded to such persons. On the examination of those cases, however, it will be found, either that advantage had been taken of the vendor's necessities to affect a favorable bargain, or that there existed some other equity in favor of the vendor in addition to the mere inadequacy of price.(u)

On the other hand the court has repeatedly refused to interpose for the relief of a reversioner, *not being an heir*, from the sale of his reversion, merely on the ground of the insufficiency of the consideration.(x)

(o) Knott v. Hill, 1 Vern. 167; Chesterfield v. Jansen, 2 Ves. 125; Peacock v. Evans, 16 Ves. 512; Earl of Portmore v. Taylor, 4 Sim. 182; King v. Hamlet, ib. 223; and S. C. 2 M. & K. 456; Newton v. Hunt, 5 Sim. 54; Bawtree v. Watson, 3 M. & K. 339.

(p) Gowland v. De Faria, 17 Ves. 24; Davis v. Duke of Marlborough, 2 Sw. 141; Shelley v. Nash, 3 Mad. 236; Coles v. Trecothick, 9 Ves. 246; Earl of Portmore v. Taylor, 4 Sim. 209.

(q) Evans v. Cheshire, Belt's Supp. 305, 6; Addis v. Campbell, 4 Beav. 401; Davis v. Duke of Marlborough, 2 Wils. 146.

(r) Shelley v. Nash, 3 Mad. 232; but see Fox v. Wright, 6 Mad. 111. [Newman v. Meek, 1 Freem. Ch. 441; see

Parham v. Erwin, 12 How. U. S. 197.]

(s) King v. Hamlet, 2 M. & K. 456.

(t) Chesterfield v. Jansen, 2 Ves. 125; King v. Hamlet, 2 M. & K. 480.

(u) Wiseman v. Beake, 2 Vern. 121; Cole v. Gibbons, 3 P. Wms. 290; 1 Sugd. V. & P. 165; Barnadiston v. Lingood, 2 Atk. 133; Bowers v. Heaps, 3 V. & B. 117; Davis v. Duke of Marlborough, 2 Sw. 140, n.; Addis v. Campbell, 4 Beav. 401.

(x) Nicholls v. Gould, 2 Ves. 422; Henley v. Axe, 2 Bro. C. C. 17; S. C. 2 Sw. 141, n.; Griffith v. Spratley, 2 Bro. C. C. 179, n.; S. C. 1 Cox, 383; Moth v. Atwood, 5 Ves. 845; Montesquieu v. Sandys, 18 Ves. 302; see 2 Swanst. 139, n.

(1) It was laid down by Sir Thomas Clarke, M. R., with regard to a sale by a sailor of his share of prize-money at great under value, that it was reasonable to regard the vendor at least in as favorable a light as a young heir. How v. Weldon, 2 Ves. 517.

We now come to the third species of fraud as defined by Lord Hardwicke; viz., that which is presumed from the circumstances and condition *of the parties contracting. And this, added that learned judge, goes farther than the rule of law, which is, [*154] that fraud must be proved, not presumed.(y)

The deeds and other engagements of persons, who are *non compos mentis*, are in general absolutely void¹ at law, as well as in equity. It seems, however, that if a person under such incapacity be suffered to levy a fine, it will be good at law: but in such a case there is no doubt, but that equity would relieve, by declaring the party taking under such an assurance to be a trustee, and decreeing a reconveyance.(z)

It has been held that mere weakness of mind alone, not amounting to idiotcy or insanity, and unaccompanied with fraud, is not a sufficient ground to invalidate an instrument.² For, as was observed by Sir Joseph Jekyl, "the court will not measure the size of people's understandings or capacities; there being no such thing as an equitable capacity and a legal incapacity."(a)

This as an abstract and general proposition is undoubtedly true; but it is also equally certain, that imbecility, or weakness of understanding, must constitute an ingredient, and a most material ingredient, in examining whether an instrument be invalid by reason of fraud, or imposition, or undue influence. Therefore where the party executing an instrument is a weak man, and liable to be imposed upon, the court will look upon the circumstances and nature of the transaction with a very jealous eye, and will very strictly examine the conduct and behavior of the persons, in whose favor it is made.

(y) *Chesterfield v. Jansen*, 2 Ves. Ch. 2, s. 2, n. (k). [See *Price v. Berrington*, 7 Hare, 394.] 155.

(z) *Rushloy v. Mansfield*, Toth. Trans. 42; *Mansfield's case*, 12 Co. 123; *Addison v. Mascal*, 2 Vern. 678; and stated 3 Atk. 310; 1 Fonbl. Eq. B. 1, (p) & (r); 1 Madd. Ch. Pr. 373; 1 Story's Eq. Jur. § 235. (a) *Osmond v. Fitzroy*, 3 P. Wms. 130; vide et *Willis v. Jernegan*, 2 Atk. 251; 1 Fonbl. Eq. B. 1, Ch. 2, s. 3, nn.

¹ In the absence of fraud or notice, a lunatic's deed is only voidable. See ante, note to page 46.

² *Ex parte Allen*, 15 Mass. 38; *Reppy v. Gant*, 4 Ired. Eq. 447; *Mann v. Betterly*, 21 Verm. 326; *Mason v. Williams*, 3 Munf. 126; *Morrison v. McCord*, 2 Dev. & Batt. Eq. 221. It is enough if there be a legal capacity to contract, though the parties differ greatly in mental power. *Hadley v. Latimer*, 3 Yerg. 537; *Thomas v. Sheppard*, 2 McCord's Eq. 36. Mere improvidence is not enough. *Green v. Thompson*, 2 Ired. Ch. 365. But if there are, besides weakness of intellect, circumstances showing imposition or undue influence, equity will interfere. *Harding v. Handy*, 11 Wheat. 103; *Deatly v. Murphy*, 3 A. K. Marsh, 472; *Whitehouse v. Hines*, 1 Munf. 507; *Brogden v. Walker*, 2 H. & J. 285; *Whelan v. Whelan*, 3 Cow. 537; *Reppy v. Gant*, 4 Ired. Eq. 447; *Rumph v. Abercrombie*, 12 Alab. 64.

If it see that any arts, or stratagems, or any undue means, have been used by them to procure such a gift; if it see the least speck of imposition at the bottom; or that the donor is in such a situation with respect to the donee, as may naturally give an undue influence over him; if there be the least *scintilla* of fraud in such a case, the court will and ought to interfere.(b)

Therefore wherever mental weakness exists, and there are in addition other circumstances connected with the transaction, from which ingredients, as was said by Lord Thurlow, "there may be made out and evidenced a collection of facts, that there was fraud or misrepresentation used,"(c) the court will relieve.

Thus where the provisions of a deed executed by such a person are unreasonable or extraordinary;(d) or the consideration is nugatory or insufficient;(e) or where the instrument is stated, contrary to the truth, to be made for a pecuniary consideration;(f) or more strongly [*155] still, where *undue practising, or influence has been actually used;(g) or from the relations existing between the parties will be presumed to have been used,(h)¹ to induce the execution of the instrument, there will be no question about the exercise of this jurisdiction.

The mental weakness in these cases may arise either from a natural, and permanent imbecility, short only of what would support a commission of lunacy;(i) or it may be occasioned by some temporary illness or debility; or by the infirmities of extreme old age.(k)

(b) *Bridgman v. Green*, Wilm. 61; S. C. 2 Ves. 627; and see Lord Thurlow's remarks in *Griffin v. De Veulle*, 3 Wood. Lect. App. 16; *Lord Denneval's* case, 2 Ves. 407; 1 Fonbl. Eq. B. 1, Ch. 2, s. 3. nn. (p) & (r); 1 Madd. Ch. Pr. 375; 1 Story's Eq. Jur. § 236; *Gartside v. Isherwood*, 1 Bro. C. C. 560; *Blackford v. Christian*, 1 Knapp, 77.

(c) In *Griffin v. De Veulle*, 3 Wood. Lect. App. 16.

(d) *Fane v. Duke of Devonshire*, 2 Bro. P. C. 77; *Bridgman v. Green*, 2 Ves. 627; *Dent v. Bennett*, 7 Sim. 539; S. C. 4 M. & Cr. 269.

(e) *Clarkson v. Hanway*, 2 P. Wms. 203; *Bridgman v. Green*, ubi supra; *Gartside v. Isherwood*, 1 Bro. C. C. 558. [See *Hutchinson v. Tindall*, 2 Green's

Ch. 357; *Rumph v. Abercrombie*, 12 Alab. 64.]

(f) *Gibson v. Russell*, 2 N. C. C. 104.

(g) *Portington v. Eglinton*, 2 Vern. 189; *Gartside v. Isherwood*, 1 Bro. C. C. 558; *Bridgman v. Green*, 2 Ves. 627; *Edmunds v. Bird*, 1 V. & B. 542.

(h) *Osmond v. Fitzroy*, 3 P. Wms. 130; *Huguenin v. Baseley*, 14 Ves. 273; *Griffiths v. Robins*, 3 Mad. 191; *Dent v. Bennett*, 7 Sim. 539; and 4 M. & Cr. 269.

(i) *Lord Donegal's* case, 2 Ves. 407; see *Osmond v. Fitzroy*, 3 P. Wms. 130; *Portington v. Eglinton*, 2 Vern. 189. [*Reppy v. Gant*, 4 Ired. Eq. 447.]

(k) *Griffiths v. Robins*, 3 Mad. 191; *Dent v. Bennett*, 7 Sim. 539. [*Harding v. Handy*, 11 Wheat. 603; *Whelan v. Whelan*, 3 Cow. 537; *Brice v. Brice*, 5 Barb. S. C. 533.]

¹ *Kennedy v. Kennedy*, 2 Alab. 7; *McCraw v. Davis*, 2 Ired. Eq. 618; *Buffalow v. Buffalow*, 2 Dev. & Batt. Eq. 241; *Cruise v. Christopher*, 5 Dana, 181; *Whelan v. Whelan*, 3 Cow. 537; *Whipple v. McClure*, 2 Root, 216; *Brice v. Brice*, 5 Barb. Sup. C. 533; *Brooke v. Gray*, 2 Gill, 83.

There is an insurmountable difficulty, said Lord Thurlow, in laying down abstract propositions on such a subject, which depends upon such a variety of circumstances.^(l) The effect of the mental weakness of a contracting party upon the judgment of the court will of course depend upon the extent, to which it is supported by the evidence in each particular case.^(m)

Old age of itself is certainly no ground for relieving against the execution of an instrument.⁽ⁿ⁾ And even where the old age is extreme, and attended with great infirmity, yet if there be the intervention of a third and disinterested person, by whom the transaction is explained, the instrument will not be set aside.^(o)

Among the four classes of persons, who are deemed in law to be *non compotes mentis*, Lord Coke has mentioned drunkards, as *non compotes* by their own act.^(p) But, he adds, this kind shall give no privilege or benefit to them or their heirs. However even at law a party may plead *non est factum* to a deed, which he had been made to execute, when so drunk, as not to know what he was doing.^(q)

Where an instrument has been executed by a person in a state of intoxication, equity will not *on that account alone* interfere to set it aside, as against the party taking under it, for that would be to encourage drunkenness,^(r)¹ and more especially relief will be refused, where the object of the instrument is, to carry into execution a family arrangement, or it is fair and reasonable in its terms.^(s)

But the case is very different, where there has been any contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication; for such conduct will amount to a direct case of fraud, against which the court will relieve, by setting aside the deed.^(t)

(l) In *Att.-Gen. v. Parnter*, 3 Bro. C. C. 443.

(m) See *Hunter v. Atkins*, 3 M. & K. 146.

(n) *Lewis v. Pead*, 1 Ves. jun. 19. [*Gratz v. Cohen*, 11 How. U. S. 1.]

(o) *Pratt v. Barker*, 1 Sim. 1, and 4 Russ. 507; *Hunter v. Atkins*, 3 M. & K. 113.

(p) Co. Litt, 447, a.

(q) *Cole v. Robbins*, Bull. N. P. 172.

(r) *Johnson v. Meddlcott*, 3 P. Wms. 131, n.; see *Cory v. Cory*, 1 Ves. 19;

Cooke v. Clayworth, 18 Ves. 12; *Naygle v. Baylor*, 2 Dr. & W. 60.

(s) *Cory v. Cory*, 1 Ves. 19; *Cooke v. Clayworth*, 18 Ves. 12.

(t) *Johnson v. Meddlcott*, ubi supra; *Cory v. Cory*, id.; *Cooke v. Clayworth*, id.; *Say v. Barwick*, 1 V. & B. 195; 1 Fonbl. Eq. B. 1, Ch. 2, s. 3, P. 67. [*Crane v. Concklin*, Saxt. 346; *Hutchinson v. Tindall*, 2 Green's Ch. 357; *Phillips v. Moore*, 11 Mis. 600; *Calloway v. Witherspoon*, 5 Ired. Eq. 128.]

¹ *Morrison v. McLeod*, 2 Dev. & Batt. Eq. 221; *Hotchkiss v. Fortson*, 7 Yerg. 67; *Hutchinson v. Brown*, 1 Clark's Ch. 408; *Harrison v. Lemon*, 3 Blackf. 51; *Belcher v. Belcher*, 10 Yerg. 121; *Maxwell v. Pittinger*, 2 Green's Ch. 156; *Whitesides v. Greenlee*, 2 Dev. Eq. 152; see *Moore v. Reed*, 2 Ired. Eq. 580, and the remarks in 9 Jur. p. ii. 75.

It is laid down by the author of the Treatise on Equity, that equity will relieve against a disposition of property, where the party is so excessively drunk, that he is utterly deprived of the use of [*156] reason and *understanding. Because in such a case there can by no means be a serious or a deliberate consent; and without this no contract can be binding by the law of nature.(u) This doctrine is certainly in accordance with the maxims of the jurists, and has been recognised with approbation by Mr. Maddock, and other eminent writers on equity jurisprudence.(x)

It has been decided, on the other hand, that equity will not at any rate interfere *in favor of* the party who takes under an instrument executed by a drunkard, to enforce its execution; although no contrivance be used or advantage taken by him; but the parties will be left to their remedies at law.(y)

Upon the same principle of fraud, presumed from the circumstances of the parties, equity will relieve against a conveyance obtained from persons in duress, or under terror, or apprehension.(z) For in such cases they have no free will, but stand *in vinculis*.

And on this account the court looks with great jealousy upon all transactions entered into by a person in a state of imprisonment; and if they are accompanied by any circumstances of imposition or oppression, it will not suffer them to take effect.(a)

And so, where advantage is taken of a person's extreme necessity, or distress, to obtain an advantageous bargain, the court, acting upon the same principle, will give redress.(b)

However, it has been remarked by Sir John Leach, V. C., that there was no head of equity more difficult of application, than the avoidance of a contract on the ground of advantage taken of distress; and that there could be no title to such relief, unless the advantage or disadvantage of the contract was within the view of the parties at the time.(c)

In all these cases the title to equitable relief will of course be much stronger, where several fraudulent ingredients, such as the

(u) 1 Fonbl. Treat. Eq. 67. [Ware v. Gibson, 13 M. & W. 626; Clifton v. Davis, 1 Pars. Eq. 31; French v. French, 8 Hamm. 214; see Harrison v. Lemon, 3 Blackf. 57; Wiggleworth v. Steers, 1 Hen. & Munf. 70.]

(x) Puffendorf, Law of Nat. B. 1, Ch. 4, s. 8; Pothier, Trait. Obligat. n. 49; 1 Mad. Ch. Pr. 398; 1 Stor. Eq. Jur. § 231, &c.

(y) Cragg v. Holme, 18 Ves. 14, n.; Shiers v. Higgons, cited 1 Madd. Ch. Pr. 399; Nagle v. Baylor, 2 Dr. & W. 64.

(z) Anon. 3 P. Wms. 294, n. e.; Att-Gen. v. Sothen, 2 Vern. 497; Crow v. Ballard, 1 Ves. Jun. 220. [Gest v. Frazier, 2 Litt. 778.]

(a) Nicholls v. Nicholls, 1 Atk. 409; Hinton v. Hinton, 2 Ves. 634.

(b) Hawes v. Wyat, 3 Bro. C. C. 156; Pickett v. Loggan, 14 Ves. 215; Wood v. Abrey, 3 Mad. 417. [McCants v. Bee, 1 McCord's Eq. 383.]

(c) Ramsbottom v. Parker, 6 Mad. 6.

imbecility or distress of the parties, or inadequacy of price, &c., are to be met with together in the same transaction. It is from the collection of such facts, as was remarked by Lord Thurlow, that it is to be made out and evidenced, that fraud or misrepresentation was used.(d)

Wherever, from the peculiar relations or connexion existing between the parties, considerable authority or influence necessarily exists on the one side, and a corresponding reliance and confidence is placed on the other, a party will not be suffered to abuse this authority or influence by extracting from it any advantage to himself.¹ But the court will look into transactions between persons in these relative situations with extreme jealousy; and if it find the slightest trace of undue influence used, or unfair advantage taken, will interpose, and give redress.(e) Indeed, in some of these cases, as, for instance, in dealings between guardian and ward, [*157] *trustee and *cestui que trust*, or attorney and client, the transaction is in itself considered so suspicious, owing to the near connexion between the parties, as to throw the proof upon the person who seeks to support it, to show that he has taken no advantage of his influence or knowledge, but has put the other party on his guard, bringing everything to his knowledge which he himself knew.(f)

Upon this principle, in transactions between a parent and child, every contract or conveyance, whereby benefits are secured to parents by their children, must be perfectly fair and reasonable in all its

(d) In *Griffin v. De Veuille*, 3 Wood. Cow. 537; *Brice v. Brice*, 5 Barb. S. C. Lect. App. 16. 533; *Taylor v. Taylor*, 8 How. 183.]

(e) *Filmer v. Gott*, 7 Bro. P. C. C. 70; (f) *Gibson v. Jeyes*, 6 Ves. 276; *Gartside v. Isherwood*, 1 Bro. C. C. 560; *Hunter v. Atkins*, 3 M. & K. 135. [See *Hunter v. Atkins*, 3 M. & K. 135; 1 Mad. Ch. Pr. 172, 406; 1 Story's Eq. Eng. L. & Eq. 34.]
Jur. § 307, &c. [*Whelan v. Whelan*, 3

¹ For a statement of the principles on which equity acts in cases of this kind, see *Ahearne v. Hogan*, 1 Dru. 310; *Espey v. Lake*, 16 Jur. 1106; *Hoghton v. Hoghton*, 11 Eng. L. & Eq. R. 138; and *Cooke v. Lamotte*, Id. 26; where the cases are fully commented on. In *Cooke v. Lamotte*, the Master of the Rolls lays down the rule in the broadest terms, comprehending within its scope every case where "a person takes a benefit from another to the prejudice of that person, and to his own benefit;" and he considers, as a general proposition, that it is requisite that the former "should be able to establish that the donor acted voluntarily and deliberately, knowing what he did." The particular case was that of a *post obit* bond executed by an aunt to a nephew residing with her, so as to render irrevocable a will executed in his favor; the transaction being through the medium of a solicitor employed by the nephew, and the circumstances showing that she was not aware of the effect of the instrument. The bond was declared void. See, in the United States; *Buffaloe v. Buffaloe*, 2 Dev. & Batt. 241; *Taylor v. Taylor*, 8 How. U. S. 183; *Greenfield's Estate*, 14 Penn. St. R. 504.

terms and circumstances, or otherwise it will be liable to be set aside.(g)

However, before this will be done, it will be necessary to prove the exercise of undue influence, or to establish some other case of actual or constructive fraud against the parent.(h)

For it has been repeatedly decided that a transaction of this nature between a parent and child will be supported as a family arrangement, notwithstanding the relationship between the parties, if it be in other respects reasonable and proper,(i) and more especially if it be such as will conduce to the benefit of the child.(k) And it is not necessary that the parent and child, in dealing with a third person, should act by separate solicitors.(l)¹

And even if there do exist circumstances connected with the transaction which might induce the court to relieve against it, the complaint must be made at the time, and not after the father's death, or when, by the act of the son, as his marriage, other persons have

(g) *Blunden v. Barker*, 1 P. Wms. 639; *Heron v. Heron*, 2 Atk. 161; *Young v. Peachy*, ib. 258; *Carpenter v. Heriot*, 1 Ed. 328; *Cocking v. Pratt*, 1 Ves. 401; 1 Mad. Ch. Pr. 406; *Story's Eq. Jur.* § 308; *Wallace v. Wallace*, 2 Dr. & W. 452, 470.

(h) *Cocking v. Pratt*, 1 Ves. 401; as in *Heron v. Heron*, 2 Atk. 161; *Young v. Peachy*, ib. 258; *Glisson v. Ogden*, cited ib.; *Carpenter v. Heriot*, 4 Ed. 328; *Hawes v. Wyatt*, 3 Bro. C. C. 156; S. C.

2 Cox, 263. [*Findlay v. Patterson*, 2 B. Monr. 76.]

(i) *Blackborn v. Edgly*, 1 P. Wms. 607; *Cory v. Cory*, 1 Ves. 19; *Browne v. Carter*, 5 Ves. 877; *Tendrill v. Smith*, 2 Atk. 85; *Cooke v. Burtchaell*, 2 Dr. & W. 165; *Tweddell v. Tweddell*, T. & R. 14.

(k) *Kinchant v. Kinchant*, 3 Bro. C. C. 374. [But see the remarks on this case in *Hoghton v. Hoghton*, 11 Eng. L. & Eq. 141.]

(l) *Cooke v. Burtchaell*, 2 Dr. & W. 165.

¹ The principle to be deduced from the cases on this subject is thus stated in *Hoghton v. Hoghton*, 11 Eng. L. & Eq. 142, by the Master of the Rolls (Sir John Romilly): "If the settlement of the property be one in which the father acquires no benefit not already possessed by him, and if the settlement be a reasonable and proper one, the court will support it, even though it appear that some influence was exerted by him to induce the son to execute it. But it must also appear that there was no suppression of what is true or suggestion of what is false." But the presumption is, in the case of pecuniary transactions between parent and child, just after the child attains the age of twenty-one, and before "complete emancipation," without any benefit moving to the child, that an undue influence has been used to procure that liability on the part of the child; and it is the business of the party who endeavors to maintain such a transaction to show that this presumption is adequately rebutted. *Hoghton v. Hoghton*, Id. 139; *Archer v. Hudson*, 7 Beav. 551. Thus, the resettlement of family estates between a father and a son, where the father obtains extensive advantages, will not be supported in the absence of unequivocal proof that the whole of the facts were known to the son, the purposes of the deed fully explained to him, and the operation of the respective provisions known to him. Ibid. As to the doctrine of courts of equity in the United States with regard to conveyances from child to parent, see *Slocum v. Marshall*, 2 W. C. C. R. 397; *Taylor v. Taylor*, 8 How. U. S. 183, where the rule was very stringently enforced; and *Jenkins v. Pye*, 12 Peters, 249.

acquired an interest in supporting the validity of the transaction in question.(m)

In the case of gifts or conveyances to a guardian by his ward on coming of age, the ground for equitable relief is far stronger. The court, acting in such cases on the broad principle of public utility, will interpose and relieve against such transactions, although in the particular instance there may not be any actual unfairness or imposition.(n) If any improper advantage be taken, that will of course constitute a yet stronger case for relief.(o)

And where a gift, purporting to be bounty for the performance of antecedent duties, is made but recently after the ward has attained his full age, "where the connexion is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian," it has been observed by Lord Eldon, that it is almost impossible that the transaction shall stand.(p)

*In one case indeed a voluntary conveyance by one lately [*158] come of age to an agent, who had acted in the management of his estates during his infancy, was partially supported by Sir J. Strange, M. R., as not being a case of fraud; although some relief was given, by modifying the instrument in respect of some objectionable covenants:—But that case seems to have been decided on its special circumstances, and the general tendency of the observations of the Master of the Rolls in his judgment was in accordance with the doctrine as stated above.(q).

This doctrine depends upon the continuance of the connexion or influence between guardian and ward, notwithstanding the latter may have come of age: as where the estate remains in the guardian's possession, or the accounts are unsettled, or where no sufficient time has elapsed, to emancipate the mind of the ward from the bias, or prejudices of infancy.(r) But undoubtedly if the ward, after coming of age, and being actually put in possession of his estate, and after the accounts are settled, thinks fit, when *sui juris* and at liberty, and after taking it into his fair, serious, and well-informed consideration,

(m) *Brown v. Carter*, 5 Ves. 877.

(n) *Pierce v. Waring*, cited 1 Ves. 380, and 2 Ves. 548; *Hylton v. Hylton*, 2 Ves. 547; *Hatch v. Hatch*, 9 Ves. 297; *Dawson v. Murray*, 1 Ball & B. 229; *Aylward v. Kearney*, 2 ib. 463; *Wood v. Downes*, 18 Ves. 126; *Hunter v. Atkins*, 3 M. & K. 135. [*Johnson v. Johnson*, 5 Alab. 90; *Somes v. Skinner*, 16 Mass. 348; *Scott v. Freeland*, 7 Sm. & M. 410; *Williams v. Powell*, 1 Ired. Eq. 460; *Caplinger v. Stokes*, Meigs (Tenn.), 175. *Guardian ad litem* in

partition cannot purchase at the sale (*Gallatin v. Cunningham*, 8 Cow. 361), nor a testamentary guardian of a devisee at a sale of the testator's land under a surrogate's order. *Bostwick v. Atkins*, 3 Comstock, 53.]

(o) *Mulhallen v. Marum*, 3 Dr. & W. 317.

(p) In *Hatch v. Hatch*, 9 Ves. 296.

(q) *Cary v. Mansfield*, 1 Ves. 379.

(r) *Wright v. Proud*, 13 Ves. 138; *Dawson v. Murray*, 1 B. & B. 232, 6. [*Williams v. Powell*, 1 Ired. Eq. 460.]

to grant any reasonable reward to his guardian for having honestly and faithfully discharged his duty, the court will not set that aside. But then it will be for the party, claiming under such a gift, to satisfy the conscience of the court, that the act is of that nature, which ought to be supported.(s)

The same principles will be applied to similar transactions in favor of *quasi* guardians, such as confidential stewards or advisers;(t) or a keeper of an asylum, under whose care the party making the gift had been placed.(u)¹

The same doctrine also holds good with respect to transactions between a trustee and his *cestui que trust*: indeed the cases are usually treated as identical.(x)(1)²

(s) *Hylton v. Hylton*, 2 Ves. 549; *Gray v. Mansfield*, 1 Ves. 379; *Revelt Hatch v. Hatch*, 9 Ves. 206, 7; 1 Mad. v. Harvey, 1 S. & S. 502; *Huguenin Ch. Pr. 172*; 1 Story's Eq. Jur. § 320. v. Baseley, 14 Ves. 273.

[*Caplinger v. Stokes*, Meigs's Tenn. 175; (u) *Wright v. Proud*, 13 Ves. 136. *Scott v. Freeland*, 7 Sm. & M. 420.] (x) *Hatch v. Hatch*, 9 Ves. 296;

(t) *Trevelyan v. Charter*, Rolls, 2d Hylton v. Hylton, 2 Ves. 549; *Hunter v. June*, 1835 [affirmed 11 Cl. & F. Atkins, 3 M. & K. 135. 714; 8 Jur. 1015. See 9 Beav. 140];

(1) The equitable doctrine, now under consideration, does not apply to a mere dry trustee, such as a trustee to preserve contingent remainders. *Parkes v. White*, 11 Ves. 226. [Nor is a devisee of land subject to a legacy so far a trustee for the legatee, as to prevent him from purchasing it at a profit. *Powell v. Murray*, 2 Edw. Ch. 636. So a purchase by a mortgagee is not within the rule. *Knight v. Majoribanks*, 2 Mac. & G. 10; 2 Hall & Tw. 308; *Murdock's case*, 2 Bland, 461. Otherwise, if there be a power of sale. *Waters v. Givens*, 11 Cl. & F. 684.]

And it applies only to transactions arising on contract *inter vivos*, for gifts by will always imply bounty, and there is nothing to prevent a trustee from receiving a benefit from his *cestui que trust*, when conferred by will. [And a conveyance to a trustee by *cestui que trust*, otherwise voidable, may be confirmed by will; when it will not be necessary for the trustee to show fair dealing in obtaining the confirmation, *Stump v. Gaby*, 22 L. J. Ch. 353.]

¹ So with regard to medical advisers. *Ahearn v. Hogan*, 1 Drury, 310; *Billing v. Southee*, 16 Jur. 188; 10 Eng. L. & Eq. 37. See *Whitehorn v. Hines*, 1 Munford, 559. The mere fact, however, of a grantee being the physician to his grantor, who was suffering under a chronic disease, was held not to affect a transaction otherwise valid. *Daggett v. Lane*, 12 Missouri, 215.

² This has been decided in a great number of cases, among which are *Davoue v. Fanning*, 2 J. C. R. 252; *Child v. Bruce*, 4 Paige, 309; *Campbell v. Johnston*, 1 Sandf. Ch. 148; *De Bevoise v. Sandford*, 2 Hoff. Ch. 192; *Stuart v. Kissam*, 2 Barb. S. C. 493; *Michaud v. Girard*, 4 How. U. S. 503; *Matthews v. Drogau*, 3 Desaus. 25; *Boyd v. Hawkins*, 2 Ired. Eq. 304; *Davis v. Simpson*, 5 H. & J. 147; *Richardson v. Jones*, 3 G. & J. 163; *Armstrong v. Campbell*, 3 Yerg. 201; *Lessee of Moody v. Vandyke*, 4 Binn. 31; *Bruch v. Lantz*, 2 Rawle, 392; *Painter v. Henderson*, 7 Barr, 48; *Shelton v. Homer*, 5 Metc. 462; *Johnson v. Blackman*, 11 Conn. 343; *Brackenridge v. Holland*, 2 Blackf. 377; *Thompson v. Wheatly*, 5 Sm. & M. 499; *Scroggins v. McDougald*, 8 Alab. 382; and see cases cited in notes to *Fox v. Macreth*, 1 Lead. Cas. Eq. 37, &c. The rule does not in general

The court does not say, that a trustee shall in no case take beneficially by gift or purchase from his *cestui que trust*: but such is the general rule; and this rule depends on the same principles, and is applicable to as great an extent, as that, which governs similar transactions between guardian and ward.^(y) And, as was observed by Lord Eldon, it is a difficult case to make out, wherever it is contended, that the exception to this rule prevails.^(z)

In the same case the same learned judge laid it down, that "a trustee *may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a [*159] jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken, by the trustee of information acquired by him, in the character of trustee."^(a)

Upon similar principles where a purchase is made by a trustee, or guardian, of the trust property, or any part of it, *from himself*; such a transaction is looked upon with even greater *odium* and suspicion, than where the dealing is between the trustee and his *cestui que trust*. It was laid down by Lord Erskine, that without any consideration of fraud, or looking beyond the relation of the parties such a contract is void, as interdicted by the policy of the law.^(b) And although the authorities seem scarcely to warrant that assertion in its extreme sense; yet it is indisputably established, that such a transaction will not be allowed to prevail under any circumstances, during the continuance of the fiduciary character of the purchaser, unless it be made under the sanction of the Court, or with the full concurrence and consent of the persons beneficially entitled to the property, who

(y) *Herne v. Meeres*, 1 Vern. 465; *Ayliffe v. Murray*, 2 Atk. 59; *Fox v. Macreth*, 2 Bro. C. C. 400; *Coles v. Trecothick*, 9 Ves. 234; *ex parte Lacey*, 6 Ves. 625; *Morse v. Royal*, 12 Ves. 372; *Hunter v. Atkins*, 3 M. & K. 135; *Whichcote v. Lawrence*, 3 Ves. 740; *Scott v. Davis*, 4 M. & Cr. 87; *Kerr v. Lord Dungannon*, 1 Dr. & W. 509, 541.

(z) In *Coles v. Trecothick*, 9 Ves. 247.

(a) *Coles v. Trecothick*, *ubi supra*; see *Morse v. Royal*, 12 Ves. 372; *Naylor v. Winch*, 1 S. & St. 567; and this subject further considered, post [page 536, and notes].

(b) In *Morse v. Royal*, 12 Ves. 372.

apply to the *cestui que trust*. *Walker v. Brungard*, 13 Sm. & M. 72; but see *Chester v. Greer*, 5 Humph. 26; and *Wade v. Harper*, 3 Yerg. 383, where it was held that where a debt is secured by a deed of trust, the creditor having the power to direct and control the sale, cannot purchase the trust property so as to make a profit thereon; and that such sale is voidable as to other creditors and the assignor. A sale by the trustee to his *cestui que trust*, is equally voidable by him with a purchase by the former. *McCanty v. Bee*, 1 McCord's Ch. 383. See post, 535, and notes.

of course in that case must be competent to consent; and even then it will be regarded with great suspicion.(c)

In the absence of such corroborative circumstances a purchase of this nature, however fair and honest in itself, is voidable at the option of the *cestui que trust*: nor is it necessary to show, that the trustee has made any profit, or obtained any advantage by this purchase;(d) although it will be supported against the purchaser, if found to be beneficial to the trust estate.(e) And it is immaterial in this respect, that the purchase is made at a public sale by auction;(f) or by another person as agent for the trustee.(g)

This doctrine applies not only to trustees strictly so called, but also to persons standing in a similar situation;(h) such as executors dealing with the estate of their testator;(i)¹ or committees with the

(c) *Campbell v. Walker*, 5 Ves. 678; *Walker*, 3 Ves. 678. [*Beeson v. Beeson*, 9 Barr. 279; *Bostwick v. Atkins*, 3 Comst. 53.]

(d) *ex parte Lacey*, 6 Ves. 625; *Lister v. Lister*, ib. 631; *Downes v. Grazebrook*, 3 Mer. 208; *Fox v. Macreth*, 2 Bro. C. C. 400; *ex parte Bennett*, 10 Ves. 385.

(e) *Ex parte Haines*, 8 Ves. 348; *ex parte Bennett*, 10 Ves. 393.

(f) *Lister v. Lister*, 6 Ves. 631; *ex parte Reynolds*, 5 Ves. 707; *Sanderson v. Walker*, 13 Ves. 603. [*McClure v. Miller*, 1 Barb. Ch. 107; *Thorp v. McCullum*, 1 Gilm. 624.]

(g) *Whelpdale v. Cookson*, 1 Ves. 9; *Lister v. Lister*, 6 Ves. 631; *Sanderson v. Walker*, 13 Ves. 601; *Downes v. Grazebrook*, 3 Mer. 200; *Campbell v.*

(g) *Campbell v. Walker*, 5 Ves. 678. [*Hawley v. Cramer*, 4 Cow. 717; *Davoue v. Fanning*, 2 J. C. R. 252; *Hunt v. Bass*, 2 Dev. Eq. 292.]

(h) *Greenlaw v. King*, 3 Beav. 49; affirmed, S. C. 10 Law Journ. N. S., Chanc. 129. [*Van Epps v. Van Epps*, 9 Paige, 237; *Beeson v. Beeson*, 9 Barr. 284.]

(i) *Ex parte Lacey*, 6 Ves. 628; *ex parte James*, 8 Ves. 346; *Whatten v. Toone*, 5 Mad. 54; *Watson v. Toone*, 6 Mad. 153; *Cooke v. Collinridge*, Jac. 607.

¹ Executors and administrators are in most of the United States considered so far trustees as to be incapacitated from purchasing directly or indirectly their testator's estate. *Davoue v. Fanning*, 2 J. C. R. 252; *Michaud v. Girard*, 4 How. U. S. 504; *Drysdale's Appeal*, 14 Penna. St. R. 531; *Beeson v. Beeson*, 9 Barr. 279; *Lessee of Moody v. Vandyke*, 4 Binn. 31; *Winter v. Green*, 1 Halst. Ch. 319; *Ward v. Smith*, 3 Sandf. Ch. 592; *Amer v. Browning*, 1 Bradf. (N. Y.) 321; *Rogers v. Rogers*, 3 Wend. 503; *Conway v. Green*, 1 H. & J. 151; *Hudson v. Hudson*, 5 Munf. 180; *Bailey v. Robinson*, 1 Gratt. 4; *Edmonds v. Crenshaw*, 1 McCord's Ch. 252; *Baines v. McGee*, 1 Sm. & M. 308; *Brackenridge v. Holland*, 2 Blackf. 377; and cases cited 1 Lead. Cas. Eq. (1st Am. Ed.) 139. A different rule has been applied in South Carolina and Alabama as to personalty. *Stallings v. Freeman*, 2 Hill's Eq. 401; *Julian v. Reynolds*, 8 Alab. 680; *Saltmarsh v. Beene*, 4 Port. 283. That the purchase is made by the intervention of a third person is not material. *Beaubien v. Ponpard*, Harr. Ch. 206; *Woodruff v. Cook*, 2 Edw. Ch. 259; *Hawley v. Cramer*, 4 Cow. 717; *Davoue v. Fanning*, 2 J. C. R. 252; *Hunt v. Bass*, 2 Dev. Eq. 292; *Paull v. Squibb*, 12 Penna. St. R. 296; *Buckler v. Lafferty*, 2 Rob. Va. 394. But if the sale be *bona fide* to a stranger, an executor is not incapacitated from repurchasing for himself; nor will the employment of the first vendee's notes in payment be evidence of a rescission. *Silverthorn v.*

estate of the lunatic;(*k*) or commissioners, assignees, or solicitors of a bankrupt or insolvent estate purchasing any portion of the assets;(*l*)¹ or the agent of the trustee who becomes the purchaser of the trust property;(*m*) or a governor of a charity taking a lease of the lands of the charity;(*n*) or an *agent for buying(*o*) or selling(*p*) property, buying or selling, for or to himself.(*o*)² [*160]

(*k*) *Wright v. Proud*, 13 Ves 136.

(*l*) *Ex parte Hughes*, 6 Ves. 617; *ex parte Lacey*, ib. 625; *ex parte Bennett*, 10 Ves. 381; *ex parte Morgan*, 12 Ves. 6; *ex parte Reynold*, 5 Ves. 707; *Morse v. Royal*, 12 Ves. 372.

(*m*) *Downes v. Gravebrook*, 3 Mer. 200. [*Cram v. Mitchell*, 1 Sandf. Ch. 251; *Buckler v. Lafferty*, 2 Rob. Va. 294.]

(*n*) *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 500.

(*o*) *Lees v. Nuttall*, 1 R. & M. 53;

Fawcett v. Whitehouse, ib. 132; *Taylor v. Salmon*, 4 M. & Cr. 134; *Lawless v. Mansfield*, 1 Dr. & W. 557, 629; *Molony v. L'Estrange*, Beat. 406; *Charter v. Trevelyan*, 8 Jur. 1015; 11 Cl. & F. 714.

(*p*) *Lowther v. Lowther*, 13 Ves. 95; *Trevelyan v. Charter*, Rolls, 2d June, 1835 [affirmed 11 Cl. & F. 714]; *Woodhouse v. Meredith*, 1 J. & W. 204; *Whitcomb v. Minchin*, 5 Mad. 91. [*Lewis v. Hillman*, 3 H. L. Cas. 607.]

McKinster, 12 Penna. St. R. 67. The fact that the sale has been made by order of the proper court, as for the payment of debts even though the order was not procured by himself, will not protect the executor. *Rham v. North*, 2 Yeates, 117; *Beeson v. Beeson*, 9 Barr. 279; *Wallington's Estate*, 1 Ashm. 307. See *Campbell v. Johnson*, 1 Sandf. Ch. 148; *Torrey v. Bank of Orleans*, 7 Hill, 260. A purchase by an executor jointly with others, makes the whole sale voidable, *Paul v. Squibb*, 12 Penna. St. Rep. 296; *Mitchum v. Mitchum*, 3 Dana, 260. Such a sale, however, is not absolutely void (unless there be actual fraud on the part of the purchaser, see *Hudson v. Hudson*, 5 Munf. 180; *Van Horn v. Fonda*, 5 J. C. R. 388); but may be confirmed by the heirs or legatees directly, (*Pennock's Appeal*, 14 Penna. St. R. 446; *Bruch v. Lantz*, 2 Rawle, 392; *Dunlap v. Mitchell*, 10 Ohio, 117; *Longworth v. Goforth*, *Wright*, 192; *Harrington v. Brown*, 5 Pick. 519; *Moore v. Hilton*, 12 Leigh, 2; *Williams's Ex'rs. v. Marshall*, 4 G. & J. 377; *Scott v. Freeland*, 7 Sm. & M. 410), or by long acquiescence. *Jenison v. Hapgood*, 7 Pick. 1; *Musselman v. Eshelman*, 10 Barr. 394; *Todd v. Moore*, 1 Leigh, 457; *Hanley v. Cramer*, 4 Cowen, 719; *Ward v. Smith*, 3 Sandf. Ch. 592; *Bell v. Webb*, 2 Gill (Maryl.), 164. As to what constitutes such acquiescence, see page 168. A confirmation by legatees or heirs, however, will not affect the rights of creditors. *Bruch v. Lantz*, 2 Rawle, 392.

A purchaser from an administrator who has bought at his own sale, is charged with notice of the trust, it being apparent on the face of the deed. *Ward v. Smith*, 3 Sandf. Ch. 592.

¹ See *Fisler v. Sorber*, 6 W. & S. 18; *Chapin v. Wood*, 1 Clark, 464; *Dorsey v. Dorsey*, 3 H. & J. 410; *Saltmarsh v. Beene*, 4 Porter, 28; *Beeson v. Beeson*, 9 Barr. 284; *Wade v. Harper*, 3 Yerg. 483; *Harrison v. Mocks*, 10 Alab. 185.

² *Parkhurst v. Alexander*, 1 J. C. R. 394; *Sweet v. Jacocks*, 6 Paige, 364; *Piatt v. Oliver*, 2 McLean, 267; 3 How. U. S. 353; *Myers's Appeal*, 2 Barr. 463; *Bank of Orleans v. Torrey*, 7 Hill, 260; S. C. 9 Paige, 653; *Church v. Ins. Co.*, 1 Mason, 341; *Bank v. Judah*, 8 Conn. 146; *Copeland v. Marine Ins. Co.*, 6 Pick. 198; *Rankin v. Porter*, 7 W. 387; *Teakle v. Bailey*, 2 Brockenb. 44; so of an agent to pay taxes, *Oldham v. Johns*, 5 B. Monr. 467; or a cashier of a bank; *Bank of Orleans v. Torrey*, 7 Hill, 260. So even though entitled to buy, if agent buys secretly in the name of a stranger. *Lewis v. Hillman*, 3 House L. Cas. 629; *per Lord St. Leonards*.

In none of these instances will the transaction be suffered to prevail against the equitable rights of the injured parties.

And on the same principle where a person, standing in any of the above-mentioned fiduciary relations, takes advantage of his situation to obtain any personal advantage out of the trust property, by a re-sale of any portion that he may have purchased, or by a renewal of a beneficial lease in his own name, or by dealing otherwise with the trust estate, he shall not retain the same for his own benefit, but shall account for it, as a trustee of the parties entitled to the *corpus* of the estate.^(q)

The same doctrine and principles will be applied to transactions between an attorney and his client, during the continuance of that relation. A gift to an attorney, or a purchase by him from his client, is not absolutely prohibited by the rules of the court (although the dictum of Lord Erskine in *Wright v. Proud*,^(r) would seem to carry the doctrine even to that extent in case of a gift), but the court, before it will support the validity of such a transaction, requires to be fully satisfied that it is unaffected by fraud of any description, either actual or constructive; and the burden of establishing its perfect fairness, adequacy, and propriety, rests with the attorney.^(s) Therefore if such proof cannot be given, the case will be treated as one of constructive fraud, and the transaction will be set aside.^(t)

And this will be more especially the case, where the gift or sale is made to an attorney during the continuance of litigation, of which

(q) *Ex parte Hughes*, 6 Ves. 617; *Edwards v. Meyrick*, 2 Hare, 60, 68. *Whichcote v. Lawrence*, 3 Ves. 740; [*Howell v. Ransom*, 11 Paige, 538; *Hawley v. Cramer*, 4 Cow. 717; *Miles v. Irwin*, 1 McCord's, Ch. 524; *Evans v. Ellis*, 5 Denio, 640.]

(r) *Wright v. Proud*, 13 Ves. 138; and see Lord Eldon's observations in *Hatch v. Hatch*, 9 Ves. 296, 7, and *Montesquieu v. Sandys*, 18 Ves. 313; *Wood v. Downes*, ib. 127. [*Berrien v. McLane*, 1 Hoff. Ch. 421. But see notes (s) and (t).]

(s) *Harris v. Tremenhere*, 15 Ves. 34; *Cane v. Lord Allen*, 2 Dow. 289; *Montesquieu v. Sandys*, 18 Ves. 302; *Bel- low v. Russell*, 1 Ball. & B. 104, 7; *Champion v. Rigby*, 1 R. & M. 539; *Hunter v. Atkins*, 3 M. & K. 135, 6; (t) *Newman v. Payne*, 2 Ves. jun. 199; *Wells v. Middleton*, 1 Cox, 112, and 4 Bro. P. C. 245; *Walmsley v. Booth*, 2 Atk. 30; *Gibson v. Jeyes*, 6 Ves. 277; *Wood v. Downes*, 18 Ves. 120; *Champion v. Rigby*, 1 R. & M. 539; *Uppington v. Buller*, 2 Dr. & W. 184. [*Merritt v. Lambert*, 10 Paige, 357; *S. C.* 2 Den. 607, *sub nom.* *Wallis v. Lambert*; *Mott v. Harrington*, 12 Verm. 199; *Greenfield's Estate*, 2 Harris (Penn.), 489; *Barry v. Whitney*, 3 Sandf. S. C. 696; *Howell v. Ransom*, 11 Paige 538. See *Lewis v. Hillman*, 3 House L. Cas. 607.]

¹ Where a trustee or agent agrees to accept a benefit from an intended purchaser, the sale cannot be sustained. *Bailey v. Watkins*, Sugden, Law of Property, 726.

he has the management; particularly if it be connected with the subject of the suit.(u)

The same rules will not apply, where the relation of attorney and client, as well as the influence arising from that relation, has completely ceased;(x) nor where the attorney is dealt with by the client in the particular transaction not as his attorney, but as a person wholly independent of that character: for the reasons arising from the danger of a breach of confidence, &c., do not apply to such cases.(y)¹

The law on this subject has recently been laid down with great force *and perspicuity by Lord Brougham in his judgment in the case of *Hunter v. Atkins*,(z) “A client,” said his lord- [*161] ship, “may naturally entertain a kindly feeling towards an attorney or solicitor, by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or, without such an intention being the predominant motive, he may wish to give him the advantage of a sale or a lease. No law can ever forbid such a transaction, provided the client be of mature age and a sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself. In a word standing in the relation, in which he stands to the other party, the proof lies upon him (whereas in the case of a stranger it would lie upon those who opposed him) to show, that he has placed himself in the position of a stranger, that he has cut off, as it were, the connexion, which bound him to the party giving or contracting, and that nothing has happened, which might not have happened, had no such connexion subsisted. The authorities

(u) *Oldham v. Hand*, 2 Ves. 259; *ley v. Norris*, 8 W. 314; *Dobbins v. Hall v. Hallett*, 1 Cox, 134; *Wood v. Stevens*, 17 S. & R. 13.]

Downes, 18 Ves. 120. [See *Leisenring v. Black*, 5 W. 303; *Hockenbury v. Carlisle*, 5 W. & S. 350. This does not apply to the attorney for the defendant buying at a sheriff's sale; *Bank v. Forster*, 8 W. 305; nor to one merely incidentally consulted in a cause; *Devin-*

(x) *Wood v. Downes*, 18 Ves. 127.

(y) *Bellow v. Russell*, 1 B. & Beat. 104; *Montesquieu v. Sandys*, 18 Ves. 302; *Edwards v. Meyrick*, 2 Hare, 60.

(z) *Hunter v. Atkins*, 3 M. & K. 135, 6. [See the remarks in *Stump v. Gaby*, 22 L. J. Ch. 354.]

¹The rule applies, however, to the managing clerk in a solicitor's office, who has in that capacity acquired the confidence of the client, and who deals with him in a matter with which he became acquainted as clerk; *Poillon v. Martin*, 1 Sandf. Ch. 569; and to one also who acts as confidential adviser before a magistrate where attorneys do not appear. *Buffalow v. Buffalow*, 2 Dev. & Batt. Eq. 241. In *Stockton v. Ford*, 11 How. U. S. 232, it was held that the attorney for the plaintiff on the recovery of a judgment which was a lien on land, could not buy it in, on sale thereof on execution (in Louisiana) against his client.

mean nothing else than this, when they say, as in *Gibson v. Jeyes*, that attorney and client, trustee and *cestui que trust*, may deal, but that it must be at arm's length, the parties putting themselves in the situation of purchasers and vendors, and performing all the duties of those characters. Or when they say, as in *Wright v. Proud*, that an attorney shall not take a gift from his client, while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature: a *dictum* reduced in *Hatch v. Hatch* to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of showing, that everything was voluntary and fair, and with full warning and perfect knowledge; for in *Harris v. Tremenhere* the court only held, that in such case a suspicion attaches on the transaction, and calls for minute examination." (z)

The doctrine is the same with regard to gifts or sales by a principal to his steward or agent. (a)

On this subject the law was thus stated by Sir John Leach, V. C., in the case of *Lord Selsey v. Rhoades*, (b) "There is no rule of policy, which prevents a steward from being a lessee under his employer. There is no rule of policy, which prevents a steward from receiving from the bounty of his employer a beneficial lease. But where the transaction proceeds not upon motives of bounty, but upon contract, there the steward is bound to make out, that he gives the full consideration, which it would have been his duty as steward to obtain from a stranger; and where the transaction is mixed with motives of bounty, there the steward is bound to make out, that the employer was fully informed of every circumstance respecting the property, which either was within the knowledge of the steward, or ought to have been within his knowledge, which could tend to demonstrate the value of the property, and the precise measure and extent of the bounty of the employer. These doctrines may be *considered [*162] as comprised in the general maxim, that a steward dealing with his employer shall derive no advantage from his situation as steward. The employer may if he pleases treat with his steward preferably to any other person; and this preference is a bounty. But the steward cannot take advantage of this preference, unless he fully imparts to his employer all the circumstances of existing competition."

Besides the known and defined relations, which we have already

(z) *Hunter v. Atkins*, 3 M. & K. 135, 6. *Earl of Winchelsea v. Garrety*, 1 M. &

(a) *Huguenin v. Basely*, 14 Ves. K. 253; *Ker v. Lord Dungannon*, 1 Dr. 273; *Harris v. Tremenhere*, 15 Ves. & W. 509, 541.

40; *Molony v. Kernan*, 2 Dr. & W. 31; (b) *Lord Selsey v. Rhoades*, 2 S. & S. Lord Selsey v. Rhoades, 2 S. & St. 41; 49, 50: S. C. 1 Bligh. 1.

considered of parent and child, guardian and ward, trustee and *cestui que trust*, attorney and client, and principal and agent; there may be a relation between parties created by friendly habits, or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business.(c)

In this case the court will take care that no undue advantage shall be taken of the influence thus acquired;(d) and in the language of Sir S. Romilly as adopted by Lord Cottenham in the recent case of *Dent v. Bennett*,(e) "this relief stands upon a general principle, applying to all the variety of relations, in which dominion may be exercised by one person over another."

It has been observed by Lord Brougham, that the limits of natural and often unavoidable kindness with its effects, and of undue influence exercised, or unfair advantage taken, cannot be rigorously defined. And that it is not perhaps advisable that any strict rule should be laid down, or any precise line drawn, by stating, that certain acts should be the only tests of undue influence, or that certain things should be required in order to rebut the presumption of it. The circumstances of each case must be carefully examined and weighed, and on the result of the inquiry we are to say, has or has not an undue influence been exerted, an undue advantage taken.(f)

Therefore a gift or sale to a confidential friend or adviser;(g) or from a patient to his medical attendant;(h) will not be set aside merely on the ground of the relation existing between the parties; even though it be proved that the donor was very old and infirm, and that the donee had acquired considerable influence over him.

If however there is proof of concealment, misrepresentation, or contrivance in procuring the bargain or gift; or the circumstances and capacity of the donor, or the terms of the transaction itself, are such as to create a presumption of the existence of fraud, the court in such cases will undoubtedly interpose, and has frequently interposed, to give relief.(i)

It is to be observed, that interests obtained through the medium of the fraudulent conduct of third persons will be set aside by a court of equity, though the party on whom the benefit is actually conferred, be innocent of the fraud. "Let the hand receiving the gift be ever so chaste," said Lord Chief Justice Wilmot, "yet if it comes through

(c) Per Lord Brougham in *Hunter v. Atkins*, 3 M. & K. 140. [Greenfield's Est. 2 Harris, 489. See ante 161. n. z.]

(d) Ibid.

(e) 4 M. & Cr. 277. [Greenfield's Estate, 2 Harris (Penn.), 492; *Cooke v. Lamotte*, 11 Engl. L. & Eq. 26.]

(f) *Hunter v. Atkins*, 3 M. & K. 140, 1.

(g) *Hunter v. Atkins*, 3 M. & K. 113.

(h) *Pratt v. Barker*, 1 Sim. 1; S. C. 4 Russ. 507. See ante 158, note 1.

(i) *Huguenin v. Baseley*, 14 Ves. 273; *Popham v. Brooke*, 5 Russ. 8; *Griffiths v. Robins*, 3 Mad. 191; *Dent v. Bennett*, 7 Sim. 539; S. C. 4 M. & Cr.

269; *Gibson v. Russell*, 2 N. C. C. 104.

[*163] a polluted channel, *the obligation of restitution will follow it.”(k) This doctrine however will of course not prevail against persons standing in the situation of *bona fide* purchasers for valuable consideration without any notice of the fraudulent act.

The fourth and last head of fraud, distinguished by Lord Hardwicke, is that, which may be collected from the circumstances of the transaction, as being fraudulent. upon other persons not parties to the agreement.(l)

A fraudulent conveyance, made with the view of defeating the claims of creditors, is altogether void by the statute 13 Eliz. ; such a deed therefore can confer no legal interest, on which a trust can be fastened by a court of equity.

But where a composition, or arrangement, is effected by a debtor with his creditors ; and one of them, who has agreed to that arrangement, secretly obtains from the debtor a conveyance of property, or some other additional benefit for himself ; that will be a fraud upon the other creditors, which a court of equity will not suffer to take effect.(m) It seems indeed that such a transaction could not be sustained even at law.(n)

Upon the same principle a conveyance by a woman, on the point of marriage, of her estate to a stranger, if made without the knowledge of the husband, is a fraud upon him, and the person taking under such an instrument will hold in equity subject to the rights which the husband would have had, if no such deed had been made.(o) Although it will be otherwise if such a conveyance be made for a valuable,(p) or even a good consideration ;(q) or with the concurrence or knowledge of the intended husband ;(r) and the proof, that the transaction amounts to a fraud on his marital rights, lies

(k) *Bridgman v. Green*, 2 Ves. 627, and *Wilm.* 58, 64 ; *Luttrell v. Olmins*, cited 11 Ves. 638, and 14 Ves. 290 ; *Huguenin v. Baseley*, 14 Ves. 289.

(l) Vide supra.

(m) *Chesterfield v. Jansen*, 2 Ves. 156 ; ex parte *Saddler and Jackson*, 15 Ves. 52. [See 15 Penn. St. R. 310.]

(n) *Leicester v. Rose*, 4 East, 372 ; *Stock v. Mawson*, 1 Bos. & P. 286.

(o) *Hunt v. Mathews*, 1 Vern. 408 ; *Strathmore v. Bowes*, 2 Bro. C. C. 345 ; S. C. 2 Cox, 28, and 1 Ves. jun. 22 ; *Ball v. Montgomery*, 2 Ves. jun. 191 ; *Goddard v. Snow*, 1 Russ. 485 ; *England v. Downes*, 2 Beav. 522. [Logan v. Simmons, 3 Ired. Eq. 487 ; *Tucker v.*

Andrews, 13 Maine, 124 ; *Waller v. Armistead*, 2 Leigh, 11 ; *Manes v. Durrant*, 2 Rich. Eq. 404 ; and note to *Strathmore v. Bowes*, 1 Lead. Cases, Eq. 317, (1st Am. Ed.)]

(p) *Blanchet v. Forster*, 2 Ves. 264.

(q) *De Maneville v. Crompton*, 1 V. & B. 354 ; *England v. Downes*, 2 Beav. 522. [See *Tucker v. Andrews*, 13 Maine, 128 ; but *contra*, *Manes v. Durrant*, 2 Rich. Eq. 404 ; *Terry v. Hopkins*, 1 Hill, Eq. 1.]

(r) *St. George v. Wake*, 1 M. & K. 610. [McClure v. Miller, 1 Bail. Eq. 108 ; though under age, *Kottman v. Peyton*, 1 Speer's Eq. 46.]

upon the husband, or other person claiming in opposition to the deed.(s)

Upon the same ground equity will not suffer a bond or other premium or benefit given for procuring a marriage ;(t) or a public office or situation ;(u) or for any other purpose, which is forbidden either by express law, or as being contrary to public policy, to be enforced by the party, to whom it is given ; for such transactions are frauds upon the rights of other persons, either as individuals, or as members of society generally.(x)

*And where the transaction is against public policy, this equity may be enforced by the party himself, who has created [*164] the interest, although he be *in pari delicto* with the defendant : but relief will only be given in these cases upon the terms of returning any consideration, that may have been received.(y)

In most of the cases indeed of this last description the instruments will be equally void at law as in equity, and they therefore cannot have the effect of creating a trust properly so called ; except where some benefit may have been already received under them, in which case the court will usually fasten a trust on the conscience of the party in respect of such past receipts, and direct an account and repayment.(z)

In like manner where there is a devise, or conveyance, to trustees upon a secret understanding, that the property is to be applied by them to purposes, which the law expressly forbids, or will not allow to take effect ; that is a fraud upon the legislature, as well as upon the rights of the parties, who would become entitled upon the failure of the illegal gift. Therefore where a bill is filed by the heir-at-law against the devisees, alleging the existence of such a trust, it has been repeatedly decided, that the defendants are bound to answer the bill notwithstanding the Statute of Frauds.(a) And if the trust

(s) *St. George v. Wake*, 1 M. & K. 210 ; *England v. Downes*, 2 Beav. 522.

(t) *Drury v. Hook*, 1 Vern. 412 ; *Smith v. Bruning*, 2 Vern. 392 ; *Roberts v. Roberts*, 3 P. Wms. 76 ; *Smyth v. Aykwell*, 3 Atk. 566 ; *Cole v. Gibson*, 1 Ves. 507 ; *Williamson v. Gihon*, 2 Sch. & Lef. 357 ; *Debenham v. Ox*, 1 Ves. 277.

(u) *Whittingham v. Burgoyne*, 3 Anst. 900 ; *Morris v. M'Culloch*, Ambl. 432, and 2 Ed. 190 ; see *Hanington v. Du Chatel*, 1 Bro. C. C. 124 ; *Hartwell v. Hartwell*, 4 Ves. 811, 15.

(x) *Robinson v. Gee*, 1 Ves. 251 ;

Franco v. Bolton, 3 Ves. 370 ; *Gray v. Mathias*, 5 Ves. 286 ; 1 Fonbl. Eq. B. 1, ch. 4, s. 4 ; 1 Mad. Ch. Pr. 377 ; *Story*, Eq. Jur. § 260, &c.

(y) *St. John v. St. John*, 11 Ves. 535, 6.

(z) *Smith v. Bruning*, 2 Vern. 392 ; *Morris v. M'Culloch*, Ambl. 432.

(a) *Muckleston v. Brown*, 6 Ves. 52, 67 ; *Strickland v. Aldridge*, 9 Ves. 516 ; see *Chamberlain v. Agar*, 2 V. & B. 259 ; *Podmore v. Gunning*, 7 Sim. 644 ; *Edwards v. Pike*, 1 Ed. 267. [*Robinson v. King*, 6 Geo. 550.]

be admitted by the answer, (b) or otherwise sufficiently proved, (c) the devisees will be decreed to be trustees for the heir-at-law. But the plaintiffs in such a case must clearly establish their title to the relief prayed, or otherwise the bill will be dismissed. (d) However in the case of positive fraud, parol evidence is admissible even against the answer of the defendant. (e)

The last class of constructive trusts of this description, is that of purchases from a trustee made with notice of the trust. It may be laid down as a general rule, that a purchaser from a trustee with notice though for valuable consideration, and *à fortiori*, a volunteer taking with notice, is in equity bound by the trust to the same extent, and in the same manner, as the person, from whom he purchased. (f)¹ And this will be the case equally, whether it be an express trust, (as in the case of a conveyance from a trustee of a term or of a settlement, (g)) or a constructive trust, (such as one arising from an agreement or contract respecting the estate. (h)) And a fine levied by a purchaser with notice will not strengthen his title, or bar the *cestui que trust*, any more than a simple conveyance. (i)

[*165] *Notice of the trust to a purchaser before actual payment of the money, although it be secured, and the conveyance

(b) *Cottingham v. Fletcher*, 2 Atk. Ves. 498; *Taylor v. Stibbert*, 2 Ves. 155; *Bozon v. Statham*, 1 Ed. 508; *Bishop v. Talbot*, cited 6 Ves. 60.

(c) *Edwards v. Pike*, 1 Ed. 267; see *Podmore v. Gunning*, 7 Sim. 665.

(d) *Adlington v. Cann*, 3 Atk. 141; *Paine v. Hall*, 18 Ves. 473; see 1 Ed. 515, n.(a)

(e) *Pring v. Pring*, 2 Vern. 99; *Strickland v. Aldridge*, 9 Ves. 520. [How v. Camp, Walk. Ch. 427.]

(f) *Mead v. Ld. Orrery*, 3 Atk. 238; *Winged v. Lefebury*, 1 Eq. Cas. Abr. 32, p. 43; *Earl Brook v. Bulkley*, 2

Ves. 498; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Crofton v. Ormsby*, 2 Sch. & Lef. 583, 2 Sugd. V. & P. 269; *Adair v. Shaw*, 1 Sch. & Lef. 262. [See *Pooley v. Budd*, 14 Beav. 34.]

(g) *Mansell v. Mansell*, 2 P. Wms. 681; *Sanders v. Dehew*, 2 Vern. 271; *Pye v. Gorge*, 1 P. Wms. 128.

(h) *Earl Brook v. Bulkley*, 2 Ves. 498; *Molony v. Kernan*, 2 Dr. & W. 31.

(i) *Kennedy v. Daly*, 1 Sch. and Lef. 379; see *Boney v. Smith*, 1 Vern. 145.

¹ *Wormley v. Wormley*, 8 Wheat. 421; *Oliver v. Piatt*, 3 How. U. S. 333; *Clarke v. Hackethorne*, 3 Yeates, 269; *Peebles v. Reading*, 8 S. & R. 495; *Reade v. Dickey*, 2 Watts, 459; *Hood v. Fahnestock*, 1 Barr, 470; *Wilkins v. Anderson*, 1 Jones (Penn'a), 339; *Murray v. Ballou*, 1 John. C. R. 566; *Den v. McKnight*, 6 Halstead, 385; *Pugh's heirs v. Bell's heirs*, 1 J. J. Marsh. 403; *Massay v. McIlwaine*, 2 Hill, Eq. 426; *Truesdell v. Callaway*, 6 Mis. 605; *Suydam v. Martin*, *Wright (Ohio)*, 384; *Benzien v. Lenoir*, 1 Car. L. R. 504; *Liggett v. Wall*, 2 A. K. Marsh. 149; notes to *Le Neve v. Le Neve*, 2 Lead. Cases, Eq. p. 1: p. 163; and post 510; *Caldwell v. Carrington*, 9 Peters, 86; *Bailey v. Wilson*, 1 Dev. & Batt. Eq. 182; *Wright v. Dame*, 22 Pick. 55. The identity of a sum of money or debt affected by a trust, does not consist in the pieces of coin, but in the fund, which may be followed so long as its identity can be traced. U. S. v. *Inhabitants of Waterborough*, *Daveis*, 154; See *Goepf's App.* 15 Penn. St. R. 428.

actually executed; (*k*) or before the execution of the conveyance, notwithstanding that the money be paid, (*l*) is equivalent to notice before the contract. (*m*)¹

However although a person may have notice of a trust affecting a property, if the person, from whom he purchases it, bought *bona fide*, and for valuable consideration, the notice to the second purchaser will not make him a trustee: (*n*)² although this circumstance may influence the court with respect to costs. (*o*) But if the second purchaser, in such a case, be the original trustee, who reacquires the estate, he will be fixed with the trust. (*p*)

- (*k*) *Tourville v. Naish*, 3 P. Wms. Bradling *v. Ord*, 1 Atk. 571; *Lowther* 307; *Story v. Ld. Windsor*, 2 Atk. 630; *v. Charleton*, 2 Atk. 242; *Sweet v. More v. Mayhew*, 1 Ch. Ca. 34; *Jones Southcote*, 2 Bro. C. C. 66.
v. Stanley, 2 Eq. Ca. Abr. 685, pl. 9. (o) *Andrew v. Wrigley*, 4 Bro. C. C. 125; 2 Sugd. V. & P. 274.
(*l*) *Wigg v. Wigg*, 1 Atk. 384. (p) *Bovey v. Smith*, 1 Vern. 149; 1 (m) 2 Sugd. V. & P. 274.
(*n*) *Harrison v. Forth*, Prec. Ch. 51; *Cruis. Dig. Tit. 12, ch. 4, s. 14.*

¹ The decisions in the United States as to the period before which notice must have been received in order to affect a purchaser, though not uniform, are in general in accordance with the English rule as stated in the text. *Wilcox v. Callaway*, 1 Wash. Va. 38; *Snelgrove v. Snelgrove*, 4 Desaus. 274; *Moore v. Clay*, 7 Alab. 142; *Blair v. Owles*, 1 Munf. 40; *Sims v. Richardson*, 2 Litt. 229; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; *Bush v. Bush*, 3 Strob. Eq. 131; *Alexander v. Pendleton*, 8 Cranch, 462; *Wormley v. Wormley*, 8 Wheat. 421; *Boone v. Chiles*, 10 Pet. 77; *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. 554; *Pillow's heirs v. Shannon's heirs*, 3 Yerg. 308; notes to *Bassett v. Nosworthy*, 2 Lead. Ca. Eq. p. 2, page 95, &c. (1st. ed.). But in *Youst v. Martin*, 3 S. & R. 430; *Boggs v. Warner*, 6 W. & S. 469; *Juvenal v. Jackson*, 14 Penna. St. R. 519: and in *Doswell v. Buchanan*, 3 Leigh, 365 (by a majority of the court); it was held that a purchaser would be protected by a payment of the purchase-money, though before conveyance executed. And so again in Pennsylvania, contrary to the doctrine of the English cases, payment of a part of the money will be a protection *pro tanto*. *Youst v. Martin*, *ub supra*; *Bellas v. McCarty*, 10 Watts, 13; *Juvenal v. Patterson*, 14 Penna. St. Rep. 519; *accord*. *Flagg v. Mann*, 2 Sumn. 486; *Frost v. Beekman*, 1 J. C. R. 288. Actual payment, is, moreover, usually decided to be necessary, *Murray v. Ballou*, 1 John. C. R. 566; *Jackson v. Caswell*, 1 Cow. 622; *Christie v. Bishop*, 1 Barb. Ch. 105; *McBee v. Loftis*, 1 Strobh. Eq. 90. But the notes of third persons, (*Jewett v. Palmer*, 7 Cow. 65); or those of the vendee if actually negotiated, (*Frost v. Beekman*, 1 J. C. R. 288; *Freeman v. Deming*, 3 Sandf. Ch. 327,) are equivalent to payment for this purpose. In Pennsylvania valuable improvements before notice; (*Boggs v. Warner*, 6 W. & S. 469; or payment of part, the rest secured to be paid on a contingency (*Bellas v. McCarthy*, 10 Watts, 131), have been held sufficient. This subject is very fully and ably discussed in the American notes to *Bassett v. Nosworthy*, 2 Lead. Cas. Eq. p. ii. [20], and to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. p. ii. [32].

² *Lacy v. Wilson*, 4 Munf. 313; *Truluck v. Peoples*, 3 Kelly (Geo.), 446; *Bracken v. Miller*, 4 W. & S. 102; *Fletcher v. Peck*, 6 Cranch, 36; *Boone v. Chiles*, 10 Pet. 177; *Boynton v. Reese*, 8 Pick. 29; *Griffith v. Griffith*, 9 Paige, 315; *Mott v. Clark*, 9 Barr, 399; 2 Lead. Cas. Eq. part ii., page 83 (1st. Am. Ed.); but see *Schutt v. Large*, 6 Barb. S. C. 373.

The notice in these cases may be either to the purchaser himself or to his counsel, attorney, or agent; (q)¹ though the counsel, attorney, or agent be himself the vendor, (r) or be concerned for both vendor and purchaser. (s) But the notice to the agent must as a general rule be in the course of the same transaction; (t) and it seems that that will also be the rule even with regard to notice to the principal himself. (u) Although this rule will not hold good in every case, for if the two transactions follow close upon each other, notice in one will be held to operate as notice in the other. (x)

The notice also may be either actual or constructive. Actual notice requires no definition: in that case knowledge of the existence of the trust is brought positively home to the purchaser. Constructive notice is in its nature no more than evidence of actual notice; but it is difficult as a general rule to lay down, what will constitute constructive notice: each case must depend on its own circumstances. (y) This however is a subject, which it will be necessary to consider more at large hereafter.²

It is upon this principle that a purchase from an executor or administrator of his testator's estate will not be suffered to prevail against the beneficial title of the creditors or particular legatees (1) or next of

(q) *Brotherton v. Hatt*, 2 Vern. 574; *Baillie*, 2 Ves. 368; *Mountford v. Scott*, 3 Mad. 34. [*Bracken v. Miller*, 4 W. & S. 111; *Henry v. Morgan*, 2 Binn. 497.]

(r) *Sheldon v. Cox*, Ambl. 624; *Dryden v. Frost*, 3 M. & Cr. 670.

(s) *Le Neve v. Le Neve*, 3 Atk. 646; *Kennedy v. Green*, 3 M. & K. 699; *Dryden v. Frost*, 3 M. & Cr. 670. [*Sergeant v. Ingersoll*, 15 Penna. St. R. 350.]

(t) *Preston v. Tubbin*, 1 Vern. 286; *Warwick v. Warwick*, 3 Atk. 291; *Worsley v. Earl of Scarborough*, id. 392; *Hine v. Dodd*, 2 Atk. 275; *Lowther v. Carleton*, id. 242; *Ashley v.*

(u) *Hamilton v. Royse*, 2 Sch. & Lef. 327; 2 Sugd. V. & P. 277, 9th ed. [*Boggs v. Varner*, 6 W. & S. 469.]

(x) *Mountford v. Scott*, T. & R. 280; *Hargreaves v. Rothwell*, 1 Keen, 154; *Perkins v. Bradley*, 1 Hare, 230.

(y) *Hine v. Dodd*, 2 Atk. 275; *Tolland v. Stainbridge*, 3 Ves. 478; *Eyre v. Dolphin*, 2 Ball. & B. 301; 2 Fonbl. Eq. B. 3, Ch. 3, s. 1, n. (b); 2 Sug. V. & Pd. 276; *Pearce v. Newlyn*, 3 Mad. 186. [Post, page 510, and see the notes to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. (p. ii. 12.)]

(1) A distinction appears to have been established in this respect between *particular* and *residuary* legatees; for it has been said, that *residuary* or *general* legatees are never permitted to question the disposition, which the executors have

¹ *Astor v. Wells*, 4 Wheat. 466; *Westervelt v. Huff*, 2 Sandf. Ch. 98; *Blair v. Owles*, 1 Munf. 40; *Jackson v. Leek*, 19 Wend. 339; *Bracken v. Miller*, 4 W. & S. 108. But notice to a husband is not notice to his wife. *Snyder v. Sponable*, 1 Hill, 567; affirmed, 7 Hill, 427.

² As to the effect of the recording acts in the various States upon the doctrines as to notice, see post, 510.

kin, if *the purchaser bought with notice or knowledge that the transaction amounted to a *devastavit* or misapplication [*166] of the assets.(z) However the power of the executor or administrator over the estate is extremely ample both at law and in equity; and necessarily so, in order to the due discharge of their duties; and the court will require a very strong case to be established, before it will interfere to question a disposition of the assets by a person filling either of those situations.(a)¹

(z) 1 Mad. Ch. Pr. 379; Story Eq. son v. Maire, 4 id. 270; and 2 Ves. jun. Jur. § 422. 95; Scott v. Tyler, 2 Dick. 725; Bonney

(a) Ibid; Crane v. Drake, 2 Vern. v. Ridgard, 1 Cox, 145; Dickson v. 616; Ewer v. Corbett, 2 P. Wms. 148; Lockyer, 4 Ves. 42, 3; Doran v. Simp- Newland v. Champion, 1 Ves. 105; son, id. 665; Hill v. Simpson, 7 Ves. Jacomb v. Harwood, 2 Ves. 268; Elms- 152; M'Leod v. Drummond, 14 Ves. lie v. M'Aulay, 3 Bro. C. C. 626; Utter- 353, and 17 Ves. 172.

made of the assets. Mead v. Ld. Orrery, 3 Atk. 235; McLeod v. Drummond, 14 Ves. 361. Although this distinction was doubted by Lord Eldon in the same case of McLeod v. Drummond, when it came before him on appeal, 17 Ves. 169, 170; and see 1 Mad. Ch. Pr. 382. [See Saxon v. Barksdale, 4 Desaus. 526. The distinction between creditors and residuary legatees in this respect was asserted in McNair's App., 4 Rawle, 155, but denied in Johnson v. Johnson, 2 Hill, Eq. 277.]

¹ In general, a purchaser of personal estate from an executor or administrator, in good faith, and having no knowledge of any intended breach of trust, is not responsible for a misapplication of the proceeds, Field v. Schieffelin, 7 J. C. R. 155; Hertell v. Bogert, 9 Paige, 57; Tyrrell v. Morris, 1 Dev. & Batt. Eq. 559; Rayner v. Pearsall, 3 J. C. R. 578; Bond v. Zeigler, 1 Kelly, 324; see Mills v. Durnford, 13 Eng. L. & Eq. 120; though where an administrator is required to sell at public sale, it has been held that a private sale passes no title. Fambro v. Gantt, 12 Alab. 305; Barnes v. McGee, 1 Sm. & M. 208; Saxon v. Barksdale, 4 Desaus. 526; but see Bond v. Zeigler, 1 Kelly, 324. Where, however, the purchaser has notice that the transaction amounts to a *devastavit*, he is liable to legatees or distributees, and the property may be pursued. Field v. Schieffelin, *ut sup.*; Colt v. Lesnier, 9 Cow. 320; Williams v. Branch Bank, 7 Alab. 906; Parker v. Gilliam, 10 Yerg. 394; Garnett v. Macon, 6 Call. 361; Petrie v. Clark, 11 S. & R. 388; Dodson v. Simpson, 2 Rand. 294; Graff v. Castleton, 3 Rand, 204, &c.; Lowry v. Farmer's Bank, 10 P. L. J. (3 Am. L. J. n. s.) 111, per Taney, C. J.; Williamson v. Morton, 2 John. Maryl. Ch. Dec. 94. In this last case the distinction is said to be that at law actual collusion is necessary to make a purchaser liable, while equity will consider the whole transaction. Therefore, where the transfer is by way of pledge for or in extinguishment of a private debt of the executor, this is sufficient notice. Petrie v. Clark; Dodson v. Simpson; Field v. Schieffelin; Williams v. Branch Bank; Williamson v. Morton, *ut sup.* But in Tyrrel v. Morris, 1 Dev. & Bat. Eq. 559, a pledge for a contemporaneous advance to one in good faith was held to be within the general rule; and see Petrie v. Clarke, *ut sup.* And where the original advance of the money was made to the executor for the benefit of the estate, and on a representation that it was needed therefor, and the executor subsequently on being pressed for

We have seen, that in some cases, such as in transactions with an expectant heir, or between guardian and ward, trustee and *cestui que trust*, or solicitor and client, the relation between the parties is of itself sufficient to raise a presumption against the propriety of the transaction, so as to throw upon the parties, who endeavor to support it, the burden of establishing its validity.(b)

In other cases, however, where no such presumption exists, those who seek to displace the claim of the persons, in whom the legal title is vested, on the score of fraud, must establish by sufficient evidence, the facts on which they rest their title to relief.

With regard to the mode of proving the fraud, it was laid down by Lord Hardwicke, "that the court has adhered to this principle, 'that the Statute of Frauds should never be understood to protect fraud; and therefore wherever a case is infected with fraud, the court will not suffer the statute to protect it, so as that any one should run away with a benefit not intended.' "(c)

Therefore wherever a case of fraud is made by the bill, parol evidence will be admitted for the purpose of establishing that case; even though the effect of such evidence be to alter or vary a written instrument, and although the benefit of the statute be insisted upon by the defendant.(d)¹ For as was said by Lord Thurlow, "The moment you impeach a deed, for fraud, you must either deny the effect of fraud on a deed, or you cannot but be under the necessity

(b) *Davis v. D. of Marlborough*, 2 Sw. 141; *Hunter v. Atkins*, 3 M. & K. 135, vide supra. *Thyn v. Thyn*, 1 Vern. 296; *Oldham v. Lichford*, 2 Vern. 506; *Drakeford v. Wilks*, 3 Atk. 539; *Reech v. Kennegate*, 1 Ves. 125, and *Ambl. 67*; *Irnham v. Child*, 1 Bro. C. C. 93; *Cripps v. Jee*, 4 Bro. C. C. 475; *Filmer v. Gott*, 7 Bro. P. C. 70; *Pember v. Mathers*, 1 Bro. C. C. 52; *Wilkinson v. Bradfield*, 2 Vern. 307; *Young v. Peachy*, 2 Atk. 257.

(c) In *Reech v. Kennegate*, 1 Ves. 125; and see *Hutchins v. Lee*, 1 Atk. 448; *Montacute v. Maxwell*, 1 P. Wms. 620; *Walker v. Walker*, 2 Atk. 98; *Young v. Peachy*, 2 Atk. 258.

(d) *Sellack v. Harris*, 5 Vin. Ab. 521; *Vern. 307*; *Young v. Peachy*, 2 Atk. 257.

payment, gave a mortgage of real estate over which he had a power of sale for the payment of debts, it was held good, and the mortgagee not liable; though the fact that the mortgage was given for a previous advance was said to be worthy of attention. *Miles v. Durnford*, 13 Eng. L. & Eq. 120. See on this subject generally, 11 Jurist, part ii. 124.

This doctrine, however, being founded in the general power of an executor over personal assets, does not apply to sales of real estate, in which case, the purchaser must look to the will for the power to sell: *Brush v. Ware*, 15 Peters, 93; *Brock v. Phillips*, 2 Wash. Va. 87 [68]; and see post, 372, and notes.

¹ *Miller v. Cotten*, 5 Geo. 346; *Elliott v. Cornell*, 5 Sm. & M. 91; *Watkins v. Storkett*, 6 H. & J. 435; *Christ v. Diffenbach*, 1 S. & R. 464; notes to *Woollam v. Hearn*, 2 Lead. Cas. Eq. p. ii., page 558, (1st. ed.)

of admitting parol evidence to prove it.”(e) But in all these cases the bill must contain allegations of fraud.(f)¹

*And the same rule prevails, where relief is sought on the ground, that through mistake, surprise, or accident the instrument is framed contrary to the intention of the parties. In such cases parol evidence will be received to establish the plaintiff's title to the relief prayed. “How,” observed Lord Hardwicke in *Baker v. Paine*, “can a mistake in an agreement be proved but by parol evidence!”(g)(1)² [*167]

However, even in the case of fraud, parol evidence is not regarded with favor, and the court will not act upon it, if it be not strong irrefragable evidence;(h) or if it be contradicted or controverted by other testimony.(i)

And where an important provision in a deed was omitted inten-

(e) In *Shelburne v. Inchiquin*, 1 Bro. C. C. 350; and see *Hare v. Sherewood*, 1 Ves. jun. 243; *Townshend v. Stangroom*, 6 Ves. 333; *Pym v. Blackburn*, 3 Ves. 38, n. (a), where the cases are collected; [Miller v. Cotten, 6 Geo. 346;] but see contra, *Conolly v. Lord Howe*, 5 Ves. 701. vington, 5 Ves. 593; *Taylor v. Radd*, 5 Ves. 595, cited *Jenkins v. Quinchant*, 5 Ves. 596, n.; *Henkle v. Royal Assurance Company*, 1 Ves. 318; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Rogers v. Earl*, 1 Dick. 294.

(f) *Imham v. Child*, 1 Bro. C. C. 94; *Putmore v. Morris*, 2 Id. 219. (h) *Shelburne v. Inchiquin*, 1 Bro. C. C. 341; *Marquis of Townshend v. Stangroom*, 6 Ves. 334. [Miller v. Cotten, 5 Geo. 346.]

(g) *Baker v. Paine*, 1 Ves. 457; *Towers v. Moor*, 2 Vern. 98; *Langley v. Brown*, 2 Atk. 203; *Barstow v. Kil-* (i) *Barrow v. Greenhough*, 3 Ves. 154. [Ib.]

(1) But relief will be refused on the ground of mistake, where the case of the plaintiff depends entirely on parol evidence, and is contradicted by the defendant's answer. *Mortimer v. Shortall*, 2 Dr. & W. 363. See *Alexander v. Crosbie*, Ll. & G. 145. [Where the answer denies the mistake, the proof must be of the clearest and most conclusive kind. *Lyman v. United Ins. Co.*, 2 J. C. R. 630; *S. C.* 17 John. R. 373; *Watkins v. Stockett*, 6 H. & J. 435; *Preston v. Whitcomb*, 17 Verm. 183; *U. S. v. Monroe*, 5 Mason, 572; *Gray v. Woods*, 4 Blackf. 432.]

¹ *Gouverneur v. Elmendorff*, 5 J. C. R. 79; *Forsyth v. Clark*, 3 Wend. 637; *Thompson v. Jackson*, 3 Rand. 504; *Booth v. Booth*, 3 Litt. 457; *Fitzpatrick v. Bent*, 1 Gilm. 454; *Miller v. Cotten*, 5 Geo. 346. But where the facts are stated with directness and precision, and constitute fraud in themselves, an allegation of fraud, *totidem verbis* is not necessary. *Kennedy v. Kennedy*, 2 Alab. 571; *McCalmont v. Rankin*, 8 Hare, 15.

² *Hunt v. Rousmanier*, 8 Wheat. 174; *Keisselbrock v. Livingston*, 4 J. C. R. 144; *Harrison v. Howard*, 1 Ired. Eq. 407; *Perry v. Pearson*, 1 Humph. 431; *Newson v. Buffalow*, 1 Dev. Eq. 379; *Peterson v. Grover*, 20 Maine, 263; *Goodell v. Freed*, 15 Verm. 448; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Gower v. Steiner*, 2 Whart. 75.

tionally by the parties, *(k)*¹ whether through a mistake of the law; *(l)* or through carelessness or inattention at the time of executing the deed; *(m)* and no fraud is charged, or proved against the defendant, who denies by his answer the existence of any such provision, parol evidence will not be admitted to add to or vary the instrument.

It has been decided also that where a deed is sought to be impeached on the ground of fraud in obtaining it, declarations by the party, who executed the deed, *subsequently* to its execution and after it became a subject of dispute, cannot be received to prove the fraud. *(n)*

We have seen that a plaintiff is entitled to an answer to allegations of fraud contained in the bill; *(o)* and that if the case be admitted by the answer, the court will act on that admission without other proof. *(p)* And though those allegations are positively denied by the answer, parol evidence will be admitted to prove them; and if the case be thus sufficiently established relief will be decreed, *(q)* and it has been decided that the court will act upon the parol testimony of a single witness unless the denial in the answer be positive, and goes to the whole case made by the bill. *(r)*

It may be observed, that where fraud is set up as a defence against a suit, brought for the purpose of enforcing the execution of a deed or agreement; parol evidence will in all cases be admitted in support of the defendant's case. *(s)*

[*168] *And according to the universal rule of evidence, where parol proofs are admitted on the one side to establish a case

(k) *Leman v. Whitley*, 4 Russ. 423.

(l) *Irnham v. Child*, 1 Bro. C. C. 92, *Potmore v. Morris*, 2 Bro. C. C. 219. [*London Railway Co. v. Winter*, 1 Cr. & Ph. 57; *Wheaton v. Wheaton*, 9 Conn. 96; *Hunt v. Rousmanier*, 1 Pet. S. C. 1; *Lyon v. Richardson*, 1 J. C. R. 60; *Greenwood v. Eldridge*, 1 Green, Ch. 146.]

(m) *Rich v. Jackson*, 4 Bro. C. C. 614, and 6 Ves. 334, n.; *Anon. Skin.* 159, and 1 Sugd. V. & P. 167, 8; *Hare v. Shearwood*, 1 Ves. jun. 241; *Jackson v. Cator*, 5 Ves. 688.

(n) *Conolly v. Lord Howe*, 5 Ves. 700. [*Bradley v. Chase*, 22 Maine, 511.]

(o) Vide *Supra* 61, *Muckleston v. Brown*, 6 Ves. 67. [*Stoval v. North Bank Mississippi*, 5 Sm. & M. 17; *Ross v. Vertner*, 1 Freem. Ch. 587.]

(p) *Contington v. Fletcher*, 2 Atk. 155, vide *supra*, 61.

(q) See *Podmore v. Gunning*, 7 Sim. 654; but see *Mortimer v. Shortall*, 2 Dr. & W. 363.

(r) *Reech v. Kennegate*, 1 Ves. 125.

(s) *Jorques v. Statham*, 3 Atk. 388; *Woolam v. Hearne*, 7 Ves. 211; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; 1 Sugd. V. & P. 137.

¹ *Robeson v. Harwell*, 6 Georgia, 589; *Parkhurst v. Van Cortland*, 1 J. C. R. 282; *Moyan v. Hays*, Id. 339; *Chauncey v. Crutchfield*, 2 Ired. Eq. 148; *Westbrook v. Harbeson*, 2 McCord, Ch. 112; *Dwight v. Pomeroy*, 17 Mass. 303; *Ratcliffe v. Ellison*, 3 Rand. 537; *Richardson v. Thompson*, 1 Hump. 151; *American Notes to Woollam v. Hearn*, 2 Lead. Cases, Eq. p. I. page 561, 1st ed.; but see *Keisilbrach v. Livingston*, 4 J. C. R. 144; *Christ v. Dffenbach*, 1 S. & R. 464; *Clark v. Partridge*, 2 Barr, 13; 4 Barr, 166; *Oliver v. Bell*, 4 Rawle, 171; *Rearich v. Swineheart*, 1 Jones* (Pa.), 238.

of fraud, they will also be received on the other for the purpose of rebutting it.(t)

It is one of the first principles of courts of equity, that a party, who seeks to establish a constructive trust in his favor, even on the ground of fraud, must use due activity and diligence in the prosecution of his claim; for as Lord Camden said in his celebrated judgment in *Smith v. Clay*,^(u) "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time."^(u)

Accordingly it was laid down by Sir William Grant, M. R., in the case of *Beckford v. Wade*,^(x) that though no time bars a direct trust as between *cestui que trust* and trustee, a constructive trust will be barred by long acquiescence, although the ground of original relief was clear and even arose out of fraud.^(x)

And both before and since that case bills for relief on the ground of fraud, whether actual or constructive, have repeatedly been dismissed solely on account of long acquiescence on the part of the plaintiffs; and this, though the circumstances were such, as would no doubt have originally entitled the parties to the relief prayed.^(y) However it has been decided, that a bill charging fraud in obtaining an estate cannot be *demurred* to on the ground of long acquiescence; for the operation of delay as a bar to the relief is a conclusion from facts, and is not a matter of law.^(z)¹

(t) Vide supra, p. 96, 125.

(u) *Smith v. Clay*, 3 Bro. C. C. 639, n.; and see *Marquis of Cholmondeley v. Lord Clinton*, 2 J. & W. 141, 151; *Chalmer v. Bradley*, 1 J. & W. 59; et vide post, Application of Stat. of Limitation [263].

(x) In *Beckford v. Wade*, 17 Ves. 97; and see *Portlock v. Gardner*, 1 Hare, 594, 607.

(y) *Bonny v. Ridgard*, cited 4 Bro. C. C. 138; *Andrew v. Wrigley*, 4 Bro. C. C. 124; *Blennerhasset v. Day*, 2

Ball. & B. 118; *Gregory v. Gregory*, Cowp. 201; S. C. Jac. 631; *Selsey v. Rhoades*, 1 Bligh. N. S. 1; *Champion v. Rigby*, 1 R. & M. 539; *Ex parte Granger*, 2 Deac. & Ch. 459; *Collard v. Hare*, 2 R. & M. 675; *Norris v. Neve*, 3 Atk. 38; *Pryce v. Byrn*, 5 Ves. 681, cited *Campbell v. Walker*, 5 Ves. 678-82; *Morse v. Royal*, 12 Ves. 355; *Medlicott v. O'Donnell*, 1 Ball. & B. 156; *Portlock v. Gardner*, 1 Hare, 594.
(z) *Earl of Deloraine v. Browne*, 3 Bro. C. C. 633, 646.

¹ Long acquiescence or laches in the case of fraud or mistake is a bar in equity, to relief. *Hawley v. Cramer*, 4 Cowen, 707; *Powell v. Murray*, 2 Edw. Ch. 644; 10 Paige, 256; *Dobson v. Racey*, 3 Sandf. Ch. 61; *Piatt v. Vatie*, 9 Pet. 405; *McKnight v. Taylor*, 1 How. U. S. 189; *Wagner v. Baird*, 7 How. U. S. 234; *Veazie v. Williams*, 8 How. U. S. 134; *Hallett v. Collins*, 10 How. U. S. 174; *Hough v. Richardson*, 3 Story, 659; *Gould v. Gould*, Id. 516; *Irwin v. Robertson*, 3 Rand. 549; *Coleman v. Lyman*, 4 Rand. 454; *Anderson v. Barwell*, 6 Gratt. 405; *Peebles v. Reading*, 8 S. & R. 484; *Hatfield v. Montgomery*, 2 Porter, 58; *Steele v. Kimble*, 3 Alab. 352; *Edwards v. Roberts*, 7 Sm. & M. 544; *Bond v. Brown*, 1 Harp. Eq. 270; *Peacock v. Black*, 1 Halst. Eq. 535; *Story Eq.* § 520,

But mere length of time of itself will not be a bar to a relief on a constructive trust originating in fraud. The party entitled to the benefit of such a trust must also be aware of his rights, and acquiesce in being deprived of them; and time in order to bar the remedy, will not begin to run until he acquires, or might have acquired, the knowledge of the fact on which the trust is founded.(a)

(a) *Ryder v. Bickerton*, 3 Sw. 81, n.; 111; *Michaud v. Gerod*, 4 How. U. S. Blennerhasset *v. Day*, 2 Ball. & B. 118; 561; *Doggett v. Emerson*, 3 Story, 700; *Trevelyan v. Charter*, 11 Cl. & F. 714, *Phalen v. Clark*, 19 Conn. 421; *Halett [Bowens v. Evans*, 2 H. L. Cases, *v. Collins*, 10 How. U. S. 174.] 237; *Warner v. Daniels*, 1 W. & M.

in notes. This may be even in cases unaffected by the Statute of Limitation, on the mere ground of staleness. *Ingam v. Toulmin*, 9 Alab. 662; *Mason v. Crosby*, 1 Wood. & M. 342; *Piatt v. Vatie*, 1 McLean, 146; 9 Peters, 405. In Massachusetts the statute applies in equity to constructive trusts, and therefore, except in cases of actual and undiscovered fraud, six years' delay precludes relief. *Farnum v. Brooks*, 9 Pick. 212. New York, by the Code of Procedure adopted in 1851, § 78, &c., in actions for the recovery of real property, &c., or for the recovery of possession thereof, seisin within twenty years is made necessary. By § 91 (6) an action for relief on the ground of fraud, in cases which theretofore were solely cognizable by a Court of Chancery, is to be brought within six years; but the cause of action in such cases is not to be deemed to have accrued until the discovery by the aggrieved party of the fact constituting the fraud; and by § 97, other actions for relief not thereinbefore provided for, which would seem, by reference to the Revised Statutes, part iii. ch. IV. Art. 6, § 50, &c., to apply to other cases of trusts formerly not cognizable at law; are to be commenced within ten years after the cause of action shall have accrued. See *Williamson v. Field*, 2 Sandf. Ch. 534. In Wisconsin, similar limitations exist.

It is now established in the United States, contrary to the doctrine stated in the text, and to some earlier cases, that where it appears on the face of the bill that the statute of limitations or lapse of time is a bar, the objection may be taken by a demurrer. The complainant, if there be circumstances accounting for the delay, or bringing the case under one of the exceptions of the act, must state them in the first instance, that they may be put in issue by the answer. *Wisner v. Barnett*, 4 Wash. C. C. R. 631; *Dunlap v. Gibbs*, 4 Yerg. 94; *Humber v. Rector of Trinity Church*, 7 Paige, 197; affirmed 24 Wend. 595; *Van Hook v. Whitlock*, 7 Paige, 373; *Maxwell v. Kennedy*, 8 How. U. S. 210; *Field v. Wilson*, 6 B. Monroe, 479; *Ingraham v. Regan*, 23 Mississippi Rep. (1 Cush.) 214; *Fetters v. See*, 2 Barb. S. C. 490; *Ferris v. Henderson*, 12 Penn. St. R. 74; (*per Lowrie J.*); *Bank U. S. v. Biddle*, 2 Pars. Eq. 27; *McLean v. Barton*, Harrington, Ch. 279; *Pratt v. Northam*, 5 Mason, 95; *Story Eq. Plead.* § 484; *contra Bulkley v. Bulkley*, 2 Day, 363; *Hickman v. Stout*, 2 Leigh. 1; see *Denston v. Morris*, 2 Edw. Ch. 37. But the laches must appear distinctly by the bill itself. *Muir v. Trustees*, 3 Barb. Ch. 477; *Battle v. Durham*, 11 Geo. R. 17. And a general demurrer where *all* the grounds of relief stated in the bill are not barred by lapse of time, will be overruled. *Radcliffe v. Rowley*, 2 Barb. Ch. 23. When the case is one of a presumption of payment merely, the defendant must allege payment in his answer. *Fetters v. See*, 2 Barb. Sup. Ct. 490. And generally, the objection of acquiescence is one which must be made in the first instance, and cannot be taken on appeal. *The State v. Holloway*, 8 Blackf. 45; *Wills v. Dunn*, 5 Gratt. 384.

However it seems, that the mere poverty of a party is not sufficient to do away with the effect of laches in prosecuting his claim.(b)

This doctrine was established previously to the recent statute 3 & 4 Will. IV. c. 27, and was acted upon in numerous decisions, where relief was afforded notwithstanding very long intervals since the accruer of the title.(c) And in this sense and to this extent the *dicta*, which are to be *found in the books, are undoubtedly true, [*169] that "no length of time will sanctify or cover a fraud."(d)

And now by the 26th section of the statute 3 & 4 Will. IV. c. 27, it is expressly enacted, that in cases of concealed fraud time shall not begin to run, until the fraud, shall, or with reasonable diligence might, have been known or discovered saving the rights of *bona fide* purchasers for valuable consideration.

Upon the same ground it has been decided, that lapse of time will not be a bar to the relief, where from the obscurity of the transaction the plaintiff was unable to obtain full information of his rights;(e) or where the party entitled, is of weak understanding, or he continues under the influence of the defendant.(f)

And in order to displace the title of a party to relief on the ground of his delay and acquiescence, it lies upon the defendant by distinct and explicit evidence, to bring home to the plaintiff the knowledge of the fact, on which the acquiescence is founded, and to which it refers.(g)¹

However where a party comes to the court after a great distance

(b) *Roberts v. Tunstall*, 4 Hare, 257. [*Perry v. Craig*, 3 Mis. 516; *Locke v. Armstrong*, 2 Dev. & Batt. 147; nor the supposed poverty of the defendant, see *Maxwell v. Henderson*, 8 How. U. S. 210.]

(c) *Stackpole v. Devoren*, 1 Bro. P. C. 9; *Vernon v. Vandry*, 2 Atk. 119; *Alder v. Gregory*, 2 Ed. 280; *Randall v. Errington*, 10 Ves. 423; *Purcell v. M'Namara*, 14 Ves. 91 *Watson v. Toove*, 6 Mad. 153; *Gordon v. Gordon*, 3 Swanst. 400; *Malony v. L'Estrange*, 1 Beat. 406. In *Trevelyan v. Charter*, Sir C. Pepys, M. R., set aside a purchase at an undervalue by a steward, after an interval of forty-seven years. *Rolls*, 2d June, 1835. [Affirmed 11 Cl. & F. 714.]

(d) *Mulcahy v. Kennedy*, 1 Ridg. P. C. 337; *Pickering v. Lord Stamford*, 2 Ves. jun. 280. [See *Prevost v. Gratz*, 6 Wheat. 481; *Michaud v. Girod*, 4 How. U. S. 560; *Marsh v. Pell*, 1 J. C. R. 598.]

(e) *Murray v. Palmer*, 2 Sch. & Lef. 487.

(f) *Aylward v. Kearney*, 2 Ball. & B. 463; *Pickett v. Loggan*, 14 Ves. 215; *Purcell v. M'Namara*, id. 91. [*Ferris v. Henderson*, 12 Penn. St. R. 74.]

(g) *Randall v. Errington*, 10 Ves. 427, 8; *Downes v. Grazebrook*, 3 Mer. 208. [See *Doggett v. Emerson*, 3 Story, 700; *Callender v. Colegrove*, 17 Conn. 1; *Phalen v. Clark*, 19 Conn. 421.]

¹ In a case of confirmation by devise the rule is different; *Stump v. Gaby*, 22 L. J. Ch. 352.

of time to impeach a transaction for fraud, very clear and strong evidence will be required to establish the plaintiff's case.^(h)

In some cases, although the court has granted the main relief prayed by setting aside the transaction, yet on account of the length of time, that had elapsed before the claim was preferred, the account has been directed to be taken only from the time of filing the bill.⁽ⁱ⁾ And the decree has been made without costs,^(k) and arrears of rents received will be given for only six years.^(l)

It is difficult to lay down as a general proposition what length of acquiescence will be a bar to relief on the ground of fraud.¹ This

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| <p>(h) <i>Chandos v. Brownlow</i>, 2 Ridg. P. C. 397; <i>Chalmers v. Bradley</i>, 1 J. & W. 59. [<i>Bowen v. Evans</i>, 2 H. L. Cases, 257; <i>Montgomery v. Hobson</i>, Meigs, 437; <i>Westbrooke v. Harbeson</i>, 2 McCord, Eq. 112; <i>Page v. Booth</i>, 1 Rob. Va. 161; <i>Phillips v. Belden</i>, 2 Edw. Ch. 1; <i>Powell v. Murray</i>, 10 Paige, 256.]</p> | <p>(i) <i>Pickett v. Loggan</i>, 14 Ves. 215; <i>Malony v. L'Estrange</i>, 1 Beatt. 406; <i>Mulhallen v. Marum</i>, 3 Dr. & W. 317. (k) <i>Attorney-General v. Ld. Dudley</i>, Coop. 146, 8; <i>Pearce v. Newlyn</i>, 3 Mad. 189. (l) <i>Pearce v. Newlyn</i>, 3 Mad. 189.</p> |
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¹ In *Michaud v. Girod*, 4 How. U. S. 561, the Court say, "We believe no case can be found in the books, in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within *thirty* years after it has been discovered, or becomes known to the party, whose rights are affected by it." In *Ward v. Van Bokkelen* (1 Paige 104), it was decided that by analogy to the statute of limitation, *twenty* years was the shortest period which could bar a proceeding in equity, to set aside a conveyance obtained by fraud. This analogy to the statute was adopted as the rule, where the fraud had or might have been discovered, in *Thompson v. Blair*, 3 Murphy, 593; *Farr v. Farr*, 1 Hill, Eq. 391; *Field v. Wilson*, 6 B. Monroe, 479; (see *Bruce v. Child*, 4 Hawks, 372,) *Perry v. Craig*, 3 Mis. 525; *Miller v. McIntyre*, 6 Peters, 61; *Bank U. S. v. Biddle*, 2 Pars. Eq. 3; *Ferris v. Henderson*, 12 Penn. St. R. 54; *Walker v. Harper*, 16 S. & R. 379; see *McDowall v. Goldsmith*, 2 Johns. Mary. Ch. 370; and 19 Am. Jur. 339. But where there is no adverse possession, or there could be no bar at law by lapse of time, so, it is said, there is none in equity. *Varich v. Edwards*, 1 Hoff. Ch. 417; *Elmendorf v. Taylor*, 10 Wheat. 176; *Barbour v. Whitelock*, 4 Monr. 197. Most cases lay down no certain period, but leave it to rest very much on the facts. Acquiescence for 18 years; *Bell v. Webb*, 2 Gill. 163; for 11 years, *Rhineland v. Barrow*, 17 John. R. 538; for 12 years, *Butler v. Haskell*, 4 Desaus. 651: has been held insufficient. On the other hand, a delay unexplained of "nearly 30 years;" *Harrod v. Fauntleroy*, 3 J. J. Marsh. 548; *Phillips v. Belden*, 2 Edw. Ch. 1; *Page v. Booth*, 1 Rob. Va. 161; *Bond v. Brown*, Harp. Eq. 270; of 38 years; *Powell v. Murray*, 10 Paige, 256: of 46 years; *Maxwell v. Kennedy*, 8 How. U. S. 210: of 50 years; *Anderson v. Burwell*, 6 Grattan, 405: of 27 years, with a lapse of 26 years after bill filed; *Hayes v. Good*, 7 Leigh, 486; has been ruled to be laches. But where the delay has been caused by the act of the defendant in any way, the lapse of time will not be material, *Richards v. Jones*, 3 G. & J. 163; *Doggett v. Emerson*, 3 Story, 700; *Callender v. Colegrove*, 17 Conn. 1; *Phalen v. Clarke*, 19 Conn. 421: and the complainant's absence from the country will account for an apparent laches. *Hallett v. Collins*, 10 How. U. S. 174. (The reporter has neglected the dates of

must necessarily be a matter of equitable discretion, depending on the nature of the transaction, and the circumstances of the parties in each individual case. In many of the cases indeed, where relief was given after a long interval, the question of acquiescence does not appear to have been raised; so that they can scarcely be considered as authorities on the point. The legal bar of twenty years appears to have been treated as the proper limit on several occasions; ^(m) and it was distinctly decided in one case, that equity will not relieve, where the facts constituting the fraud are in the knowledge of the party, and he lies by for twenty-five years, ⁽ⁿ⁾ and in *another case twenty-one years' acquiescence was held to be a bar to the relief. ^(o) [*170]

In *Gregory v. Gregory*, Sir William Grant, M. R., dismissed a bill, to set aside a purchase by a trustee after a lapse of eighteen years, upon the length of time only, and the decision was affirmed on appeal by Lord Eldon. ^(p)

And in the case of *Champion v. Rigby*, ^(q) Sir John Leach, M. R., refused to set aside a purchase by a solicitor from his client after an acquiescence on the part of the plaintiff for eighteen years. ^(q) And in a late case acquiescence for eighteen years in a purchase by a trustee was held by Vice-Chancellor Wigram to bar the right to relief. ^(r)

In such cases, however, unless the case of acquiescence is extremely strong, the bill will usually be dismissed without costs. ^(s)

In *Pryce v. Byrn*, Lord Alvanley, M. R., dismissed a bill to set aside a purchase by trustees made twenty years before. ^(t) But in *Molony v. L'Estrange*, ^(u) relief was given against a purchase by an agent after an acquiescence of thirty years. ^(u) And in a late case in Ireland relief was given against a lease fraudulently obtained by a person, who filled the character of guardian, and agent, and re-

^(m) *Smith v. Clay*, 3 Bro. C. C. 639, n.; *Hovenden v. Ld. Annesley*, 2 Sch. & Lef. 636, 7; *Stackhouse v. Bamston*, 10 Ves. 466.

⁽ⁿ⁾ *Blennerhasset v. Day*, 2 Ball. & B. 118.

^(o) *Selsey v. Rhodes*, 1 Bligh. N. S. 1.

^(p) *Gregory v. Gregory*, Coop. 201; S. C. Jac. 631.

^(q) *Champion v. Rigby*, 1 R. & M. 539.

^(r) *Roberts v. Tunstall*, V. C. Wigram, 27th Feb. 1845, MS. [4 Hare, 257.]

^(s) *Gregory v. Gregory*, Coop. 201; *Champion v. Rigby*, 1 R. & M. 539; *Portlock v. Gardner*, 1 Hare, 594.

^(t) *Pryce v. Byrn*, cited 5 Ves. 681.

^(u) *Molony v. L'Estrange*, Beat. 406.

this case, so that the length of time which elapsed between the fraud and the filing of the bill, does not appear.) In cases of mistake more diligence would seem necessary, especially where parol evidence is to be resorted to. See *Hite v. Hite*, 1 B. Monr. 177, where 17 years; and *Bruce v. Child*, 4 Hawks. 372; where 19 years, acquiescence were held to bar relief.

ceiver, where there had been a delay of eleven years in instituting the suit.(x)

Where the right is vested in a large body of persons, such as creditors, it has been decided, that acquiescence is no argument against decreeing the relief.(y) Although in the instances, where this was decided, the acquiescence does not seem to have been for a very long period.

This exception will also prevail in favor of large societies of persons, such as a society of dissenters, for whose benefit relief was decreed in one case by Sir William Grant after a delay of twenty-two years, although without costs on account of the length of time.(z) And the same rule has been established in favor of charities generally.(a) But this subject will be considered more at length in a future chapter.(b)

II.—BY EQUITABLE CONSTRUCTION IN THE ABSENCE OF FRAUD.

It not unfrequently happens, that the principles, adopted by courts of equity in administering justice, differ materially from those, that have been established by courts of law. The former are often carried to a greater extent, and occasionally indeed are at variance with the latter. In such cases the courts of equity vindicate their own principles by means of their peculiar jurisdiction *in personam*, [171] and convert the holder of the *legal estate, though unaffected by fraud either actual or constructive, into a trustee for the party who is entitled by the rules of equity to the beneficial interest.

For instance when a contract has been entered into for the sale of an estate, the legal title to the property remains unaffected, and *at law* the parties have only acquired a right of action for breach of the contract, in case it is not performed. But one of the first principles of equity is, that it looks upon things, agreed to be done, as actually performed;(c) and acting on this principle, when the contract is made, it considers the vendor as a trustee for the purchaser of the estate

(x) *Mulhallen v. Marum*, 3 Dr. & W. 317.

(y) *Whichcote v. Lawrence*, 3 Ves. 745, 52; *Case in Exchequer*, cited 6 Ves. 632; *York Buildings Company v. Mackenzie*, 8 Bro. P. C. 42.

(z) *Attorney-General v. Ld. Dudley*, Cowp. 146.

(a) *Attorney-General v. Hungerford*, 8 Bl. N. C. 437; *Attorney-General v. Flint*, V. C. Wigram, Mich. Term, 1844. [4 Hare, 147.]

(b) *Post*, Pt. 2, Ch. 2, s. 5.

(c) *Francis's Maxims*, 13; 1 Fonbl. Eq. Tr. B. 1, Ch. 6, s. 9.

sold;(d)¹ and the purchaser as a trustee of the purchase-money for the vendor.(e)

This equity attaches immediately on the making of the contract, and will not therefore be affected by the subsequent death, or bankruptcy, or any other act of either of the parties, before the contract is carried into execution.(f)

Another rule of equity, which admits of no exception, is, that the court will never allow a trust to fail for want of a trustee.(g) Therefore where a trust is created, but the party creating it has appointed no trustee;(h) or the trustee by the rules of law is incapable of taking;(i) or the appointment of the trustee fails by his death, or refusal, or otherwise;(k) in all these cases the court will follow the estate into the hands of the party, in whom it becomes vested at law, and will treat him as the trustee for the execution of the trust.(l)²

This description of trust is clearly within the recent statute (4 & 5 Will. IV. c. 23) for the amendment of the law relative to the escheat,

(d) *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Ch. Ca. 39; *Green v. Smith*, 1 Atk. 572; 1 Sugd. V. & P. 171; *Wall v. Bright*, 1 J. & W. 500.

(e) *Green v. Smith*, ubi supra; *Pollexfen v. Moore*, 3 Atk. 273; 1 Sugd. V. & P. 171.

(f) *Paul v. Wilkins*, Toth. 106; *Barker v. Hill*, 2 Ch. Rep. 113; *Winged v. Lefebury*, 2 Eq. Ca. Abr. 32, pl. 43; *Orlebar v. Fletcher*, 1 P. Wms. 737; *Bowles v. Rogers*, 6 Ves. 95, n.; *Whitworth v. Davis*, 1 V. & B. 545; 1 Sugd. V. & P. 171, 2. [Not by death, *Newton v. Swazey*, 8 N. H. 9; *Jacobs v. Locke*, 2 Ired. Eq. 286; *Glaze v. Drayton*, 1

Desaus. 109; *Tiernan v. Roland*, 15 Penn. St. 429; *Rutherford v. Green*, 2 Ired. Eq. 121.]

(g) Co. Litt. 290, b.; Butl. note 1, VI.; 1 Mad. Ch. Pr. 580.

(h) Co. Litt. Butl. not. ubi supra; *White v. White*, 1 Bro. C. C. 12.

(i) *Sonley v. Clock Maker's Company*, 1 Bro. C. C. 81. [*Stone v. Griffin*, 3 Verm. 400; *Vidal v. Girard*, 2 How. U. S. 128.]

(k) *Hewett v. Hewett*, 2 Ed. 332; Co. Litt. 113 a, n. 2; *Doiley v. Sharrat*, 2 Fonbl. Eq. 216; *Lewis v. Lewis*, 1 Cox, 162.

(l) 1 Mad. Ch. Pr. 580; *White v. White* ante, 48; 5 Beav. 222.

¹ See notes to *Woollam v. Hearne*, 2 Lead. Cas. Eq. p. i. [355]; and to *Mackreth v. Simmons*, 1 Id. [195]; *McKay v. Carrington*, 1 McLean, 50; *Crawford v. Bertholf*, Saxt. Ch. 458; *Ten Eyck v. Simpson*, 1 Sandf. Ch. 244; *Waddington v. Banks*, 1 Brock, 468; *Malin v. Malin*, 1 Wend. 625; *Kerr v. Day*, 14 Penn. St. 114. So where a vendor under articles, is only able to convey a part of the lands at the time, and subsequently acquires the remainder, he will hold it as trustee for his vendee. *Tyson v. Passmore*, 2 Barr, 122; see *McCall v. Coover*, 4 W. & S. 151; *Wilson's Estate*, 2 Barr, 325.

² Equity never suffers a trust to fail for want of a trustee, but if necessary will appoint one; ante, page 48 note; *King v. Donnelly*, 5 Paige, 46; *Field v. Arrow-smith*, 3 Hump. 442; *Dawson v. Dawson*, Rice Eq. 243; *Lee v. Randolph*, 2 Henn. & Mun. 12; *Dunscorn v. Dunscorn*, Id. 11; or treat the holder of the legal title as such, *Cushney v. Henry*, 4 Paige, 345; *McIntyre School v. Zan. Canal & R. R.*, 9 Hamm. 203; *McKennan v. Phillips*, 6 Whart. 571; *Boykin v. Ciples*, 2 Hill's Eq. 200; *Griffith v. Griffith*, 5 B. Monroe, 113.

and forfeiture, of trust estates. The fourth section of that act, expressly extends its operation to trusts arising or resulting by implication of law or construction of equity. There is therefore no doubt, but that this equity would be enforced against the crown, or any lord by escheat, upon whom the *legal* title to an estate so circumstanced would devolve in default of an heir or next of kin of the creator of the trust.(m)

Again, where a testator appoints a debtor to be his executor; such an appointment will operate *at law* as a release, or extinguishment, of the debt. The principle being, that as an executor cannot maintain an action against himself for the debt, the right of action, which has been thus once voluntarily suspended by the act of the party, is for ever gone and discharged.(n)

[*172] *In equity, however, the executor will be accountable for the amount of the debt, due from himself as general assets for the payment of the testator's debts and legacies.(o) And this equity will be enforced in favor of the residuary legatee or next of kin of the testator.(p)¹

Another instance of a constructive trust of this description is, the case of a person taking property from a trustee without notice of the trust, but without having given any valuable consideration for it. In such a case the party, in whom the property thus becomes vested, will be bound by the trust to the same extent, as the trustee, from whom he took.(q) However we have seen that it would be different with regard to a *bona fide* purchaser for a valuable considera-

(m) 1 Mad. Ch. Pr. ubi supra. [In *son v. Gutteridge*, 13 Ves. 264; 2 Wms. Hughes v. Wells, 13 Eng. L. & Eq. 401, Exors. 815, 16. [Story's Eq. § 1209.]
so decided.]

(n) Nedham's case, 8 Co. 136, a; Talb. 203; S. C. 3 Bro. P. C. 607; Wentw. Off. Ex. Ch. 2, p. 73, 14th ed.; Carey v. Goodinge, 3 Bro. C. C. 110. 2 Wms. Exors. 811, and cases cited. [See Pusey v. Clemson, 9 S. & R. 204.]

(o) Flud v. Rumsey, Yelv. 160; Phillips v. Phillips, Freem. 11, and 1 Ch. Ca. 292; Errington v. Evans, 2 Dick. 456; Carey v. Goodinge, 3 Bro. C. C. 111; Berry v. Usher, 11 Ves. 90; Simp- (q) Pye v. George, 1 P. Wms. 128; 1 Cruis. Dig. Tit. 12, Ch. 4, s. 16; Mansell v. Mansell, 2 P. Wms. 681. [Ante. 164, note.]

¹ In many of the United States the common law rule is abrogated, and the debt of an executor is required to be included in the inventory and assets, Pennsylvania, Act of 1834, § 6 (so, before the act, Pusey v. Clemson, 9 S. & R. 204; Griffith v. Chew, 8 S. & R. 32); Delaware, Rev. Code (1852), No. 1811; New Jersey, Rev. Stat. (1847), 358; Maryland, 1 Dorsey's Laws, 394; Virginia, Code of 1849, 543; North Carolina, 1 Rev. Stat. (1837), 278; South Carolina, Grimke Pub. Laws, 494; Georgia, Cobb's Dig. 302; Alabama, Clay's Dig. 228; Florida, Thompson's Laws, 196; Texas, Dallam's Digest, 92; Missouri, Rev. St. (1845), 77; Mississippi, How. & Hutch. 404; Arkansas, Rev. St. (1838), 78; Kentucky, 1 Moo. & Br. 668; Ohio, Rev. Stat. (1831), 349.

tion.(r)⁽¹⁾ But persons, who obtain possession of an estate by actual ouster and disseisin, without collusion with the trustee will not be bound by the trust, *although they may have had notice of it*. For the disseisor creates a title for himself paramount to the trust.(s)²

(r) Ante, p. 164.

(s) Finch's case, 4 Inst. 85; Sugd. Gilb. Us. 429.

(1) The stock and other property of corporations is constructively a trust fund for the payment of their debts; so that their creditors have, in equity, a lien or priority in payment on it, over the stockholders. Therefore if a corporation is dissolved, the contracts survive the dissolution, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of a bona fide purchaser; for such property will be held affected with a trust, primarily for the creditors of the company, and, subject to their right, secondarily for the stockholders, *pro rata*. (*Mumma v. The Potomac Company*, 8 Peters's Rep. 281.) This doctrine was held as to a judgment obtained by the plaintiff against the company, the right to revive which by *scire facias* was determined by the Supreme Court of the United States, to have been lost to the plaintiff by the dissolution of the corporation. The counsel for the plaintiff appear to have entrapped themselves by their case stated and agreement, and the decision, or rather the reasoning of the court upon the excluded point (p. 286), seems founded on a conceit, not to say a quibble. The court also refused costs, because there was no such corporation in esse as the defendants; yet, without viewing them as a corporation *pro illa vice*, there was no party defendant in court.

The capital stock of an incorporated bank is also, constructively, a trust fund for all the debts of the corporation; and no stockholder can take any share of such capital until all the debts are paid. And if the capital should be divided, leaving any debts unpaid, every stockholder, receiving his share, would, in equity, be held liable *pro rata*, to contribute to the discharge of such debts out of the fund in his own hands. *Vose v. Grant*, 15 Mass. Rep. 505, 517; *Spear v. Grant*, 16 Id. 9; *Wood v. Dummar*, 3 Mason, 308 a.

The remedy, however, is in equity alone; for a court of common law, is incapable of administering full relief; since it has no power of bringing all the proper parties before the court, or of ascertaining the full amount of the debts, the mode of contribution, the number of contributors, or the cross equities and liabilities, which may be absolutely required for a proper adjustment of the rights of all parties, as well as of the creditors. (*Ibid.* 2 Story's Eq. 499, 500.) The cases last quoted though referred to the head of trusts by equitable construction in the absence of fraud, strike the editor as belonging appropriately to trusts raised by the implication of fraud; for what can involve grosser symptoms of bad faith than the act of stockholders deliberately dividing their corporate property to the exclusion of their creditors? He should think that on this ground, there would be no difficulty in the question suggested by Mr. Justice Jackson in the cases in Massachusetts, in the event of the insolvency of any of the stockholders, whether the loss of the amounts received by them should be borne by the creditors or the other stockholders.—T.

² The registration of a deed or mortgage is only notice to those claiming through or under the grantor or mortgagor, *Felton v. Hunter*, 11 Shepley, 29; *Keller v. Nutz*, 5 S. & R. 246; *Woods v. Farmere*, 7 Watts, 382; *Bates v. Norcross*, 14 Pick. 224; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Crochett v. Maguire*, 10 Mis. 34.

And a term outstanding in a trustee will attend the inheritance for the benefit of the disseisor.(t)

[*173] *Upon the death of a mortgagee in fee, who has not foreclosed, the mortgage debt will constitute part of his personal assets, but the legal fee in the lands will descend, if not otherwise disposed of, to his heir-at-law. The heir however will hold, as a trustee by construction of equity, for the benefit of the parties entitled to the personal estate.(u)¹

So where the legal interest in real or personal estate, is vested in a mortgagee, or other incumbrancer, to secure a debt; which is afterwards paid: he becomes a trustee for the mortgagor immediately upon the satisfaction of the debt, until a reconveyance be executed.(x)

Money deposited by a person with a banker creates a legal debt between the parties, which may be recovered by an action at law. But in the absence of special circumstances, the customer is not at liberty to treat the banker as a *trustee*, and sue him in equity for an account.(y)

There is another class of trustees, which may be referred to a constructive trust of the description now under consideration. This is, trustees *de son tort*, or those, who of their own authority enter into the possession or assume the management of property which belongs beneficially to others.² Such persons will of course be always liable

(t) *Reynolds v. Jones*, 2 S. & St. 206. 251, n. (A.); *Poole v. Pass*, 1 Beav.

(u) *Ellis v. Guavas*, 2 Ch. Ca. 60; 1 600.
Fonbl. Tr. Eq. B. 3, C. 1, s. 13; 2 Cruis. (y) *Foley v. Hill*, [1 Phill. 399, affirmed, 2 Cl. & Finn. N. S. 28. See

Dig. 90, 1. *Potts v. Clegg*, 16 M. & W. 321, and American notes.]

¹ *Chase v. Lockerman*, 11 G. & J. 185. But in America generally a mortgage is treated both at law and in equity as a mere chattel interest, (see 4 Kent's Comm. 160, &c., *McCall v. Lenox*, 9 S. & R. 302;) and a reconveyance is not deemed necessary to revest the fee in the mortgagor; see 4 Kent, 194, and notes.

² An administrator who interferes with the real estate of his intestate, and assumes to act as trustee, may be treated as such, and cannot demur to a bill asking for his removal and the appointment of a new trustee. *Le Fort v. Delafield*, 3 Edw. Ch. 32; see *McCoy v. Scott*, 2 Rawle, 222; *Schwartz Est.*, 14 Penn. St. R. 47. In *Rackham v. Siddall*, 1 Mac. & G. 607; 2 Hall & T. 44; affirming S. C. 16 Sim. 297, it was held that a person assuming to act as heir or devisee of a trustee, and committing an act which if done by the trustee would have been a breach of trust, cannot relieve himself from liability, by asserting that he was not in fact trustee. So, one who enters on an infant's land, and takes the rents and profits, may be treated as guardian or trustee, and is liable to account as such. *Wyllie v. Ellice*, 6 Hare, 505; *Drury v. Conner*, 1 H. & G. 220; *Chaney v. Smallwood*, 1 Gill, 367; *Goodhue v. Bambell*, Rice's Eq. 190; Bloom-

to be deprived of the possession, which they have thus assumed, at the will of the parties beneficially entitled. And as a general rule they will doubtless be liable to the payment of any costs or expenses, which their unauthorized intrusion may have occasioned. Although cases may be easily imagined, where the interference of a stranger has proceeded from necessity and from the sole desire of protecting and benefiting the property, and where consequently a trustee of this description would be decreed to have his costs and other expenses. During the continuance of their possession or management, such trustees are subject to the same rules and remedies as other constructive trustees.^(z)¹

It is to be observed, that the general doctrine of constructive trusts will not be enforced against the Bank of England with regard to sums of *stock in their books. And as a general rule they will only be bound to recognise the person who has the [*174] legal title to the stock.^(a)²

(z) See *Wilson v. Moore*, 1 M. & K. 127, 146. [*Boddy v. Lefevre*, 1 Hare, 602, n. and cases cited.]

(a) *Pearson v. Bank of England*, 2 Bro. C. C. 529; *Hartgo v. Bank of Eng-* land, 3 Ves. 55; *Bank of England v. Parsons*, 5 Ves. 665; *Austin v. Bank of England*, 8 Ves. 522; *Bank of England v. Lunn*, 15 Ves. 583; *Bristed v. Wilkins*, 3 Hare, 235.

field v. Eyre, 8 Beav. 250; and being thus a fiduciary he cannot set up the statute of limitations; *Goodhue v. Bambell*, ut sup. But in these cases the party injured electing to pursue the equitable remedy, instead of treating the other as a trespasser, must in his turn do equity, and must therefore join in his bill all who concur in the tortious act; and cannot single one out, as he could at law, *Wyllie v. Ellice*, ut sup.; see also *Phene v. Gillam*, 5 Hare, 5.

¹ Another instance of a constructive trust may be found in the case of a suit in equity by a creditor of an estate, to recover his debt from legatees or distributees, who have received payment of their claims from the executor (acting by mistake, but *bona fide* and without fault) before a due discharge of all the debts. In such a case, the executor who has so distributed the assets, may be sued at law by the creditor. But the legatees and distributees, although there was an original deficiency of assets, are not at law suable by the creditor. Yet, he has a clear right in equity in such a case, to follow the assets of the testator into their hands as a trust fund for the payment of his debt. The legatees and distributees are in equity treated as trustees for this purpose; for they are not entitled to anything, except the surplus of the assets, after all the debts are paid. Besides, they, in the case put, being ultimately responsible to pay the debt to the executor out of such assets, if the executor should be compelled to pay it to the creditor, by a suit at law, may be made immediately liable to the creditor in equity. (*Riddle v. Mandeville*, 5 Cranch, 329, 330.) But the other is the more broad and general ground, as the creditor may sometimes have a remedy, where the executor, if he has paid over the assets, might not have any against the legatees or distributees. (*Ibid.* 2 Story's Eq. 498.) See *Russell v. Clarke's Executors*, 7 Cranch, 69, 97; *McCall v. Harrison*, 1 Brock. C. C. Rep. 126; for other cases of implied trust.—T.

² See as to the liabilities of purchasers of stock standing in the name of trustees, *Walsh v. Stille*, 2 Pars. Eq. 17; *Mechanics' Bank v. Seton*, 1 Pet. Sup. Ct.

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DIVISION III.

THE CONSTITUTION OF TRUSTEES BY WAY OF SUBSTITUTION IN THE PLACE OF THOSE ALREADY CREATED.

THE machinery of trusts would be very imperfect, if means were not provided for filling up the vacancies which may be occasioned from time to time by the death, or resignation, or refusal to act, of the original trustees. New trustees may be created, either 1st, in exercise of a power contained in the trust instrument; or 2d, by the interposition of the Court of Chancery.

CHAPTER I.

THE SUBSTITUTIONARY CREATION OF TRUSTEES IN EXERCISE OF A POWER.

THE office and duties of a trustee, being matters of confidence, cannot be delegated by him to another, unless an express authority for that purpose be conferred on him by the instrument creating the trust.

Therefore upon the death, or refusal to act, of one or more of several co-trustees, the office of trustee will devolve with the legal estate upon the survivors, or upon those who accept the trust, and ultimately upon the heir, or personal representatives of the last survivor. Nor will there be any means of continuing the original number and the proper succession of trustees by any fresh appointment, except under a decree of the Court of Chancery.

299; *Porter v. Bank of Rutland*, 19 Verm. 410; *Reader v. Barr*, 4 Hamm. (Ohio), 446; *Christmas v. Mitchell*, 3 Ired. Eq. 535; though see *Albert v. Savings Bank*, 1 John. Maryl. Ch. Rep. 406, S. C. 1 Am. Law Reg. 282; *Lowry v. Comm. Bank, C. C. U. S.*, for Maryland, 3 Banker's Magazine, 201; 10 Penna. Law Jour. (3 Am. L. J. N. S.) 111; which last cases rule, that the risk is on the bank or corporation making the transfer. In *Lowry v. Comm. Bank*, ut supr., Chief Justice Taney considers the decisions as to the Bank of England to be exceptions depending merely on the meaning and policy of the act of Parliament, of which the management of the public stocks was transferred to it; remarking that "certainly none of the English cases convey the idea that upon general principles of law, a bank is not bound to notice a trust of its own stocks, and must look to the legal estate." In *Bank of Virginia v. Craig*, 6 Leigh, 399, it was held that a guardian holding stock of his ward, could transfer the same, and that the bank could not prevent the breach of trust.

If a trustee convey away the trust estate to another, though it be to his co-trustee, without any such authority created by the trust instrument, or the sanction of the court, the conveyance will doubtless operate to pass the legal estate in the property, but the office of trustee with all its responsibilities will still remain unchanged in the original trustee. He will therefore continue personally answerable to the *cestuis que trusts* for any misconduct or breach of trust, committed by the party, in whose power he has thus placed the trust estate. (a) And the person to whom the property is so conveyed, will be unable to exercise any of the powers, annexed to the office of trustee, in any dealings with third persons respecting the trust estate. (b)

*A power to nominate new trustees can seldom exist, except where the trust has been expressly created by deed or [*176] will. In all other cases of trust the continuance of the trustee by substitutionary appointment must be provided for by application to the Court of Chancery, which will form the subject of consideration in the next chapter.¹

A power to appoint new trustees can only be created by the author of the trust himself. The court cannot in general delegate to others the authority, which it assumes in these cases; and trustees, appointed or substituted by the court, will not usually be authorized to appoint others in their stead. (c) (1)

However, there seems to be an exception to this rule in cases of charity. For in charitable trusts equity will not only appoint new trustees to fill the vacancies actually created, but it will also sanc-

(a) *Chalmers v. Bradley*, 1 J. & W. 68; *Wilkinson v. Parry*, 4 Russ. 272; 6 Jarm. Bythewood's Conveyancing, 506, 3d ed.; *Adams v. Paynter*, 14 Law Journ. N. S., Chanc. 54; *Collyer's* Ch. 532.

(b) *Ibid.* et vide *Lord Braybroke v. Inskip*, 8 Ves. 417.

(c) *Bayley v. Mansell*, 4 Mad. 226; *Southwell v. Ward*, Tambl. 314; but see *Joyce v. Joyce*, 2 Moll. 276; 2 Sugd. Pow. 533, 6th ed.; *Brown v. Brown*, 3 Y. & C. 395.

(1) However, in *Joyce v. Joyce*, 2 Molloy, 276, which was a suit for the appointment of new trustees, the decree directed a proviso to be inserted in the deed, authorizing the parties from time to time thereafter to appoint new trustees; and see *White v. White*, 5 Beav. 221; and *Lampayo v. Gould*, 12 Sim. 426, and post, Chap. II., sect. 3. [These cases are now overruled. See *Holden v. Dublin*, 18 L. J. Ch. 479, 11 Beav. 594; *Bowles v. Weeks*, 14 Sim. 591; *Oglander v. Oglander*, 2 De G. & Sm. 381; 12 Jur. 786; 17 L. J. Ch. 439]

¹ It has been held that a power reserved to the assignor, in an assignment for the benefit of creditors to appoint new trustees, on the resignation of the old, was void as interfering with the rights of the creditors. *Plank v. Schermerhorn*, 3 Barb. Ch. 641; but see *Robins v. Embry*, 1 Sm. & M. Ch. 207.

tion the insertion of a direction in the scheme, that regular appointments may be made by proper parties from time to time, as often as occasion may require.(d)

Every well drawn deed of settlement and will creating trusts, which may by possibility endure beyond a very short period, contains powers, enabling any of the trustees for the time being to relinquish the trust, as well as provisions for supplying by fresh nominations the vacancies to be occasioned by the resignation, or the death or incapacity of any trustee.(e) A suit in Chancery will be the almost certain consequence of the omission of these provisions.

Such a power will be inserted in a settlement under articles as a "reasonable and proper power." Thus in *Lindow v. Fleetwood*,(f) a strict settlement was directed by a will, and that there should be inserted in it, powers of leasing, sale, partition, and exchange, and that in such settlement should be inserted "all such other proper and reasonable powers, as are usually inserted in settlements of like nature." Sir J. Leach, M. R., held, that a power to appoint new trustees was a proper and reasonable power to be inserted in the settlement.(g) Some reliance indeed was placed by the court upon the direction being in a separate and distinct sentence, but Sir E. Sugden in his work on Powers observes, that "appears to be too thin a distinction."(g)

In framing these powers the greatest care should be taken to provide for every possible contingency, in which a change or new appointment of trustees may become necessary, or desirable, so as to obviate the expense and trouble of an application to the Court of Chancery.(1) And where an *appointment is made under
[*177] such a power, it is of the last importance both to the retiring

(d) *Attorney-General v. Shore*, 1 M. & Cr. 394; 2 Sugd. Pow. 533, 6th ed.; 3d ed.

(e) 6 Jarm. Bythew. Convey. 506.
(f) *Lindow v. Fleetwood*, 6 Sim. C. C. 373; S. C. Seton, Decr. 131; case, 152; *Lampayo v. Gould*, 12 Sim. 426.
(g) 2 Sugd. Pow. 527.

(1) The following is suggested as a proper form for a power of appointing new trustees of property settled upon the usual trusts in strict settlement.

Provided always, and it is hereby further declared, that if the trustees hereby appointed, or any of them or any future trustees or trustee hereof shall die (either before or after their or his acceptance of the trusts thereof), go to reside abroad, desire to be discharged from, renounce, decline or become incapable or unfit to act in the trusts of these presents, while the same trusts or any of them shall be subsisting. Then, and in every or any such case, and so often as the same shall happen, it shall be lawful for the said (*the cestuis que trusts [if any] for life*), or the survivor of them by any writing or writings under their, his, or her hands or hand attested by two or more witnesses, and after the decease of such survivor then for the surviving or continuing trustees or trustee hereof, or the executors or administrators of the then last acting trustee (whether such surviv-

and the newly appointed trustee, as well as to the *cestuis que trusts* and other persons interested, to ascertain, that the appointment is clearly sanctioned by the terms of the power. If the circumstances do not warrant the making the new appointment, or there be any irregularity in the mode of exercising the power, the appointment will be bad, and the retiring trustee will not be exonerated from the responsibilities of the trust, whilst the newly appointed trustee will be unable to exercise the powers attached to the office.^(h)

The power should express plainly the cases, in which new trustees may be appointed, and when and by whom the appointment is to be made, it should also embrace every event, that can render such an appointment necessary, *viz.*; the death of all or any one or more of the original or substituted trustees, their absence from the country, their wish to retire from the office, or their original refusal to accept it, or finally their future incapacity to discharge its duties; and it is seldom that any difficulty can arise either upon the construction or effect of the power when so framed.

However the construction of these powers, when less accurately framed, has not unfrequently been the subject of litigation.⁽¹⁾

(h) See *Adams v. Paynter*, 14 L. J. N. S., Ch. 54; 1 Coll. Ch. 532.

ing trustees or trustee or executors or administrators respectively shall be willing to act in other respects or not), by any writing or writings, under their or his hands or hand attested by two or more witnesses, to nominate and substitute any person or persons to be trustee or trustees hereof in the place of the trustee or trustees so dying, going to reside abroad, desiring to be discharged, renouncing, declining, or becoming incapable or unfit to act as aforesaid. And that so often as any new trustee or trustees hereof shall be appointed as aforesaid, all the hereditaments, &c., which shall for the time being be holden upon the trusts hereof, shall be thereupon conveyed, assigned, and transferred respectively in such manner, that the same may become legally and effectually vested in the acting trustees hereof for the time being, to and for the same uses and upon the same trusts and with and subject to the same powers and provisions as are herein declared and contained of, and concerning the same hereditaments and premises respectively, or such of the same uses, trusts, powers, and provisions as shall then be subsisting or incapable of taking effect. And that every new trustee, to be from time to time appointed as aforesaid, shall thenceforth be competent in all things to act in the execution of the trusts hereof, as fully and effectually and with all the same powers and authorities to all purposes whatsoever, as if he had hereby been originally appointed a trustee in the place of the trustee, to whom he shall, whether immediately or otherwise, succeed.

(1) Where there was a power in a deed of settlement of a dissenting chapel, for the appointment of new trustees on the desertion or removal of any existing trustee; it was held by Lord Eldon, that the clause did not apply to the case of a trustee, who had left the trust, on account of its having been converted by the other trustees against his approbation to purposes distinct from the intention of the founder. *Attorney-General v. Pearson*, 3 Mer. 412.

In the case of *Morris v. Preston*,⁽ⁱ⁾ powers of sale and exchange were given in a settlement to the trustees to preserve contingent remainders: and there was a power, in case of the death of any or either of the trustees, for the husband and wife, or the survivor, *with the consent of the surviving co-trustee or co-trustees*, to appoint any new trustee or trustees; and upon such appointment the *surviving* [*178] *co-trustee* should convey the estate, *so that the *surviving trustee and trustees*, and the new trustee or trustees, might be jointly concerned in the trusts, in the same manner, as such *surviving trustee* and the person so dying would have been, in case he were living.—The purchaser objected to the title of trustees under the power of sale, because they were not appointed until the death of *both* the trustees of the original settlement, which was not authorized by the power: but the objection was waived without argument.^(j) With respect to this case Sir E. Sugden has observed, that the power in terms clearly did not extend to the event which happened: it contemplated only an appointment on the death of one trustee, and not an appointment after the death of both: the ground on which the plaintiff's counsel waived the objection must have been, that the *intention* of the power was, that new trustees should be appointed, whenever circumstances might require it. "Clear as this point appears to be," says the same learned writer, "it is to be regretted, that the opinion of the court was not taken upon it. It has more than once happened, that what counsel has given up in argument, the court has enforced."^(k) However, the case of *Morris v. Preston* has since been judicially recognised as an authority by the learned writer and judge, whose observations have just been cited.

In a recent case in Ireland two trustees were appointed by a settlement, and there was a power for the tenant for life *together with the surviving or continuing or acting trustee for the time being* to nominate new trustees, with a direction that the trust estate should thereupon be vested in the new trustee *jointly with the surviving or continuing trustee*. One of the original trustees died, and the other became bankrupt, and it was objected that the power was consequently gone; but the Lord Chancellor (Sir E. Sugden) overruled the objection, observing, that it happened in many cases without the power being affected.^(l)

In a very late case before the Vice-Chancellor of England, three executors and trustees were appointed by a will, which contained the ordinary power, in case all or any of the said trustees should die, &c., that it should be lawful for the surviving, continuing, or acting, trustees or trustee to appoint new trustees. Two of the trustees *died in*

(i) *Morris v. Preston*, 7 Ves. 547.

(k) 2 Sugd. Pow. 529, 30.

(l) *Re Roche*, 1 Conn. & Laws. 306;

2 Dr. & W. 287.

the testator's lifetime; and although it was unnecessary to decide the point, his Honor's opinion evidently was that the power did *not* apply to the event that had happened. "It appears to me," observed his Honor, "at least very questionable, *whether Mr. John Gladstone (the surviving trustee) could in the events that have happened, have appointed new trustees.*" I cannot but think, that it was at least a question whether he had the power, which he certainly might have exercised, if the two other trustees had died after the testator.^(m)¹

The grounds of this opinion of the learned judge doubtless were, that the persons dying in the testator's lifetime *never filled the character of trustees*, so as to come within the terms of the power; and in framing the power in a will it may be advisable to guard against this difficulty by expressing, that it is to take effect whether the trustees *die before or after the testator, or before or after the acceptance of the trust. [*179]

In *Sharp v. Sharp*,⁽ⁿ⁾ the power in a will provided that, in case *either* of the testator's two trustees should happen to die, or desire to be discharged from, or neglect, or refuse, or become incapable, to act in the trust thereby in them reposed, it should be lawful for the *survivors or survivor of the trustees so acting in the trust*, wherein such vacancy should happen, or the executors or administrators of the last surviving trustee, to appoint any other trustee or trustees. *Both of the trustees refused to act*, and conveyed the trust estate to two new trustees of their own nomination. It was held by the Court of K. B. that the power was given to the surviving or continuing trustees only, *who acted in the trust*, and not to those who, *in limine refused to act*; and that the power did not apply to, and was not well exercised in the case then before them.⁽ⁿ⁾

It will be observed that the form of the power, as already stated, expressly provides for such a case as *Sharp v. Sharp*, by authorizing the surviving or continuing trustees to appoint, whether they are willing to act in other respects or not.

It was decided by this last case, that a power to appoint new

(m) *Walsh v. Gladstone*, 8 Jur. 51; (n) *Sharp v. Sharp*, 2 B. & A. 405. [14 Sim. 12.]

¹ In *Winter v. Rudge*, 15 Sim. 596, the Vice-Chancellor, in accordance with the opinion above expressed, held, that a power in a will to a *cestuy que trust* during her life, and after her death to the then surviving or continuing trustee, to appoint any new trustee or trustees, as often as any of the first or future trustees should die, &c., did not authorize the appointment by the *cestuy que trust* of a new trustee in place of one who died in the testator's lifetime. But in the subsequent cases of *Earl of Lonsdale v. Beckett*, 19 L. J. Ch. 342; and *Hadley's Trust*, 21 L. J. Ch. 109; 16 Jur. 98; 9 Eng. L. & Eq. 67, this decision appears to be overruled, and such a power will apply where the trustee dies during the testator's lifetime, as well as after.

trustees, given to the *survivor* of several trustees, may be legally exercised by the *continuing* trustee upon resignation or refusal to act of the others.(o)

The same case has also determined, that where three distinct classes of trustees are appointed by name for three distinct properties; and the power to appoint new trustees is expressed to take effect upon the death, &c., of any one of the first class of trustees by name, so far as applied to the trusts reposed in them; or upon the death, &c., of any one of the second class of trustees, also naming them, so far as applied to the trusts reposed in them; and there was no mention of the third class of trustees: the power will not apply to the last class of trustees or the property vested in them as such, but will be confined to those two classes, who are expressly mentioned.(p)

It was decided by Sir E. Sugden in the case of *Re Roche*, that the "*bankruptcy*" of a trustee rendered him "unfit to act," so as to bring him within the scope of the power, which was expressed to take effect, in case of any trustee becoming "*unfit*."(q)¹

Where the survivor of two or more trustees is desirous of retiring, it is improper for him to appoint two new trustees by the same deed in the place of himself on his retirement and of the deceased trustee, and such an appointment will be set aside.(r)² The proper course in such cases is, for the old trustee to appoint a new one in the place of the one, who is dead, and the newly appointed trustee then by a subsequent deed may appoint another in the place of the old trustee who retires.

Where more trustees than one are originally appointed, the power [*180] as *usually worded, clearly does not authorize one of the trustees to retire, and without appointing another person in

(o) See *Eaton v. Smith*, 2 Beav. 236, (q) *Re Roche*, 1 Conn. & Laws. 306; 9, and *Hawkins v. Kemp*, 3 East, 410; 2 Dr. & W. 287.

Cooke v. Crawford, 11 Law Journ. N. S., Chanc. 406; 13 Sim. 91. (r) *White v. Parker*, 1 Bing. N. C. 582. [See post 183, note.]

(p) *Sharp v. Sharp*, 2 B. & A. 405.

¹ But "incapable to act" contemplates personal incapacity; and therefore, a trustee who had become bankrupt, and had been indicted for not surrendering to the fiat, and had absconded, was held not within these words. In *Re Watt's Settlement*, 9 Hare, 106; 15 Jur. 459; 20 L. J. Ch. 337; 4 Eng. R. 67, in *Re Roche* was, however, recognised. See *Turner v. Maulé*, 15 Jur. 761, 5 Eng. L. & E. 222, *accord*. In *Walker v. Brungard*, 13 Sm. & M. 724, 758, a power of this nature was held to be entirely in the *cestui que trust's* discretion.

² Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, going to reside abroad, or becoming incapable of acting, &c., the surviving trustee, although himself residing abroad, may appoint another trustee in the place of one deceased. *O'Reilly v. Alderson*, 8 Hare, 101.

his place, to vest the entire property in his colleagues as the sole trustees.(s) As a general rule it can scarcely be desirable, that such an authority should be conferred, as its obvious effect would be in many cases, materially to diminish the security of the trust estate. If, therefore, such a power should ever be considered desirable, it should be provided for by an express clause.(t)

Upon this principle the original number of trustees cannot in general be lessened; and where two trustees were originally appointed, and the original trustees, being desirous of retiring, joined in appointing a single trustee in their place, and transferred to him the trust funds, it was held, that this act was not warranted by the power,(1) and was therefore a breach of trust.(u)(2)¹

(s) *Wilkinson v. Parry*, 4 Russ. 274; (t) See 6 Jarm. Bythew. Convey. 509, *Adams v. Paynter*, 14 Law Journ. N. S. 3d edit. Chanc. 154; [1 Coll. Ch. 532.] (u) *Hulme v. Hulme*, 2 M. & K. 682.

(1) Where the exercise of the power of appointment is not imperative on every vacancy, and the original number has been diminished by death, it is conceived, that an appointment by the survivors of *one* trustee in the place of the one, who made the last preceding vacancy in the trust, would be good, and that it is not necessary to make up the full original number of trustees. For instance, where *A.*, *B.*, and *C.*, are appointed trustees, and *A.* dies, and then *B.* dies, and *C.* then appoints *one* trustee in the place of *B.*, there seems to be no reason for questioning the validity of that appointment. Although it might be otherwise, if the appointment of the single trustee were *expressed* to be in the place *both* of *A.* and *B.*

(2) Since the chapter on this subject went through the press, there has been a later judicial decision on an important point, connected with the validity of the appointment of new trustees under a power: and according to that decision, the usual power of appointing new trustees authorizes the appointment of a fewer number of trustees in the place of a larger number originally created. In *Corrie v. Byrom* (the case alluded to), a testator devised all his real estate to five trustees (whom he also appointed his executors), and the survivors and survivor of them, and the heirs and assigns of such survivor, in trust to sell for the benefit of his children and the issue of any deceased child in such manner, &c., as his wife (who was also one of the trustees) should appoint. The will contained a power framed in the ordinary way, for the trustees or trustee for the time being to appoint any new trustees or trustee in case of the death or retirement, &c., of the existing trustees or trustee. All the trustees survived the testator, and they all proved the will, and acted in the trust; *three* of them afterwards died at different intervals, and *upon the death of the third, A. and B.*, the two surviving trustees executed a deed, appointing *C.* to be the new trustee jointly with themselves *in the place of the three deceased trustees*, and at the same time a conveyance of the trust estate was made to *A.*, *B.*, and *C.*, upon the trusts of the will. Shortly afterwards *A.* and *B.* (the two survivors of the original trustees) both died, and *C.* then appointed *D.* to be the new trustee *in the place of A.* who had died last, and by a deed dated the following day, *which recited the desire of C. to retire from the trust*, *D.* appointed *E.*, *F.*, and *G.*, to be new trustees jointly with herself *in the place of C. and the original trustees*. These appointments

¹ See *Hospital v. Amory*, 12 Pick. 445; but see *Greene v. Borland*, 4 Metc. 332.

[*181] *And so with regard to the converse case, of appointing several trustees in the place of one. As a general rule the

were accompanied by conveyances of the legal estate to the newly appointed trustees. *D., E., F., and G.*, as the acting trustees of the will, contracted to sell a part of the estate, which was of considerable value, but an objection was taken by the purchaser to the title of the trustees to exercise the power of sale, on the ground that the new appointments had been improperly made, as the original number of five trustees ought to have been continued. In order to avoid the expense of a hostile suit for specific performance, the parties determined to take the opinion of the court upon the point by means of an amicable suit between the *cestuis que trusts* and the trustees, and a bill was accordingly filed by the *cestuis que trusts* praying alternately in the first instance, that the appointment of the new trustees might be declared valid, or if the court considered it invalid, that new trustees might be appointed. The cause was brought before Vice-Chancellor Wigram, who expressed a very decided opinion, that the appointment was good, and that there was no foundation whatever for the objection, but his Honor refused to make a declaration to the effect, as it was against a practice of the court to make a bare declaration, unaccompanied by the grant of any relief. The plaintiffs then amended their bill, by striking out the first alternative in the prayer, and the bill, as amended, prayed a declaration that the appointment of new trustees was invalid, and that new trustees might be appointed by the court. Upon the cause coming on again, his Honor acted upon his previously expressed opinion, and dismissed the bill with costs, the decree directing the dismissal being prefaced by a declaration that the appointment of *D., E., F., and G.*, as the new trustees was good. *Corrie v. Byrom*, Vice Chancellor Wigram, 26th April, 1845, M. S.

As this decision was made in an amicable suit, and without being adversely argued, it cannot be regarded as an authoritative decision on the point in question, and it is to be regretted, that the matter was not brought before the court in a more conclusive manner by means of a suit against the purchaser for a specific performance. However, as far as it goes it is an express decision, and by an existing judge, not only that the appointment of one trustee expressly in the place of three or more who have died is a good exercise of a power, but also, what is still stronger, that the appointment of fewer trustees than the original number is valid, where one of the existing trustees *retires from the trust*. It may be remarked, that the observations of Vice-Chancellor Knight Bruce, in *Meinertzhagen v. Davis*, 1 Coll. Ch. R. 353, as to the propriety of adhering to the original number of trustees, are somewhat at variance with Vice-Chancellor Wigram's decision in *Corrie v. Byrom*; moreover, the considerations attending the protection and security of the trust property, which might be materially lessened and endangered by the diminution of the number of trustees, would suggest the propriety of receiving that decision, and the principle which it involves, with some degree of caution. [In a subsequent case, before the Vice-Chancellor of England, the doctrine of *Corrie v. Byrom* was followed. There a settlement by which three trustees were appointed contained a power for the *cestui que trust*, in case the trustees therein named, or either of them, should die or be discharged from the trust, to appoint any other person or persons to be trustee, or trustees in the place of such trustee or trustees so dying or being desirous to be discharged. One trustee died and the other two were desirous to be discharged, when two new trustees only were substituted. Held, that their appointment was good, and the retiring trustees, who refused to transfer the fund but paid it into court, were ordered to pay the costs. In *Re Fagg's Trust*, 19 L. J. Ch. 175.]

original number of trustees ought to be adhered to; it is a rule of convenience, and generally settled.(x) The appointment of two or more trustees in the place of one must therefore be regarded in general as invalid.(y) And such an appointment unquestionably should never be made, unless it be explicitly and distinctly authorized by the terms of the power.

But, if the expressions contained in the power necessarily imply, that the appointment of a greater number of trustees, must have been in contemplation, such an appointment will be supported. For instance, where only *two* trustees are originally appointed, and the power provides for the appointment of a new trustee *or trustees* (in the plural) on the death, &c., of the existing *trustee* or trustees, it has been held, that the terms of the power necessarily contemplate an increase in the number of trustees.(z) But this ground of construction fails, where the number of trustees originally created is *more than two*.(a)¹

However, the court has not in every case adhered strictly to this rule, such as it is. And an increase in the original number of trustees has been sanctioned on general grounds without reference to the special terms of the power. In the late case of *Sands v. Nugee*,(b) by a settlement *in the Scotch form* certain estates were vested in two trustees, with power for the settlor to appoint any other persons to be trustees; *and it was directed that two trustees should be a quorum*. Each of the trustees, who should accept the trusts, was empowered to nominate any other person to succeed to himself in the trust after his decease. One of the original trustees disclaimed, the other by will appointed *three persons* to succeed him in the trusts, and devised and bequeathed to them all the trust property. One of those persons only accepted the trust, and he contracted with the defendant for the sale of part of the real estate. The defendant objected to the title on the *ground, that the appointment of three trustees was not authorized by the power in the set- [*182] tlement: but Sir L. Shadwell, V. C., considered, that there was nothing in the objection, and overruled the exception, which had

(x) Per V. C. K. Bruce in *Meinertzhagen v. Davis*, 8 Jur. 973; S. C. 1 Coll. Ch. R. 335.

(y) Ex parte *Davis*, 2 N. C. C. 468; see *Devy v. Peace*, Tam. 77.

(z) *D'Almaine v. Anderson*, Lewin, Trust, 465; *Meinertzhagen v. Davis*, ubi supra.

(a) Ex parte *Davis*, 2 N. C. C. 468.

(b) *Sands v. Nugee*, 8 Sim. 130; and see *In re Welch*, where, on a reference to the Master, four trustees were appointed by him in the place of the survivor of three original trustees; 3 M. & Cr. 293.

¹ But it is not contrary to the practice of the court, to appoint three trustees in the place of two nominated in a will containing no power to appoint new trustees. *Birch v. Cropper*, 2 De Gex & Sm. 255.

been taken by the defendant to the Master's report in favor of the title.

The opinion of the learned judge who decided this case, appears to have been clear on the point. However it is to be observed, that the *terms* of the power, being to nominate one person, did not warrant the appointment of three; that appointment must therefore have been supported only on the ground of the intention. Now the direction in the settlement, that two trustees should form a *quorum*, implied, that it was considered by the settlor, that some discretion and management would be required in the administration of the trust. If the appointment of three trustees in the place of one were good, by the same reasoning the appointment of thirty or any other number would be equally good; and thus it would be in the power of any one trustee, by filling the trust with a large number of nominees of his own, to swamp and render nugatory the control and protection afforded 'to the trust estate by the plurality of trustees. In addition to this the incumbrance and complexity, which may thus be occasioned to the title, is an obvious and not an insignificant objection to such an exercise of the power. In the case of *D'Almaine v. Anderson*,^(c) before the same learned judge, *two* trustees were appointed by the testator; and the will contained the usual power in case of the death, &c., of the trustee, "for the surviving or continuing trustee *or trustees* for the time being to appoint one or more person or persons to be a trustee *or trustees* in the room of the trustee or trustees so dying," &c. One of the trustees died, and the survivor appointed *two new trustees* in his place. The Vice Chancellor expressed his opinion, that such a case *was immediately contemplated by the proviso*.^(c) The principle of this decision has been already considered. The same point afterwards came before Sir K. Bruce, V. C., sitting as chief judge of the Court of Review, and the case of *Sands v. Nugee*, and that of *D'Almaine v. Anderson* were cited. But his Honor declined to sanction the appointment of *four* trustees in the place of the *original number of three*, who had all died. In the case in question the power was contained in a settlement, and authorized the tenants for life or the survivor "from time to time, as often as there should be occasion, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, &c." The original number of trustees in this case was *three*; consequently the plural number in the alternative of the power did not necessarily refer to the appointment of several trustees in the place of one, as in *D'Almaine v. Anderson*, and his Honor distinguished that case from the one before him on that ground, and from that of *Sands v. Nugee*, on the ground, that the settlement there was in the Scotch form.^(d)

(c) *Lewin, Trust.* 465.

(d) *Ex parte Davis*, 2 N. C. C. 468.

In a still later case also, before V. C. K. Bruce, the original number *of trustees of a settlement was *two*; and the power of appointing new trustees, was expressed *alternatively in the* [*183] *plural number*, as in *D'Almaine v. Anderson*. The appointment of three trustees in the place of the two original trustees was, therefore, supported for the reason already, stated; viz., that those expressions in the power showed that such an appointment must have been contemplated by the settlement.(e)

In order to preclude any question on this point, it might be advisable to insert a proviso, that the original number of trustees is to be maintained in every appointment. And if that be not the intention of the parties, an express direction authorizing the increase or diminution of the original number of trustees should always be inserted in the power.

A question can seldom arise as to the parties by whom the power is to be exercised. That must of course always depend on the terms of the power itself. In the case of settlements and wills where immediate beneficial interests are given to persons *sui juris*, the power is usually and properly given to those parties during their lives, or at all events its exercise is made subject to their consent. Where there are no competent parties who have a direct and certain beneficial interest in the trust property, it may sometimes be a question, whether the power shall be vested in the surviving or continuing, or in the retiring trustee or the representative of the deceased trustee. On this subject Mr. Jarman has the following observations: "On behalf of the surviving or continuing trustee it may be reasonably urged, that he should have some share in the nomination of one, who is to be his coadjutor in the trust; while on the other hand it does not seem quite right to enable him to fill the trust with his own nominees, as by so doing one of the objects of having a plurality of persons in the trust, namely, that one should be a check upon the other, may be defeated; since the continuing trustee, if he were dishonestly disposed, would select for his coadjutor one, who would further his designs. Perhaps the best mode of meeting the difficulty is to give the power to both the retiring and continuing trustees, or such of them as shall think proper to exercise it; but this is a less eligible plan, when the power relates to land, than when it affects personalty only; because in deducing the title through the newly appointed trustees, it would be necessary to prove, that all the non-concurring trustees, who had the option of joining in the nomination, had declined to do so. These observations too are of less force, where no principal sum is placed at the disposal of the trustees; and the consequence therefore of any malversation would be so

(e) *Meinertzhagen v. Davis*, 1 Coll. Ch. R. 353; [and the remarks in *Stones v. Rowton*, 17 Jur. 750. See 2 Strobb. Eq. 89.]

inconsiderable, and so certain of detection, as to render any attempt of the kind extremely improbable. In such cases the principal object is to provide for every possible event which can create a vacancy.(r)

According to the general rules that govern the laws affecting powers, a power of appointing new trustees can be exercised only by those persons to whom it is expressly given.¹ Therefore, if the power be given to particular persons *by name*, without adding any words of survivorship, the power will be gone upon the death of one of the parties named.(s) If, *however, it be given to three or more [*184] generally, *as a class of persons*: as to "my trustees," "my sons," &c., and not by their proper names, the authority will survive, while the plural number remains:(t) and where "executors" are the donees of a power, it may be exercised by a single surviving executor.(u)

In like manner the power cannot be exercised by the heirs, or personal representatives, or assigns, of any trustee, unless the authority be thus limited by the terms of the original power.(x) And in these cases the power will be confined strictly to those persons who answer

(r) 6 Jarm. Bythew. Convey. 506, 7.

(u) 1 Sugd. Pow. 244, 6th edit.

(s) Co. Litt. 113, a.; 1 Sugd. Pow. 141, 6th ed.; Basier v. Hudson, 9, 11, 16.

(x) 1 Sugd. Pow. 145, &c.; Bradford v. Belfield, 2 Sim. 264; see Eaton v. Smith, 2 Beav. 236. [Post, 283.]

(t) 1 Sugd. Pow. 144; Gartland v. Mayott, 2 Vern. 105.

¹ A settlement contained a proviso that in case either of the trustees should die or become unwilling to act, the acting trustees or trustee, or the executors or administrators of any surviving trustee, might nominate a fit person or persons in his or their places. On the death of one trustee, the survivor executed a deed by which, after reciting that he was desirous of retiring from the trust, and that he had appointed another person to be a trustee in his place, he conveyed the estate to a new trustee on the trusts. It was held that the surviving trustee had power to nominate a new trustee to act in his place, and that the appointment by recital was good. *Miller v. Pridden*, 11 Eng. L. & Eq. 74. But in *Stones v. Rowton*, 17 Jurist, 750, a different conclusion was arrived at. There the settlement appointed two trustees, and provided "that if the said trustees, or either of them, should die or become desirous of being discharged, or refuse or become incapable to act, the settlor during his life, and, after his decease, the surviving or continuing trustee or trustees, or the executors or administrators of the last acting trustee, might appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying or desiring to be discharged, or refusing or becoming incapable to act; and upon every such appointment the trust premises should be so transferred, that the same might become vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely as the case might require." The settlor died without appointing new trustees, and the two original trustees (being desirous of being discharged from the trust) afterwards appointed by the same deed two other persons to be trustees in their places. The Master of the Rolls held this not to be a valid appointment. The case of *Miller v. Pridden* was distinguished.

the precise description. Therefore, a power given to a trustee, his *heirs, executors, or administrators*, will not be well executed by a *devisee*,(y) or an *assignee*(z) of the trustees.¹ However, it has been already stated that a power for a "surviving" trustee to appoint will be well executed by a *continuing* or "*sole acting*" trustee.(a)

Upon the same principle it would seem to be clear, that where the power is given to be exercised by the surviving trustees, *when they are reduced to a certain specified number*, it cannot be exercised by any *less* number of survivors, and is therefore gone, unless it be exercised before the trustees are reduced to a fewer number than that required for its exercise.(b)

However, on the other hand, it has been decided, that the power may be well exercised in such a case, *before* the trustees are reduced to the specified number. In one case, a deed of conveyance of a chapel to twenty-five trustees contained a clause directing that when by death or otherwise the number should be reduced to *fifteen*, then the remaining fifteen trustees or the majority should proceed to make up the complement to twenty-five. When the number was reduced to *seventeen*, twelve of that number (the other five dissenting) elected eight new trustees, and this appointment was held to be within the scope of the power. Lord Chief Baron Eyre observed,—that the period of the trustees being reduced to fifteen was that at which they were *compellable* to fill up their numbers, *not but what they might do it sooner*.(c)

A married woman may exercise the power of appointing new trustees, as well as any other power, in the manner and to the extent, prescribed by the instrument, by which the authority is created.(d)

(y) *Cole v. Wade*, 16 Ves. jun. 27; 1 Sugd. Pow. 148; and see *Cafe v. Bent*, 3 Hare, 245. [*Ockleston v. Heap*, 1 De Gex & Sm. 640. See post, 283.]

(z) *Bradford v. Belfield*, 2 Sim. 264.

(a) *Sharp v. Sharpe*, 2 B. & A. 405; *Eaton v. Smith*, 2 Beav. 236. [See ante, 184, note.]

(b) *Jarm. Byth. Conv.* 512, 3d ed.; sed vide *Att.-Gen. v. Floyer*, 2 Vern. 748; *Att.-Gen. v. Bishop of Litchfield*, 5 Ves. 825; and this subject considered, post, in this chapter.

(c) *Doe d. Duplex v. Roe*, 1 Anstr. 86.

(d) 1 Sugd. Pow. 184. [Ante, 49, n. 2.]

¹ A power contained in a settlement of real estate, enabled one of the parties, his executors, administrators, and assigns, on a vacancy, to appoint a new trustee. The party so empowered died, having by his will named three executors, one of whom renounced probate; and a vacancy in the trust occurring, it was held that the two acting executors had power to appoint the new trustee. *Earl Glanville v. McNeile*, 7 Hare, 156; 13 Jur. 252; 18 L. J. Ch. 164. Where A. B. the survivor of a number of trustees, appointed C. D. his executor, and bequeathed to him all property vested in him, A. B. as trustee; it was held that C. D. was not thereby created trustee, no intention to that effect being manifested in the creation of the trust. *Mortimer v. Ireland*, 11 Jur. 721.

An infant, however, cannot exercise such a power, except indeed it be a simply collateral power, which is rarely, if ever, the case.(e)

The discretion of a trustee of a power to nominate new trustees will not be restrained by equity, where he is acting *bona fide*.(f)¹ But where a suit is once instituted, and the court has assumed the control or administration of the trust estate, the trustee will not in [*185] general be permitted *to exercise his power by appointing a new trustee, without the sanction of the court; more especially where a considerable remuneration is attached to the office of trustee.(g)

There is no doubt, said Lord Eldon, in *Webb v. Lord Shaftesbury*,(h) of the control of the court over the discretion of the trustee upon a bill filed. "It does not prevent the exercise of his discretion, but takes care that it shall be duly exercised. In the ordinary case, trustees, parties to the suit, will not be allowed to change the trustees without the authority of the court." And in that case his Lordship held, that if the defendant wanted to appoint a new trustee, he must go before the Master, and propose a person, and therefore he ought to be restrained from appointing without an application to the court.(i)

In the recent case of *Attorney-General v. Clack*,(k) a charity was to be administered by eight trustees, and when the number of trustees was reduced to four, those four were to appoint eight others. The number of trustees was reduced to four, and an information was then filed to have four new trustees appointed, and to restrain the four surviving trustees from appointing in the mean time. However, pending that information, the surviving trustees, without the sanction of the court, appointed four new trustees. The case came before Lord Langdale, M. R., who held that the appointment was neither a

(e) *Hearle v. Greenbank*, 1 Ves. 298; 1 J. & W. 251; vide post, Discretionary Powers, p. 485.
1 Sugd. Pow. 213, 20.

(f) 2 Sugd. Pow. 531, 6th ed. [*Hodgson's Settlement*, 4 Eng. L. & Eq. 182; 487, 8.]

15 Jur. 552.] (i) *Ibid*. [But the master is not

(g) *Millard v. Eyre*, 2 Ves. jun. 94; bound to approve the persons so proposed, though he is to have regard to the power. *Middleton v. Reay*, 7 Hare, 106; 13 Jur. 116; 18 L. J. Ch. 153.]
Webb v. Lord Shaftesbury, 7 Ves. 480; *Att.-Gen. v. Clack*, 1 Beav. 467; 2 Sugd. Pow. 531, 2; and see — *v. Robarts*,

(k) *Att.-Gen. v. Clack*, 1 Beav. 467.

¹ It is the duty, however, of trustees to make the appointment with regard to the interest of the *cestui que trusts*, and generally on communication with them, *O'Reilly v. Alderson*, 8 Hare, 101; *Marshall v. Sladden*, 7 Hare, 428, 14 Jur. 106; and they will not be permitted to appoint merely to continue the trust property under the management of a particular solicitor, though the new trustees be otherwise unobjectionable. *Marshall v. Sladden*.

contempt, nor an act altogether void, but that it imposed upon the trustees the necessity of proving, by the strictest evidence, and at their own expense, that what had been done was perfectly right and proper; and as this did not clearly appear to be the case, his Lordship decreed the appointment to be set aside, and that the trustees should pay personally all the extra costs occasioned by their act. However, in a recent case, before V. C. Wigram, the court refused to annul the appointment of new trustees made by the old ones after the filing of the bill. (*k*)

With regard to the manner in which powers to appoint new trustees must be exercised; it need only be observed, that in the execution of this as well as of every other power, all the formalities prescribed by the instrument creating the power, must be duly observed, both with respect to the nature of the instrument, and also in its execution and attestation; (*l*) except, indeed, so far as the law on this subject has been altered by the 10th section of the recent Will Act, 1 Vict. c. 26, which provides, that no appointment in exercise of a power to be made by will shall be valid, unless executed as required by the act; viz.—signed by the party in the presence and attested by two or more witnesses,—and that every will so executed shall be a valid execution of any power, so far as respects its execution and attestation.¹

Where the consent of one, or of several persons, who are named, is *required to the execution of the power, that, like every other condition, must be strictly complied with. And if the [**186*] person, whose consent is necessary, die without having given that consent, and that event be not provided for, the power is gone. (*m*)

The instrument of appointment will not of itself vest the legal estate in the trust property in the newly appointed trustee; for that purpose it must be accompanied by a conveyance or assignment of the property to the new trustee, or to him jointly with the surviving

(*k*) *Cafe v. Bent*, 3 Hare, 249; and will be bad, and *vice versa*. Ibid. *Scott v. Davis*, 4 M. & Cr. 87. see this subject considered, post, Effect of Suits.

(*l*) See 1 Sugd. Pow. 265, &c. 6th ed. (*m*) 1 Sugd. Pow. 334; *Hall v. Dewes*, Jac. 192; but see *Morris v. Preston*, 7 Ves. 547, and *supra*. Therefore, where it is required to be executed by *will*, an execution by *deed*

¹ Where the trust property is personal estate, and it is not specially required, the new appointment need not be in writing. *Foster v. Goree*, 4 Alab. 440. Where the power to appoint is given to several, they must all join in the same deed; a subsequent deed of confirmation by one not party to the first is not sufficient. *Crosby v. Huston*, 1 Texas, 203. An appointment by recital in the deed of conveyance from the old to the new trustee, is sufficient, *Miller v. Pridden*, 11 Eng. L. & Eq. 74, stated ante, p. 183, note.

or continuing trustees, if any.⁽ⁿ⁾ Where the legal estate in fee simple is vested in the surviving or continuing trustee, the conveyance may be by a simple deed limiting it to the use of himself and the new trustees jointly.⁽¹⁾

When the estate of the trustees is to preserve contingent remainders in a settlement, it has been usually considered essential, that the new trustees should have a seisin, to serve the uses, in the same manner as the old trustees had. To raise this new seisin, two deeds are necessary; by the first, the uses of the settlement are revoked, and the estate appointed to a stranger in fee, and the old trustees join in conveying the estate to him: the stranger then reconveys (which he may do by endorsement), to the uses of the settlement, in the same manner as if the new trustee's name had been inserted therein.^(o)

Sir E. Sugden, in his work on Powers, discountenances this circuitous proceeding, as creating unnecessary expense and trouble; and he adds, that if it ever should become necessary to decide the point, there is little doubt but that it will be determined;—1st, That the power only meant, that the estates actually vested in the trustees (to preserve contingent remainders) shall be transferred to the old and new trustees, which may be done by one deed operating under the Statute of Uses; 2d, That they may then exercise the powers created by the settlement; and consequently, 3d, That there is no seisin to transfer, and therefore the revocation and appointment is nugatory and of no effect.^(p)

Where, however, the trust property consists of leaseholds or terms for years, upon which the Statute of Uses has been decided not to operate, the legal estate cannot be vested jointly in the continuing and newly appointed trustees by one deed, as may be done where the estate is of freehold tenure; and the usual and most convenient method of effecting this object is by two deeds. By the first, the existing trustees assign the property to a stranger, who by the second deed, endorsed on the other, reassigns to the old and new trustees jointly upon the original trusts.^(q)

Where the trust property consists of money or stock, this circuitous proceeding is wholly unnecessary, as the object may be equally

(n) *Folley v. Wontner*, 2 Jac. & W. 248; see *Owen v. Owen*, 1 Atk. 496.

(o) 2 Sugd. Pow. 527, 8, 6th ed.

(p) 2 Sugd. Pow. 528, 6th ed.

(q) 6 Jarm. Byth. Conv. 524.

(1) A testator gave estates to four trustees, with powers and directions to appoint a new trustee within two months after a vacancy. A deed of appointment of a person as a new trustee was executed, but the estate was not conveyed to him:—Held, that the person was not appointed a trustee, but that the old trustees could alone execute a power of sale. *Warburton v. Sandys*, 9 Jur. 441, 503; 14 Sim. 622. A power to appoint by any deed or writing is well executed by a duplicate instrument. (*Ibid.*)

secured by one deed, containing a covenant on the part of the old trustees to *transfer into the joint names of themselves and the new trustees, upon the trusts of the original settlement.(r) [*187] Or what is better, the transfer may be made first; and a deed, declaring the trusts of the transfer, executed by the old and new trustees.

If a single trustee only be required for the management of the trust estate, upon the appointment of a new trustee, a simple conveyance or assignment from the old to the new trustee is all that is requisite to vest the legal estate in the latter, whether the property be freehold or leasehold.

It is not in general imperative upon the donees of a power of appointing new trustees to exercise it, upon the occurrence of every vacancy, but the old trustees may continue to act notwithstanding the diminution of their number by death: and even where all the original trustees have died without exercising the power, the heir of the survivor will not be restrained from acting.(s)

Where it had been enacted by an act of parliament, enabling five trustees to dispose of certain houses by lottery, that if any of the trustees should die before the drawing of the lotteries, and the conveyance of the prizes, the survivors or survivor *should and were thereby required* to appoint a new trustee or trustees, it was objected to the validity of a conveyance by the four *surviving trustees after the death of the fifth*, that it was imperative on the survivors to fill up the vacancy in the trust, before they could execute a conveyance. But the court was of opinion that the clause was directory only, and that the conveyance clearly operated to pass the legal estate, and the objection was therefore overruled.(t) So in *Attorney-General v. Floyer*,(u) the devise was to six trustees and their heirs, and the testator *directed that when the number was reduced to three they should choose others*. All the trustees died but one; and the *sole survivor* appointed other trustees and conveyed the property to them. And it was held, to be only *directory* on the trustees to fill up the number, and that the appointment by the survivor was valid. And the case of *Attorney-General v. Litchfield*,(x) is to the same effect.(1)

(r) 6 Jarm. Byth. Conv. 527, n., 3d ed.

(s) *Attorney-General v. Bishop of Litchfield*, 5 Ves. 825; and see *Attorney-General v. Floyer*, 2 Vern. 749. [See *Foster v. Goree*, 4 Alab. 440.]

(t) *Doe d. Read v. Godwin*, 1 Dowl. & Ry. 259; and see *Attorney-General v. Cuming*, 2 N. C. C. 139.

(u) 2 Vern. 748.

(x) 5 Ves. 825.

(1) Power to appoint new trustees reserved in a will "to the survivor of A., B., and C., the trustees named in the will, and such new trustee or trustees to be nominated in his or their stead" as thereafter mentioned;—Held, properly ex-

However the terms of the power may unquestionably make it *imperative* on the trustees to appoint others either on every vacancy, or when they are reduced to a certain number.(y)

These questions have usually arisen on charitable trusts.

[*188] *There is no doubt, that where the donees of the power neglect to exercise it on the occurrence of any vacancy, equity under a proper application will interpose and itself make the appointment.(z) Although this will only be done, where the number of trustees is so reduced, as to render a new appointment actually necessary,(a) as where the number is lessened to one-third.(b)

A trustee, who has been duly appointed under a power, and in whom the legal estate in the trust property has been vested by a proper conveyance or assignment, stands precisely in the same situation, and is invested with the same powers and privileges with reference to the trust estate, as if he had been originally appointed a trustee;(c) with the exception indeed of discretionary powers personally given to the original trustees.(d)

It is almost unnecessary to observe, that a conveyance or assignment of trust property to a new trustee, duly executed by the trustees or other persons, in whom the legal estate is vested, will operate to transfer the legal interest to the party taking under such an instrument, although it may not be authorized by any power.(e) But, as we have already seen, such a transaction will not have the effect of discharging the original trustees from the responsibilities or duties of the trust; indeed so far from it, it will of itself amount to a breach of trust.(f)

(y) *Doe v. Roe*, 1 Anst. 86; *Foley v. Wontner*, 2 J. & W. 245.

(c) *Vide supra*.

(z) See next chapter, Att.-Gen. v. Bishop of Litchfield, 5 Ves. 831. [See *Hodgson's Settlement*, 4 Eng. L. & Eq. 182.]

(d) *Cole v. Wade*, 16 Ves. 27; 1 Sugd. Pow. 148; post, Pt. III. Div. I. Chap. II. s. 3.

(a) *Re Marlborough School*, 13 Law. Jour. N. S. Chanc. 2 [7 Jur. 1047]; *Re Faversham Charities*, stated *supra*.

(e) *Doe v. Godwin*, 1 D. & R. 259; *White v. Parker*, 1 Scott, 542; 6 Jarm. Byth. Conv. 508, n.

(b) *Re Warwick Charities*, MS., 22 Nov. 1844, L. C.

(f) *Vide supra*.

exercised by C.; B. having died, and A. having renounced the trusts of the will. (*Cafe v. Bent*, 9 Jur. 653; 5 Hare, 34.) "The only question is, whether the fact that the trustees are named in the introductory clause of the power makes any difference,—whether, by naming them, the testator must be presumed to have meant something different with regard to those named to what he meant with regard to trustees to be appointed afterwards. I think that the cases which have been referred to justify me in holding that the trustees are so named not for the purpose of founding any distinction between them and after appointed trustees, but only because *they* happened to be the trustees for the time." (The Vice Ch. (*Wigram*) *Ibid*.)

However where the whole beneficial interest in the trust estate is absolutely vested in an individual, or in several individuals who are competent to dispose of it, the parties beneficially entitled are of course able to appoint a new trustee without any express power for that purpose; and the old trustee in such a case upon the requisition of the *cestui que trust* is bound to transfer the legal estate to the newly appointed trustee.^(g)

It may be observed, that although a trustee may have declined, or deserted the trust, or otherwise so acted, as to bring himself expressly within the terms of the power for appointing another in his place, he is not discharged from the trust, until that appointment has been duly made: until then therefore he still continues to be a trustee, and may resume the discharge of his duties as such.^(h)

Where the settlement is governed by the English law, and the parties are English, it would be a very hazardous exercise of a power, to appoint foreigners, or persons resident abroad, to be the new trustees; and though the point has never been actually decided, there can be but little doubt, that such an appointment would be set aside.⁽ⁱ⁾¹

But if the parties or either of them be foreigners, the appointment of their countrymen to be new trustees, although also foreigners and out of the jurisdiction, will be supported.^(k)

It may be added, that the appointment of one of the *cestuis que trusts* as *a trustee is clearly improper, for a trustee ought to be disinterested for the benefit of all parties. [*189]

The expense of an appointment of new trustees, where necessary and proper, must unquestionably be borne out of the *corpus* of the trust estate, in the absence of any direction to the contrary in the trust instrument; and the interest of the *cestui que trust* for life is not primarily chargeable with this expense; although his misconduct, in occasioning the necessity of the new appointment, may sometimes be a reason for making him bear the costs.^(l)

It is to be observed, that where there has been an invalid appointment of a trustee under a power, it will be a very serious question

(g) *Angier v. Stannard*, 3 M. & K. 566. the remarks in *Ex parte Roberts*, 2 Strob. Eq. 88.]

(h) *Attorney-General v. Pearson*, 3 Mer. 412. (k) *Ibid.*

(l) See *Coventry v. Coventry*, 1 Keen,

(i) *Meinertzhagen v. Davis*, 8 Jur. 758.

973; S. C. 1 Coll. N. C. C. 353. [See

¹ A power to appoint a new trustee, on an existing one becoming incapable to act, was ruled, in *Withington v. Withington*, 16 Sim. 104, not to apply to the case of a trustee going to reside abroad; and in *O'Reilly v. Alderson*, 8 Hare, 101, it was said that permanent residence abroad, does not, *ipso facto*, deprive the trustee of his office.

whether any subsequent appointment could, in any case, be sustained, even though otherwise regular and proper. At all events it seems clear, that if the title of the subsequently appointed trustee is implicated in the validity of the previous vicious appointment, it cannot be supported; as, for instance, where the subsequent appointment is *in place of that trustee* irregularly appointed, or still more strongly if it be made *by that trustee*, or if the new trustee be expressed to be appointed *to act with* the irregularly appointed trustee.^(m)¹

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*CHAPTER II.

THE SUBSTITUTION OF TRUSTEES BY THE COURT OF CHANCERY.

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|-------------------------------|--------------------------------|
| I.—IN WHAT CASES THE COURT | III.—WHOM IT WILL APPOINT, AND |
| WILL ACT [190]. | THE EFFECT OF THE APPOINT- |
| II.—HOW THE COURT ACTS [194]. | MENT [210]. |

I.—IN WHAT CASES THE COURT WILL ACT.

WHEREVER circumstances render it necessary or desirable, to appoint new trustees, the Court of Chancery in exercise of its inherent jurisdiction will interpose upon a proper application, and make the appointment.^(a)²

(m) See *Adams v. Paynter*, 14 Law (a) 2 Sugd. Pow. 532, 6th ed.; [Cham- Journ. N. S., Chanc. 54. [1 Coll. Ch. bers v. Maudlin, 4 Alab. 477.] 532; *Crosby v. Huston*, ante, 185, n.]

¹ A power to appoint new trustees is not exhausted by once being exercised; and, therefore, if the new trustee fails to accept, the donee of the power may appoint anew. *Foster v. Goree*, 4 Alab. 440.

² In Pennsylvania it has been held that where the lands lie there, a court of another state cannot appoint a new trustee in place of one appointed in Pennsylvania. *Williams v. Maus*, 6 Watts, 473. See ante, 44, note.

Upon the subject of this chapter, special provisions will be found in the legislation of the different states. The following summary is believed to furnish the principal regulations with reference thereto.

PENNSYLVANIA.—There having been at first no Court of Chancery in Pennsylvania, the execution of trusts was left very much to the voluntary action of the parties. See *Shaw v. Cameron*, 11 S. & R. 252; *Moody v. Fulmer*, stated in Wh. Dig., TRUSTEES, pl. 244; 6th ed. In 1825, an Act was passed (*Dunlop*, 392) by which jurisdiction was given to the Supreme Court in all cases of trust, so far as regarded the appointment and discharge of trustees; and the cases for the exercise of these powers were specified. This Act, with some additions, by a subsequent statute passed in 1828 (*Dunlop*, 420), was extended to the District Courts and Common

This jurisdiction exists, and will be equally enforced, whether the instrument creating the trust does or does not contain a power to

Pleas of the state. By the general Act with regard to the organization of courts of 1836, extensive chancery powers are given to the Supreme Court and Courts of Common Pleas, especially in the county of Philadelphia; and by the Assignees' and Trustees' Act of the same year (Dunlop, 689), sect. 15, the Courts of Common Pleas are given jurisdiction of cases of trusts express or implied, arising on deed or will; except as to trusts created by will and vested in executors or administrators, either by express words or operation of law, over whom the Orphans' Court has jurisdiction: (and, indeed, as to all trusts given to executors *nominatim* or *virtute officii*, the Orphans' Court has concurrent jurisdiction. Browne's Appeal, 12 Penn. St. R. 333.) The powers of the District Courts, under the Act of 1828, were expressly reserved. By sect. 16, a trustee wasting, neglecting, or mismanaging (what this is, see Chew's Estate, 2 Pars. 153), the trust estate or fund, or in failing circumstances, may be cited to show cause why he should not be dismissed, on application of any person interested (which does not comprehend the next of kin of a living *cestui que trust*, though the latter is of weak intellect, *Kuhler v. Hoover*, 4 Barr, 331), and the court may thereupon order security or dismiss. By sect. 18, in cases of infancy or temporary absence, a trustee *ad interim* may be appointed, with the same powers as the one for whom he is substituted. The foregoing sections are not applicable to assignments for the benefit of creditors which are specially provided for by the same act. The general provisions applicable to all assignees and trustees are as follows. Sect. 20. Where a trustee, &c., has been duly declared a lunatic or habitual drunkard (an inquisition of lunacy, &c., is not, *ipso facto*, a removal, *Sill v. McKnight*, 7 W. & S. 244), or has removed from the state, or ceased to have a place of residence therein, for a year or more, the court may on due proof dismiss him, and appoint another. Sect. 21. Where a trustee, &c., is dismissed or discharged, the court may make an order for transfer of books and papers, &c. Sect. 22. A trustee, &c., may be discharged on his own application by bill or petition, setting forth such facts as would entitle him to relief in equity;—provided that his accounts have been settled, that notice has been given as required by the Act, and that he has surrendered trust estate to trustee appointed, and done all other things necessary in equity. By sect. 23, the court may appoint new trustees where a sole assignee or trustee shall renounce (that is, *before acceptance*, *Read v. Robinson*, 6 W. & S. 329), or refuse to act under, or fully to execute the trust, &c., or dies (this does not apply to trusts annexed to the office of executor, 4 W. & S. 492; or to a passive trust, where the deceased trustee was merely the depository of the legal title, *Carlisle's Appeal*, 9 Watts, 332), or is dismissed or discharged, or where one of several trustees, &c., renounces, refuses, dies, or is dismissed or discharged, and the duties of the trust require a joint act; and also where no trustee is appointed by name or description. By the Act of 1846 (Dunlop, 960), the Orphans' Court of proper county, in all cases of trusts created by will, may appoint new trustees, upon the death, resignation, or removal, of the old trustees and may dismiss or discharge in cases falling under the 23d section of Act of 1836; and by the Act of 1849 (Dunlop, 1053), in all cases of trusts created by wills admitted to probate in the city and county of Philadelphia, to be executed by any executor or executors, by virtue of their office or otherwise, and *any* of the executors shall die, renounce, resign, be dismissed, or refuse to act in the trust, leaving the others continuing therein, the Orphans' Court, on the application of any party in interest, and with the consent of the continuing executors, and on notice, may appoint a trustee or trustees in his place. Sect. 24 (of Act of 1836). This power of appointment, &c., may be exercised

appoint new trustees.(b) And we have seen in the last chapter, that the court, when once put in possession of a case by the filing of a bill,

(b) *Webb v. Earl of Shaftesbury*, 7 re Foxhall, 2 Ph. 281; *Suarez v. Pam-Ves*. 480; *Re Fauntleroy*, 10 Sim. 252; *pelly*, 2 Sandf. Ch. 336.]
Finlay v. Howard, 2 Dr. & W. 490. [In

on application by bill or petition of any person interested, &c., and not otherwise, and on due notice. Sect. 25. The trustees thus appointed are to have the same powers and authorities in relation to the trust, and be subject in the same manner to the control of the court, as the old trustees; and (sect. 26), on the appointment, and on giving security when so required, all trust estate and effects shall vest at once in the trustees, &c. When the trustee is appointed by the original instrument, security is not a prerequisite to the *vesting* of the estate. *Johnson's Appeal*, 9 Barr, 416; *Dallam v. Fitler*, 6 W. & S. 326. In the counties of Philadelphia and Lancaster, by Acts of 3d of March, 1847 (*Dunlop*, 971), and 1849, § 9 (*Dunlop*, 1055, where the Act of 1847 is mis-cited), where a trust created by will is to be executed by the executors, they may renounce, without affecting their office or trust as executor generally, or any other trust in the will. In the case of a married woman possessed of a separate estate under the Act of 1848, by the Act of 1850 she may apply to the Common Pleas of the proper county, for the appointment of a trustee, other than her husband. An Act of 1838 (*Dunlop*, 763) provides that, where trustees reside out of the state, and any part of the trust property or fund is situate in Pennsylvania, the court may appoint one or more resident trustees to act in conjunction with the foreign trustees. In the *Supreme Court*, proceedings to compel a trustee to pay over money, or to remove him, must be by bill. *Ex parte Hussey*, 2 Whart. 350.

With regard to the jurisdiction of the Orphans' Court in cases of testamentary trusts, vested in executors *virtute officii* or otherwise, see the general Act of 1834, and its supplements; the Acts of 1846 and 1849, above cited; and *Brown's Appeal*, 12 Penn. St. R. 333; and *Webb v. Dietrich*, 7 W. & S. 401, where it was held that a purchase by executor at his own sale, in the absence of actual fraud, was no ground for removal.

NEW YORK.—By the Revised Statutes (3d ed.), part ii. ch. 1, art. ii. § 45, passive trusts are abolished, the legal estate vesting at once in the *cestui que trust*, and therefore in such case no question can arise on the appointment or removal of trustees. See *In matter of Craig*, 1 Barb. S. C. 33. Prior active or future express trusts still subsist; the latter are to sell for creditors, to sell mortgage or lease for legatees, or to satisfy charges on the land; to receive rents and profits of land, and apply them to the use of any person during his life, or for a shorter term; or to accumulate rents and profits, within the limits prescribed. In other cases of express trusts, no estate vests in trusts; but if the trust can be exercised as a power, it is valid as a power in trust; and as to resulting trusts, see ante, p. 91. With reference to the appointment, &c., of trustees, the following provisions are enacted:—Sect. 68. Where a sole surviving trustee dies (see 5 Paige, 559), the trust estate (whether personal or real, *Hawley v. Ross*, 7 Paige, 103) does not descend to the heirs or representatives, but vests in the court, to be executed by some person to be appointed under its direction. See *King v. Donnelly*, 5 Paige, 46; *Matter of Vonschoonhoven*, 5 Paige, 559; *Bulkley v. De Peyster*, 26 Wend. 21; *McCosker v. Brady*, 1 Barb. Ch. 329; 1 Comst. 214. Where the trust has thus devolved on the Court of Chancery, the parties interested may apply for a receiver, to act until a new trustee is appointed. *McCosker v. Brady*, 1 Barb. Ch. 329. Sect. 69. On the petition of any trustee, the court may

will not suffer any fresh appointment of trustees to be made except under its sanction and control.(c)

(c) *Millard v. Eyre*, 2 Ves. jun. 94; — *v. Robarts*, 1 J. & W. 251; *Att.-Webb v. Ld. Shaftesbury*, 7 Ves. 480; *Gen. v. Clack*, 1 Beav. 467.

accept his resignation, and discharge him from the trust, under such regulations as may be established by the court, and on such terms as the rights and interests of the parties may require. See *Matter of Vonschoonhoven*, 5 Paige, 559; *Cruger v. Holliday*, 11 Paige, 314; *Craig v. Craig*, 3 Barb. Ch. 76, sect. 70. Upon petition or bill of any person interested, the court may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who from any other cause shall be deemed an unsuitable person to execute the trust. See *Matter of The Mech. Bank*, 2 Barb. Ch. 446; and, as to lunatic trustee, *Matter of Wadsworth*, 2 Barb. Ch. 381, sect. 71. The court has full power to appoint a new trustee in place of one resigned or removed; and where there is no acting trustee from such cause, the court may appoint or cause the trust to be executed by one of its officers under its direction. Sect. 72. These three last sections apply only to express trusts. Independently of these statutory provisions, the court has no power upon a mere petition to discharge a trustee, or to accept his resignation, and appoint another in his place, without the consent of all persons who are, or on a future contingency may be interested in the execution of the trust. The usual course of proceeding is by bill. *Matter of Van Wyck*, 1 Barb. Ch. 565.

To these powers of appointment and removal under the Revised Statutes the Supreme Court has now succeeded, under the new code. *Vandervolgen v. Yates*, 3 Barb. Ch. 242.

MASSACHUSETTS.—By the Revised Statutes of 1836, p. ii., tit. iv., ch. 69, § 1, testamentary trustees are obliged to give bond before judge of probate (sect. 2), unless testator otherwise directs, or parties consent; and (sect. 4), if they neglect to give bond when required, they are to be deemed to have declined the trust. See *Dorr v. Wainright*, 13 Pick. 328. Every such trustee (sect. 5) may upon his own request be allowed to resign his trust, when it shall appear to judge of probate proper. Sect. 6. An executor or administrator of former trustee cannot be required to accept the trust against his will. Sect. 7. The judge of probate may, on notice to trustee and those interested, remove a trustee who has become insane, or otherwise incapable of discharging his trust, or evidently unsuited therefor. Sect. 8. Where a trustee declines or resigns trust, or dies, if no provision be made for supplying the deficiency in the will, the judge of probate shall, after notice (4 Metcalf, 330), appoint a new trustee, to act alone, or jointly with the others, as the case may be. See 3 Metc. 332; 12 Pick. 445. Every new trustee has and may exercise the same power, rights, and duties, whether as sole or joint trustee, as if originally appointed by testator; trust estate vests in him as it would have done in old trustee; and judge of probate may, moreover, order such conveyances by former trustee or representative as may be proper or convenient. Sect. 9. Every new trustee is to give bond as before.

NEW JERSEY.—By Rev. Stat. 1847, tit. vii. ch. 5, § 13. Where a trustee, appointed by last will or testament, other than executor, shall neglect or refuse to act, or die before completion of the trust, the Orphans' Court is authorized to appoint some suitable person or persons to execute the trust, with security, who is or are to have and possess all the power of former trustee.

VERMONT.—By Rev. Statutes 1839, tit. xii. ch. 55, § 1, &c., trustees appointed by will to give bond, unless it is otherwise directed, and (sect. 4), on refusal to do so,

No person interested could be advised to rest satisfied with the appointment of a new trustee under a power, unless the terms of the

are to be regarded as declining. Sect. 5. Any trustee may decline or resign when the Probate Court shall judge proper to allow it. Sect. 6. When any trustee becomes insane, or otherwise incapable of discharging his trust, or obviously unsuitable, Probate Court may remove on notice. Sect. 7. Where trustee declines, or resigns his trust, or dies, or is removed before the object for which he was appointed is accomplished, and no adequate provision made by will to supply vacancy, Probate Court, after notice, may appoint new trustee to act alone or jointly. Sect. 8. New trustee to have and exercise same powers, &c., as if originally appointed; and trust estate vests, &c., in him, as it did, or would have done, in old trustee; and court may order such conveyances by old trustee or representatives as may be necessary and proper.

ALABAMA.—By Act of 1829 (Clay's Dig. 588). Sect. 1. A trustee may be removed by the Circuit Court of the county where such trustee resides, or of the county where the estate shall be, on notice, to be directed by the court. Sect. 2. Trustee may resign on rendering full account of estate and management thereof; on notice, &c. Sect. 3. On resignation or removal, court may appoint another trustee. Sect. 4. Remedy is given against trustee wasting, or about to waste. Sect. 5. Trustees to render an account once a year, and on failure, may be removed. By Act of 1843 (Clay's Dig. 350), where trustee dies, the Register in Chancery may, on application of any person interested, and notice, appoint one or more trustees in place of the deceased trustee. This power, given by statute, does not affect the general powers of the Court of Chancery over the removal of trustees, &c. *Drane v. Gunter*, 19 Alab. 731.

MAINE; NEW HAMPSHIRE.—The provisions of the Rev. Statutes of Maine, 1846, tit. v. ch. 70, sect. 28, § 1; and Rev. Stat. N. H., 1842, tit. xix. ch. 168, are similar to those of Vermont, so far as regards the appointment or removal of testamentary trustees. An executor who is also trustee, remains such till on neglect to give bond, he is declared by probate judge to have declined the trust. *Groton v. Ruggles*, 17 Maine, 137.

VIRGINIA.—By Rev. Code, 1849, p. 675, it is provided, that the personal representative of a sole or surviving trustee shall execute the trust, or so much thereof as remained unexecuted at the death of such trustee, whether the subject be real or personal estate, unless the instrument creating the trust otherwise directs, or another trustee is appointed for the purpose, by a Court of Chancery having jurisdiction. See *Hughes v. Caldwell*, 11 Leigh, 342. See other provisions as to "Fiduciaries" in general, page 546. Where the *cestuy que trusts* of personalty are non-residents, the fund may be transferred on bill or petition to a trustee appointed by a court of record in the proper state, which when done will be a discharge *pro tanto* to the resident trustee. Page, 539, 40.

SOUTH CAROLINA.—The Act of 7 Anne, ch. 19, enabling infant trustees and mortgagees, to convey or assign, and giving power to the court to compel them so to do, as though of age, is in force (2 Coop. Stat. 547); and by an Act passed in 1796 (5 Coop. Stat. 277), in every case of a trust estate where the person entitled to the use of any property or estate vested in trustees, being of age, or his guardian, if under age, is willing to have other trustees substituted in the room of those in whom the legal estate is vested, or to have any one or more trustees substituted in the room of any one or more of the first or former trustees, the Court of Equity is authorized to permit such one or more of the first or former trustees to surrender his or their trust (by petition or consent endorsed in the petition of another, 4 Strob. Eq. 80), and to appoint such one or more trustees in his or their room (if a foreigner, security to be given, 2 Strob. Eq. 88), as may appear

power clearly and distinctly authorize the appointment in the particular event which may have occurred; if there be the slightest doubt as to the validity, or the application of the power to the case in question, the appointment, for the security of all parties, should be made only under the sanction of the court.(d)

It seems, that the circumstances and nature of the trust property—as where the administration of a *charity* is in question—will justify an application to the court for the appointment of new trustees, *in the first instance*, notwithstanding the existence of a power in the trust instrument to make such an appointment; and this, though no request may have been made to the existing trustees to exercise the power, and no charge of misconduct is made against them by the bill.(e) But in general it would be improper to burden the estate with the expense of a suit, unless that course were rendered necessary by the refusal of the donees of the power to make the appointment, or by some misconduct on the part of the existing trustees;(f) and although the court might grant the relief prayed, it would decree the plaintiffs to pay the costs of the suit.(g)

*Where vacancies in the trust have been occasioned by the death of any existing trustee,(h) (1) or by his having gone [*191]

(d) See *Millard v. Eyre*, 2 Ves. jun. 94. (h) *Hibbard v. Lambe*, Ambl. 309;

(e) *Att.-Gen. v. Clack*, 1 Beav. 470, 1. *Hewitt v. Hewitt*, Ambl. 508; *Att.-Gen.*

(f) *Finlay v. Howard*, 2 Dr. & W. 490. [See *In re Lloyd*, 3 J. & Lat. 255.] *v. Clack*, 1 Beav. 467; *Drayson v. Po-*

(g) *Finlay v. Howard*, *ubi supra*. *Dr. & W. 490; Devey v. Pace*, Taml. 77. [Matter of *Jones*, 4 Sandf. Ch. 616.]

(1) But where there were twelve trustees of a charity, and two of them died, the court held that there was no sufficient reason for an application for the appointment of two new trustees in their place at the expense of the charity. *Re Marlborough School*, 13 Law Journ. N. S., Chan. 2, 7 Jur. 1047. And in a very recent case before Lord Lyndhurst, his Lordship expressed an opinion to the same effect. *Re Faversham Charities*, L. C. 15th November, 1844, MS.

proper and advisable; and the trustees so appointed and substituted shall then be considered, to all intents and purposes, as vested completely and absolutely with all the estate, &c., and liable to all the conditions, &c., as the old trustees: provided, that a certificate of such appointment be endorsed on the original deed or will, and also recorded therewith. In *McNish v. Guerard*, 4 Strob. Eq. 66, it was decided, under this act, that a conveyance from the original trustees to their successors was not necessary, the practice being to make the transfer by order of the court. But the substituted trustee, nevertheless, cannot sue in his own name at law on a judgment obtained by the old trustee. *Davant v. Guerard*, 1 Spear's Law, 242. See *Ingersoll v. Cooper*, 5 Blackford, 439. All parties interested must be made parties; *Ex parte Tunno*, 1 Bail. Eq. 395. The act does not apply to executors; *Ex parte Galluchal*, 1 Hill, Eq. 148; who cannot be discharged from their office. *Hargood v. Wells*, Id. 59.

See further, MICHIGAN.—Rev. Stat. 300, 301; TENNESSEE.—Act of 1831, Carr. & Nich. 693; OHIO.—Rev. Stat. 1841, 1001; WISCONSIN.—Rev. St. 1849, ch. 57, the provisions of which are copied from the New York Act.

abroad and released,(i) or by no person being able to be found, answering to the description of the trustee in the instrument creating the trust,(k) the court acting on the principles above stated will on a proper application appoint new trustees to supply those vacancies.

And in like manner where the circumstances or conduct of any existing trustee render it inexpedient for him to continue in the office, the court will adapt its relief to the exigencies of the case, and having first decreed the removal of the trustee, will then proceed to supply the vacancy by appointing another person to act in the trust, and by directing the conveyance or transfer of the trust property to him.

Thus this relief has been decreed, where the original trustee or trustees declined to act;(l) or were desirous of being discharged;(m) or had absconded;(n) or were incapable of acting through age and infirmity;(o) or could not discharge the trust through disagreement amongst themselves;(p) or had been guilty of breaches of trust;(q) or become bankrupt.(r)¹

(i) *Buchanan v. Hamilton*, 5 Ves. 722.

(k) *Att.-Gen. v. Stephens*, 3 M. & K. 347.

(l) *Miles v. Neave*, 1 Cox, 159; — *v. Roberts*, 1 J. & W. 251. [In *re Russell's Trust*, 1 Engl. L. & Eq. 225, a trustee may, however, decline *except* for the purpose of appointing new trustees. *Hadley's Trust*, 9 Engl. L. & Eq. 67.]

(m) *Howard v. Rhodes*, 1 Keen, 581; *Coventry v. Coventry*, id. 758; *Hamilton v. Fry*, 2 Moll. 458; *Greenwood v. Wakeford*, 1 Beav. 576. [See *Matter of Jones*, 4 Sandf. Ch. 115.]

(n) *Millard v. Eyre*, 2 Ves. jun. 94.

(o) *Bennett v. Honeywood*, Ambl. 710.

(p) *Bagot v. Bagot*, 10 Law Journ. N. S. Chanc. 116; see *Uvedale v. Patrick*, 2 Ch. Cas. 20.

(q) *Mayor of Coventry v. Att.-Gen.* 7 Bro. P. C. 235; *Ex parte Greenhouse*, 1 Mad. 92; *Att.-Gen. v. Shore*, 7 Sim. 290, 309, n.; *Att.-Gen. v. Drummond*, 1 Dr. & W. 353; 3 id. 162.

(r) *Bainbrigge v. Blair*, 1 Beav. 495; *Re Roche*, 1 Conn. & Laws. 306; 2 Dr. & W. 287. [See *Turner v. Maule*, 5 Engl. L. & Eq. 222, under a power, and ante 179, note.]

¹ It has been decided in the United States, that courts of equity in general have power to appoint new trustees where the original trustees refuse, decline, or neglect to act, (*King v. Donnelly*, 5 Paige, 46; *Peyster v. Clendinning*, 8 Paige, 295; *Matter of Mechanics' Bank*, 2 Barb. S. C. 446; *McCorken v. Bond*, 1 Barb. Ch. 329; *Potts' Petition*, 1 Ashm. 340; *Lee v. Randolph*, 2 Hen. & Munf. 12; *Dawson v. Dawson*, *Rice's Eq.* 243; *Field v. Arrowsmith*, 3 Hump. 442); or omit to enter security where the act requires it (*Johnson's Appeal*, 9 Barr, 446); or die, (*State Bank v. Smith*, 6 Alab. 75; *Ex parte Conrad*, 2 Ashm. 527; *Pate v. McClure*, 4 Rand. 164; *Dunscombe v. Dunscombe*, 3 Hen. & M. 11); or are incapable of acting (*Suarez v. Pumpelly*, 2 Sandf. Ch. 336); as by long-continued habits of intemperance (*Bayles v. Staate*, 1 Halst. Ch. 513); or by lunacy (*Matter of Wadsworth*, 2 Barb. Ch. 381, see in *re Smith*, 17 Law Journ. Ch. 415); but great age by itself is not enough (*Hosack v. Rogers*, 6 Paige, 415); or have been guilty of breaches of trust (*Parsons v. Winslow*, 6 Mass. 361; *Cooper v. Day*, 1 Rich. Eq. 26; *Gibbes v. Smith*, 2 Id. 131; *Thompson v. Thompson*, 2 B. Monr. 161; see *Matter of Mech. Bank*, 2 Barb. S. C. 446); as in making improper investments of the trust money (*Gibbes v. Smith*, 2 Rich. Eq. 131; *Johnson's Appeal*, 9 Barr, 416). Constructive fraud alone, however, as buying in the trust property

And in like manner it has been considered a sufficient reason for changing a trustee, where a corporation, which was originally appointed to act as trustee, had become subject to a foreign power;(s) or where a female trustee had married a foreigner, although by her answer she denied any intention of quitting the kingdom, and stated her desire of continuing in the trust.(t) And in the case of a charity, where two of the original trustees were the holders for the time being of offices which were changed annually, the inconvenience of so frequent a change was held a sufficient reason for appointing other trustees.(u) In one case a trustee, though desirous of acting, was removed by the court, and a new one appointed, because his co-trustees declined to act with him.(x) But a failure by a trustee in discharging the duties of his office from mistaking or misunderstanding his duty, will not of itself be a sufficient ground for *removing him.(y) And the *bona fide* [*192] refusal of a trustee to exercise a pure discretionary power for the benefit of the trust estate (as a power of varying securities) is also a wholly insufficient reason for a suit to have him discharged from the trust.(z)

The fact of the original trustees having been appointed by an act of parliament instead of any private instrument, will not prevent the court from asserting and exercising its jurisdiction by appointing other trustees in their room, where circumstances render it necessary.(a)

However, in addition to the general jurisdiction, inherent in the court for this purpose, acts of parliament have been passed from time to time, by which the power of appointing new trustees in certain cases is expressly given to the court, to be exercised (as we shall presently have occasion to consider) in a more concise and summary way.

(s) Att.-Gen. v. Mayor of London, 3 Bro. C. C. 171.

(t) Lake v. De Lambert, 4 Ves. 592.

(u) Ex parte Blackburne, 1 J. & W. 297.

(x) Uvedale v. Patrick, 2 Ch. Ca. 20.

(y) Att.-Gen. v. Coopers' Comp., 19 Ves. 192; Att.-Gen. v. Caius Coll., 2 Keen, 150.

(z) Lee v. Young, 2 N. C. C. 532.

(a) Buchanan v. Hamilton, 5 Ves. 722.

[But see Callis v. Ridout, 7 G. & J. 1.]

at his own sale, is not enough. Webb v. Deitrich, 7 W. & S. 401. A mere disagreement between trustee and *cestuy que trust* will not be sufficient. Clemens v. Caldwell, 7 B. Monr. 171. Where a *cestuy que trust* was prohibited from coming into the State, the court, in a case in South Carolina, appointed inhabitants of the same State with him; Ex parte Tunno, 1 Bail. Eq. 395. But a trustee residing out of the jurisdiction will not be appointed, unless on security given. Ex parte Roberts, 2 Strob. Eq. 86. It seems that it is only permanent absence, where there are other trustees, which will authorize the substitution of a trustee. Gale's petition, R. M. Charlton, 109 (and see Re Mais, 12 Engl. L. & Eq. 306). Where the trusts under a will vested in the executor are distinguishable from those attached to his office, the court may dismiss him as to the former, and not as to the latter. Craig v. Craig, 3 Barb. Ch. 76; Matter of Wadsworth, 2 Barb. Ch. 381.

Thus the general Bankrupt Act (6 Geo. IV. c. 16, s. 79), provides, that if any bankrupt shall as trustee be seized or possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured thereon or arising out of the same, or shall have standing in his name as trustee either alone or jointly any government or other stock in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the persons entitled in possession to the receipt of the rents, &c., and on due notice to all other persons interested, to order the assignees and all persons, whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, &c., to such person or persons, as the Lord Chancellor shall think fit, upon the same trusts as the said estate, &c., was subject to before the bankruptcy, or such of them as shall then be subsisting and capable of taking effect, and also to receive and pay over the rents, &c., as the Lord Chancellor shall direct.

And now by the Bankruptcy Court Act (1 & 2 Will. IV. c. 56, s. 2), this, as well as the other jurisdiction of the Lord Chancellor in matters of bankruptcy, is transferred to the Court of Review, subject to the right of appeal to the Lord Chancellor.^(b)¹

The statute 11 Geo. IV. & 1 Will. IV. c. 60, was introduced by Sir E. Sugden, to obviate the inconvenience occasioned by the disabilities, &c., of trustees, for which the previous acts, passed with the same view,^(c) had been found not to provide a sufficient remedy. That act provides, that where trustees are persons *non compos mentis*; ^(d) or infants; ^(e) or out of the jurisdiction; ^(f) or where it is unknown who is the survivor of several trustees; or whether he be living or dead; or who is his heir; ^(g) (1) or where any trustee, or heir or executor of any last surviving trustee, refuses or neglects to

(b) Archb. Bkrupt. Law, 9th ed., 248; see *Williams v. Bird*, 1 V. & B. 3.

(c) 7 Ann. c. 19; 36 Geo. III. c. 90; 6 Geo. IV. c. 74. [Repealed and supplied by the "Trustee Act of 1850;" 13 & 14 Vict. c. 60; 14 Jur. part ii. p. 360.]

(d) Sect. 3, 4, 5. [Trustee Act, 1850, § 3, 4, 5, 6.]

(e) Sect. 6, 7. [Trustee Act, 1850, § 7, 8.]

(f) Sect. 8, 9, 10. [Trustee Act 1850, § 9, 10, 11. *Watts' Settlement*, 9 Hare, 106; 15 Jur. 459. See *Plyer's Trust*, 15 Jur. 766; *Re Mais*, 12 Eng. L. & Eq. 306.]

(g) Sect. 8, 9, 10. [Trustee Act, 1850, § 13, 14, 15, or there is a contingent right of unborn trustees, &c., § 16.]

(1) By the recent act for the amendment of the Law of Escheat, 4 & 5 Will. IV. c. 23, s. 2, this provision is extended to cases where a trustee dies *without* an heir. [Trustee Act, 1850, § 15.]

¹ The Bankruptcy Consolidation Act of 12 & 13 Vict. c. 106, has now transferred the jurisdiction of the Court of Bankruptcy in the appointment of trustees to the Court of Chancery; see *Ex parte Walker*, 19 L. J. Bank. 37.

convey, assign, surrender, or transfer the *trust property, when required to do so as directed by the act; (h)¹ it shall be lawful for the Lord Chancellor *on petition* to direct a conveyance, &c., to be made by the trustee himself, or by any person whom the court shall appoint in his place.² And then by the 22d sect., after reciting that cases may occur upon application by petition under the act for a conveyance or transfer, *where the recent creation or declaration of the trust or other circumstances may render it safe and expedient* for the Lord Chancellor, &c., to direct by an order upon such petition, a conveyance or transfer to be made to a new trustee or trustees, without compelling the parties seeking such an appointment to file a bill for that purpose, although there is no power in any deed or instrument creating or declaring the trusts of such land or stock to appoint new trustees; it is enacted, that *in any such case* it shall be lawful for the Lord Chancellor, &c., to appoint any person to be a new trustee, by an order to be made on a petition for a conveyance or transfer under the act after hearing all such parties as the court shall think necessary: and thereupon a conveyance or transfer shall be executed so as to vest such land or stock in such new trustee either alone or jointly with any surviving or continuing trustee, as effectually and in the same manner, as if such new trustee had been appointed under a power in any instrument creating or declaring the trusts of such land or stock, or in a suit regularly instituted.

It has been decided, that the jurisdiction, conferred on the court by the 22d sect. of this act, applies only to the cases pointed out by the previous sections; viz., the disability or refusal of the existing trustees, or their being out of the jurisdiction, or their existence not being known, and then only in recent and plain cases; and that in all other cases a bill must be regularly filed for the appointment of trustees under the general jurisdiction of the court.(i)

(h) Sect. 8, 9.

Ex parte Boyne, Ca. Temp. Plunk. 134;

(i) Re Nicholls, Ca. Temp. Sugd. 17; Re Fitzgerald, id. 20; Re Pennefather, 2 Dr. & W. 292; Re Hartford, ib.; Hart v. Ld. Ffrench, ib.; Re Whitley, id. 23;

Re Earl of Mayo, id. 124; Re Fairsewell, 2 Jur. 987; Re Clark, 1 Jur. 737; Re Anderson, Ca. Temp. Sugd. 27.

¹ Trustee Act, 1850, § 17, &c. And see on construction of these sections, Rowley v. Adams, 14 Beav. 130; 15 Jur. 1002; In re Hodgson's Settlement, 4 Eng. L. & Eq., 182; Ex parte Russell, 1 Sim. N. S. 404; 15 Jur. 100; 1 Eng. L. & Eq. 225; In re Hartwell's Will, 8 Eng. L. & Eq. 172; Smyth's Settlement, 4 Eng. L. & Eq. 107.

² In all these cases, by the "Trustee Act, 1850," it is provided that it shall be lawful for the Court of Chancery or the Lord Chancellor as guardian of lunatics, to make an order vesting the lands, &c., in such person or persons as the court, &c., shall direct, or in the acting trustees; or to release the lands from any contingent right, &c.; which order shall have the same effect in the respective cases, as a conveyance, assignment, or release by the old trustee. See 14 Jur. p. ii. p. 361, &c.

In cases of charity, we shall presently see, that a similar general summary jurisdiction is conferred on the court by 62 Geo. III. c. 101 (Sir Samuel Romilly's Act). And in consequence of the great expense to charities, where all the trustees were dead, in making out the title of the heir to the surviving trustee, the Act 1 Will. IV. c. 60, s. 23, also provided, that where all the trustees of any estate for any charity or charitable or public purpose should be dead, the court might on a petition in a summary way require by advertisement the representative of the last surviving trustee to appear or give notice of his title within twenty-eight days and prove his pedigree or other title as trustee, and in default the court is authorized to appoint new trustees, and to order a conveyance to be made to them of the trust property without the necessity of any decree.^(k) And this enactment has since been embodied and extended by subsequent statutes.^(l)¹

Where no trustees of a charity had been appointed since 1634, the court on an application made in 1844, presumed the death of all [*194] the *trustees, and directed a reference to the Master in the terms of the 23d section of the above act.^(m)

The death of two out of twelve original trustees of a charity is not a sufficient reason for an application to the court to appoint two

(k) 2 Sugd. Pow. 533, 4.

Belke's Charity, 13 Jur. 317; and

(l) 2 & 3 Will. IV. c. 57, s. 3, 4; 5 &

"Trustee Act, 1850," s. 45.]

6 Will. IV. c. 71, s. 18, 20. [See In re

(m) Re Nightingale's Charity, 3 Hare, 336.

¹ Now by the Trustee Act of 1850 (13 & 14 Vict. c. 60, sect. 32), whenever it shall be expedient to appoint a new trustee or trustees, and it shall be found inexpedient, difficult (and under the head of "difficulty" is comprehended the case of a lunatic trustee, though there be a power of appointing in the instrument; Matter of Davies, 7 Eng. L. & Eq. 8; 3 Mac. & G. 278), or impracticable so to do without the assistance of a Court of Chancery; the Court of Chancery may make an order appointing a new trustee or trustees, either in substitution for or in addition to (thus the Court may appoint two new trustees in place of one, Ex parte Turnstall, 15 Jur. 645; 5 Eng. L. & Eq. 116) any existing (which includes disclaiming, Tyler's Trust, 8 Eng. L. & Eq. 96) trustee or trustees, who (sect. 33) shall have the same right and powers as though appointed by regular suit. The Court (sect. 35) at the same or at a subsequent time may make an order, vesting the new trustee with the land, &c., as though conveyance, &c., had been duly executed (see In re Davidson, 7 Eng. L. & Eq. 161), and they are (sect. 35) to give power to sue at law in cases of choses in action, &c. Such discharge (sect. 36) is not, however, to affect the old trustees further than would an appointment exercised under a power in the original instrument. The application (sect. 37) for such order may be made by any person beneficially interested, though under disabilities, or by the old trustee. In order to the application, the parties may (sect. 38) go before a master first and establish the fact (see Re Farmer, 12 Eng. L. & Eq. 330); or (sect. 39) immediately to the Chancellor or Court. See Robinson's Trust, 2 Eng. L. & Eq. 14; 15 Jur. 487. Sect. 40. Costs to come out of estate in general. (See In re Fulham, 15 Jur. 69.)

new trustees at the expense of the charity.⁽ⁿ⁾ But where the number of the original trustees is lessened by one-third, the court on petition will proceed to the appointment of others.^(o)

II.—HOW THE COURT ACTS IN APPOINTING NEW TRUSTEES.

1st.—The appointment may be made by a suit.

As a general rule, the jurisdiction of the court to appoint new trustees can only be called into exercise by means of a bill filed by and against all proper parties, and praying for the desired relief.¹ In some instances, however, as we have already seen, the court has been expressly empowered by the legislature to administer this relief in a more summary way upon petition.

It is to be observed, that the summary proceedings authorized by these acts, are not in any case rendered imperative on the court, and the original jurisdiction of proceeding by bill or information still exists, and may be exercised even in cases coming directly within any of those statutes.^(p)

Thus in a recent case, that occurred since the passing of the statute 6 Geo. IV. c. 16, a trustee, who had become bankrupt, was removed on that ground, and another appointed in his place, in a regular suit instituted for that purpose, although the same object might have been accomplished by means of a petition under the act.^(q) And in another late case an information was filed for the appointment of new trustees of a charity in the place of some who were dead.^(r)

And where a bill has been filed and the answer put in, the court will not entertain a petition presented afterwards for the same object, but the cause must proceed regularly to a hearing.

However, if the objection were taken by any of the parties in a private trust, or even without any such objection being taken in the case of a charity (whose interests the court is bound of itself to protect), the additional expense incurred by the proceeding by suit would probably be visited on the parties by whose conduct it was unnecessarily occasioned. We shall presently have occasion to con-

(n) *Re Marlborough School*, 13 Law Journ. N. S., Chanc. 2; *Re Faversham Charities*, L. C. 15th Nov. 1844, MS. (p) See *ex parte Rees*, 3 V. & B. 11; *Miller v. Knight*, 1 Keen, 129.
(o) *Re Warwick Charities*, cor. Ld. (q) *Bainbrigge v. Blair*, 1 Beav. 495.
Lyndhurst, Ch., 22d Nov. 1844, MS. (r) *Attorney-General v. Clack*, 1 Beav. 467.

¹ See *Ex parte Knust*, 1 Bailey's Eq. 489; *Ex parte Hussey*, 2 Whart. 330; *Matter of Van Wyck*, 1 Barb. Ch. 565. A trustee will not be divested of his trusts, and a receiver appointed, before answer, unless there be danger of irreparable loss. *Ogden v. Kip*, 6 John. Ch. 160.

sider the cases in which a suit will be necessary notwithstanding those statutes.(t)

A bill for the appointment of new trustees may be filed, either by the parties beneficially interested in the trust estate against the existing *trustees, and this is the more usual course;(u) or, if [*195] circumstances require it, by the existing or continuing trustees, against their *cestui que trusts*;(x) or again, one or more of several trustees may join as co-plaintiffs with the *cestui que trusts* in a suit for the removal of one of the trustees and the appointment of another in his place.(y)

Where the trust is for charity, and it is not considered possible or advisable to proceed by petition under either Sir Samuel Romilly's,(z) or Sir Edward Sugden's(a) Acts, the proceeding will be by information filed by the Attorney-General on behalf of the charity;(b) and relators, though usual in such a case, are not indispensable.(c)

In all cases, the circumstances which render the new appointment necessary or proper, must be stated; and the removal of the old trustee (where that forms part of the object of the suit), as well as the new appointment, and the directions for the execution of the necessary conveyance, should be prayed by the bill.

However, the court has sometimes directed a reference to the Master to approve of a new trustee, although that does not appear to have been expressly included in the prayer for relief.(d)

All the persons beneficially interested must be made parties to a suit for the appointment of a new trustee.(e)¹

(t) See *Finlay v. Howard*, 2 Dr. & W. 490.

(u) *Bennet v. Honeywood*, Ambl. 708, 14; *Millard v. Eyre*, 2 Ves. jun. 94; *Buchanan v. Hamilton*, 5 Ves. 722; *Earl of Portsmouth v. Fellows*, 5 Mad. 450; *Howard v. Rhodes*, 1 Keen, 581; *Bainbridge v. Blair*, 1 Beav. 495.

(x) *Coventry v. Coventry*, 1 Keen, 758; *Greenford v. Wakeford*, 1 Beav. 576.

(y) *Lake v. De Lambert*, 4 Ves. 592.

(z) 52 Geo. III. c. 101.

(a) 1 Will. IV. c. 60.

(b) *Att.-Gen. v. Mayor of London*, 3 Bro. C. C. 171; *Att.-Gen. v. Stephens*, 3 M. & K. 347; *Att.-Gen. v. Clack*, 1 Beav. 467.

(c) *Re Bedford Charity*, 2 Sw. 520; 1 Dan. Ch. Pr. 13.

(d) *Attorney-General v. Stephens*, 3 M. & K. 349, 52; see *Wilson v. Wilson*, 2 Keen, 251.

(e) *Wardle v. Hargreaves*, 11 Law Journ. N. S., Chanc. 126. [See *In re Smith*, 2 De G. & S. 781; *Ex parte Tunno*, 1 Bail. Eq. 395.]

¹ A *cestui que trust* who has a vested though future interest, may file a bill for removal of a trustee. *Cooper v. Day*, 1 Rich. Eq. 24. But where a married woman, *cestui que trust*, drew an order on the trustee of her separate estate in favor of her children, it was held that this did not create a lien on the fund so as to entitle the children to be heard in the appointment of a new trustee. *Hawley v. Ross*, 7 Paige, 103. A new trustee may be appointed though some of the *cestuis* are infants, and others out of the jurisdiction. *Hunter v. Gibson*, 16 Sim. 158. A trustee who had retired and allowed a new trustee to be appointed, without communication to his *cestui que trust*, is not a necessary party to a bill

Where the object of a suit is to have a trustee removed for misconduct, no statement will be scandalous or impertinent, which goes to impute to the defendant misconduct or corrupt or improper motives, such as vindictiveness, or personal hostility, in the execution of the trust; although it is impertinent, and possibly scandalous, to state circumstances of *general* malice or personal hostility. *(f)*

Where the court has already assumed the administration of a trust estate through a suit, though instituted with a different object, a distinct bill need not be filed for the appointment of new trustees, but the court will entertain an application for that purpose made in the form of a motion in the cause; and upon the hearing of such a motion it will in a proper case make an order, referring it to the Master to approve of a proper person to act as trustee. *(g)*

The court will not by its decree in a suit in the first instance appoint any person who may be proposed as the new trustee; but it will be referred to the Master to approve of a proper person to be trustee; *(h)* (1) *or if the appointment of any particular person may have been asked, the reference will be to inquire whether the party proposed be a proper person to be trustee: *(i)* and on application, leave will be given to any particular persons to propose themselves before the Master, if no objection exist to their appointment. *(k)* [*196]

However, where all parties, being competent, consent to the appointment of a particular person to be the new trustee, the court will at once direct the transfer of the trust estate to him without any reference. *(l)*¹

(f) Per Sir J. Leach, V. C., in *Earl Seton's Decrees*, 249, 50. [*Matter of Portsmouth v. Fellows*, 5 Mad. 450. *Stuyvesant* 3 Edw. Ch. 299; but see

(g) — *v. Osborne*, 6 Ves. 455; now under Trustee Act of 1850, *Robinson's Trust*, 2 Eng. L. & Eq. 111.]
Webb v. E. of Shaftesbury, 7 Ves. 487;
 — *v. Roberts*, 1 J. & W. 251.

(h) *Luther v. Chamberlen*, *Seton's*

Dec. 249; *Buchanan v. Hamilton*, 5
 Ves. 722; *Millard v. Eyre*, 2 Ves. jun.
 94; *Att.-Gen. v. Stephens*, 3 M. & K.

352; *Howard v. Rhodes*, 1 Keen, 581;
(i) *O'Keeffe v. Calthorpe*, 1 Atk. 18;
 — *v. Roberts*, 1 J. & W. 251.

(k) *Attorney-General v. Clack*, 1
 Beav. 474.

(l) *O'Keeffe v. Calthorpe*, 1 Atk. 18.

(1) Sometimes the reference will be to the Master *at once to appoint* the new trustees, *Att.-Gen. v. Arran*, 1 J. & W. 229; *Millard v. Eyre*, 2 Ves. jun. 94; *Seton's Decrees*, 250.

complaining of such new appointment, and seeking to displace the new trustee, all relief against the old being waived. *Marshall v. Sladden*, 7 Hare, 428; 14 Jur. 106. So a trustee who has transferred the trust property to a trustee appointed by order of the court, will be bound by the substitution, although not a party to the suit in which it was made. *Thomas v. Higham*, 1 Bailey's Eq. 222.

¹In *Young v. Young*, 4 Cranch, C. C. R. 499, the trustee of a family settlement was changed by consent on bill filed, though infants were interested; but see *Cruger v. Halliday*, 11 Paige, 314; *Jones v. Stockett*, 2 Bland, 409.

The report of the Master, upon a reference in a suit to approve of a new trustee, may be excepted to on the ground of the unfitness of the person appointed: but there must be a direct complaint of his actual unfitness; and where the exception is taken on the ground, that another person would have been more fit for the office, than the person approved of by the Master, the court will not enter into the question of the comparative fitness of the parties.^(m)

The appointment of the new trustee by the court would not be complete without a conveyance or transfer of the trust property to him. The decree therefore usually goes on to direct a proper conveyance of the legal estate (to be settled if necessary by the Master) either to the new trustee alone, or to him jointly with the surviving or continuing trustees, if any; and that the conveyance shall be executed by all requisite parties, whether the surviving trustees, or the representative of the last survivor, or a trustee who by the same decree is removed from his office.⁽ⁿ⁾

As a general rule the costs of a suit for the appointment of a new trustee to supply a vacancy in the trust, as well as the expenses consequential on such a suit, will be borne by the general *corpus* of the trust estate. And the same rule will also prevail where the bill is filed by a trustee to be discharged from the trust, if he has sufficient reason for making the application, and does not act from obstinacy or caprice.^(o) And where the costs of the trustee are directed to be paid out of a fund under the control of the court, they will be directed to be taxed as between solicitor and client. If there be no such fund, the taxation will be only as between party and party.^(p)

However, if a trustee have once accepted the trust, he must assign a sufficient reason for seeking to be discharged:¹ and if no such reason be given, he will not be allowed his costs of a suit, instituted by the *cestui que trusts* for the appointment of a new trustee to act in his place; but in making a decree in such a suit the court will give no directions as to the payment of costs, thereby leaving each party to pay his own.^(q) It has been laid down that *in England* a trustee will *never* be removed *on a bill filed by him against the cestui que trusts*, and although that will be done in *Ireland*, it will be only on the terms of the trustee *paying* the costs of the suit.^(r)

^(m) Att.-Gen. v. Dayton, 2 S. & S. 528.

^(p) 3 Dan. Ch. Pr. 77.

⁽ⁿ⁾ O'Keeffe v. Calthorpe, 1 Atk. 18; Seton's Decr. 249, 50.

^(q) Howard v. Rhodes, 1 Keen, 581. [Courtenay v. Courtenay, 3 J. & Lat.

^(o) Coventry v. Coventry, 1 Keen, 758; see Taylor v. Glanville, 3 Mad. 176; Curteis v. Chandler, 6 Mad. 123; Greenford v. Wakeford, 1 Beav. 581.

529; Matter of Jones, 4 Sandf. 416.] ^(r) Hamilton v. Fry, 2 Moll. 458.

¹ See Cruger v. Halliday, 11 Paige, 314; Re Molony, 2 J. & Lat. 391.

However the practice affecting this question, as established by the courts in England at the present day, does not fully bear out the *dictum, thrown out by the judge, who decided the case of [*197] Hamilton v. Fry.(r)

In the recent case of Greenford v. Wakeford,(s) the law on this subject was thus laid down by Lord Langdale, M. R., "If a trustee undertakes the performance of a trust, he is not entitled, as against the estate he has undertaken to protect, to exercise a mere caprice, and without any assignable reason say, that he will no longer continue trustee. But on the other hand, if a trustee finds the trust estate involved in intricate and complicated questions, which were not and could not have been in contemplation at the time, when the trust was undertaken, he has in consequence of that change of circumstances, a right to come to the court to be relieved; and the court will judge, whether the circumstances were such as to make it fair for him to decline acting longer upon his own responsibility."(s)

There can be no question, but that the heir or personal representative of an original trustee, upon whom the law casts the legal estate of the trust property, may apply to the court to be relieved from the trust by having other trustees appointed, if they have never accepted or acted in the trust.(t)

In a late case the conduct of the *cestui que trusts* for life, in creating frequent incumbrances and embarrassing the trust estate, and thereby fixing the trustees with responsibilities, which they had not originally contemplated, was held a sufficient reason, for the trustees themselves to institute a suit against the *cestui que trusts*, for the purpose of being discharged from the trust; although under the circumstances of that case the costs of the suit were ordered to be paid out of the interest of the tenant for life.(u)

And so where the trust estate had been involved in complication and difficulty, through an improper investment, which had been made by a trustee for the benefit and accommodation of one of the *cestui que trusts* for life; it was held by the same learned judge, that the trustee was not precluded from coming to the court to be relieved from the trust, although the difficulties were occasioned by his own act; and that he was entitled to his costs either against the trust fund, or the tenant for life.(x)

In that case the trustees, by whom the bill was filed, were the executors of the original trustee, by whom the breach of trust had been committed; and that was a material circumstance in their

(r) Hamilton v. Fry, 2 Moll. 458.

(u) Coventry v. Coventry, 1 Keen,

(s) Greenford v. Wakeford, 1 Beav. 758.

581, 2.

(x) Greenford v. Wakeford, 1 Beav.

(t) Greenford v. Wakeford, ubi supra. 576, 582.

favor ; but from his Lordship's observations it may be concluded, that the decree would have been the same, had the bill been filed by the original trustee himself.(y)

It is almost unnecessary to state, that if the trustees be guilty of any improper conduct, they will be fixed personally with the costs occasioned by their misbehavior.(z)

2d. The appointment may be made on petition :¹

There has been already occasion to observe, that by particular enactments of the legislature the court has been empowered in certain cases to dispense with the institution of a formal suit, and to exercise its jurisdiction of appointing new trustees in a more summary way upon petition.²

[*198] *Thus in the case of trusts for charitable purposes the statute 52 Geo. III. c. 101 (usually called Sir Samuel Romilly's Act), provides, That in every case of a breach of trust, or supposed breach of trust, or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the court, praying such relief as the nature of the case may require, and the court is empowered, and required, to hear and determine such petition in a summary way, upon such affidavits or other evidence as may be produced, and to make such order thereon and in respect of the costs, as it shall think just.

It will be remarked, that this act does not in terms authorize the appointment of new trustees by the court on petition : however there never has been any question, but that this power comes within the general scope and intention of the act ; and where a clear breach of trust has been committed by the existing trustees of a charity, the court on a petition presented under the act will not only remove the old trustees, but also compel them to convey to new trustees at their own expense.(a)

And even where no breach of trust is established, or suggested, against the existing trustees ; yet, if their continuance in the office be likely to occasion considerable inconvenience to the charity (although from no personal default of theirs), the court will appoint

(y) 1 Beav. 582.

(a) Ex parte Greenhouse, 1 Mad. 92,

(z) Att-Gen. v. Clack, 1 Beav. 474 ; 109 ; Ex parte Seggears, 1 V. & B. see Ex parte Greenhouse, 1 Mad. 92, 497.

109 ; and see this subject further considered, post, Costs.

¹ In South Carolina, though the appointment is generally on bill filed, yet where by the death of a former trustee the estate has devolved on his executor, he may be removed on petition. Ex parte Knust, 1 Bail. Eq. 489 ; see note, ante, 190.

² See the Act of 1850, stated ante, 193.

other trustees in their room on a petition, under the act presented solely with that object.(b)(1)

It has been decided by Lord Eldon, that although the act authorizes "any two or more persons" to present a petition, yet that must be understood to mean persons having an interest; and therefore that no person can petition under the act, who has not a direct interest in the charity.(c) And the petitioners must show, that their interest is such as is alleged in the petition.(d)

The petition moreover must be signed by the Attorney-General, or by the Solicitor-General, if there be no Attorney-General at the time; and the court will require such signature to be affixed with as much deliberation as to be a regular information.(e) An order made upon a petition, which had not been signed by the Attorney or Solicitor-General will be a mere nullity,(f) and the petition may be taken off the file.(g)

We have already had occasion to remark that the act does not make it imperative on the parties to proceed by petition.(h) If however an information be filed, and a petition under the act presented, having all or some of the same objects in view, the court will not proceed on both, but will refer it to the Attorney-General to consider which should proceed.(i)

*The act does not authorize the court to decide on petition any adverse claims affecting the charity, whether such [*199] claims arise between the trustees themselves, or the parties claiming a benefit.(k) And where a petition presented under the act, embraces in its prayer relief, which partly can and partly cannot be granted in that form of proceeding, the court will have great difficulty in separating the proper from the improper objects of the petition.(l) It has been held also, that constructive trusts are not within the operation of this act.(q)

The substance and object of the provision, contained in the 23d

(b) *Ex parte Blackburne*, 1 J. & W. 297.

(c) *Re Bedford Charity*, 2 Swanst. 518.

(d) *Corporation of Ludlow v. Greenhouse*, 1 Bl. N. S. 17, 91.

(e) *Ex parte Skinner*, re *Lawford Charity*, 2 Mer. 453, 6.

(f) *Attorney-General v. Green*, 1 J. & W. 303.

(g) *Re Dovenby Hospital*, 1 M. & Cr. 279.

(h) *Ex parte Rees*, 3 V. & B. 11; and see ante, p. 194.

(i) *Attorney-General v. Green*, 1 J. & W. 303.

(k) *Corporation of Ludlow v. Greenhouse*, 1 Bligh. N. S. 17; re *West Retford*, 10 Sim. 101, 8.

(l) *Ex parte Skinner*, 2 Mer. 457.

(q) *Ex parte Brown*, Coop. 295.

(1) But see *Ex parte Skinner* in re *Lawford Charity*, 2 Mer. 456, where Lord Eldon is reported to have said, that the result of a conversation he had had with the then Master of the Rolls and the Vice-Chancellor on the scope of this act was, that they all considered the act as meant to extend only to cases of plain breach of trust.

section of Sir E. Sugden's Act (1 Will. IV. c. 60), has been already stated, and it has been seen, that the provision has been embodied in the subsequent statute (2 & 3 Will. IV. c. 57, s. 3).^(r) The object of those enactments being, to facilitate the relief, in case of the death of all the trustees of a charity.

By those acts, where all the trustees of real estate, held in trust for a charity *are dead*, the court is empowered on the petition of the Attorney-General, or of the persons or body administering the charity, or of any person on behalf thereof, to direct advertisements to be made for the representatives of the last surviving trustee to appear, or give notice of his title within twenty-eight days, and in default of such appearance or notice, or if such title shall not be proved within thirty-one days afterwards, then to appoint any new trustees, and to direct the conveyance to them of the charity estate by any person to be appointed for that purpose, without the necessity of any decree. It has recently been decided by Lord Langdale, M. R., that the court has power to make an order, referring it to the Master to approve of new trustees of a charity, upon a petition presented under the act of 2 & 3 Will. IV. c. 57 only, and that the petition for that purpose need not be under the 52 Geo. III. c. 101 (Sir S. Romilly's Act).^(s)

There can be no doubt, but that Lord Eldon's decision in the case of *The Bedford Charity*,^(t) as to the persons who may present a petition under Sir S. Romilly's Act, will apply equally to the acts now under consideration; and that the parties presenting the petition, must therefore have a direct interest in the charity. It has been decided, that the person having the administration of a charity may present a petition under the act.^(u) The petition may of course be presented by the Attorney-General himself.^(x)

It may be observed in this place, that the provisions of Sir E. Sugden's Act (1 Will. IV. c. 60), with reference to the powers thereby given to the court, in case of the disability, &c., of trustees, are by the 21st section expressly extended to trusts for charity or friendly societies.

The bankruptcy of a trustee, as we have already seen, is another instance in which the court has been expressly authorized by the legislature to appoint a new trustee in room of the bankrupt summarily upon petition; and the substance of the seventy-ninth section [*200] of the General Bankrupt Act (6 Geo. IV. c. 16), by which this power was given to the court, has been already stated.^(y)

(r) Vide supra, p. 193.

(u) *Re Nightingale's Charity*, 3 Hare,

(s) *Re Fowey's Charities*, 4 Beav. 336.

225.

(x) *Re Fowey's Charities*, 4 Beav.

(t) 2 Swanst. 518.

225.

(y) Preceding section, p. 192.

It has also been stated, that this power is now vested by the Bankruptcy Court Act (1 & 2 Will. IV. c. 56), in the Court of Review, subject to the appellant jurisdiction of the Lord Chancellor.(z)

A new trustee will be appointed in the place of a trustee, who had become bankrupt, though the latter had obtained his certificate.(a) The Court of Review has no jurisdiction to appoint new trustees of a fund on the bankruptcy of the existing trustees, unless the persons beneficially interested are before the court. Therefore no new trustee can be appointed, where the *cestui que trust* is out of the jurisdiction.(b)

The remaining cases in which the court has the power of appointing new trustees on petition, are those provided for by Sir Edward Sugden's Act (1 Will IV. c. 60), as extended by the subsequent statute 4 & 5 Will. IV. c. 23, s. 2. These are the disability of the existing trustees from lunacy or infancy: their absence from the jurisdiction: or refusal to convey or assign: or where it is unknown who was the survivor of several trustees: or whether a sole or last surviving trustee be living or dead: or where the sole or last surviving trustee is dead, without leaving an heir: or it is not known who is his heir.

The provisions of this act have been already in part considered; and it has been seen, that the 22d sect., which is the one that expressly empowers the court to appoint new trustees on petition, has been held to apply only to these cases of disability, &c., in the existing trustees, which are provided for in the previous sections of the act.(c) Orders obtained under this section in other cases, said Sir E. Sugden, Lord Chancellor of Ireland, "are absolutely waste paper, and have no legal validity under the act."(d) We will now proceed to consider some of the principal decisions, on applications for the appointment of new trustees by petition under this act, taking the several cases in which such an application is authorized, in their order as stated above. That is, 1st, The lunacy of the existing trustee; 2d, His infancy; and lastly, his being out of the jurisdiction, or unknown, and other cases of that description.(e)

And 1st, In case of the lunacy of the existing trustee.

Before the court will act upon a petition for the appointment of a new trustee presented under the 22d sect., it must be shown in the first place, that the case is one that comes within the previous sections of the act.

By the interpretation clause (sect. 2), it is declared that the pro-

(z) Ante, preceding section, 192.

(a) Ex parte Smith, re Dry, 3 Jur.

1129.

(b) Re Molineux, 8 Jur. 132.

(c) Ante, preceding section.

(d) In re Fitzgerald, Ca. Temp. Sugd.

22; re Pennefather, 2 Dr. & W. 292; Harte v. Lord Ffrench, ibid.

(e) The jurisdiction of the court under this act to direct a conveyance by a trustee under disability, is considered in a future chapter on that subject.

visions relating to a "lunatic," are to extend to any "idiot," or "person of unsound mind," or incapable of managing his affairs.

Where a petition is presented under the act on the lunacy of the existing trustee, it was held on one occasion, by Sir L. Shadwell, V. C., that the Vice-Chancellor had jurisdiction to make an order, [*201] directing the *reference to the Master in the first instance to inquire, whether the person named in the petition was a lunatic trustee within the act, although his jurisdiction ceased at that point.(f) (1)

In a subsequent case, however, before the Lords Commissioners, it was held, that the Vice-Chancellor had no jurisdiction to make even such a preliminary reference, and that *every* order in the case of lunatic trustees must be made by the person entrusted with the jurisdiction over lunatics by the royal sign manual.(g) This decision excludes also the jurisdiction of the Master of the Rolls in such cases. Therefore where there had been some proceedings in a suit in the Exchequer, relative to the estate of a lunatic trustee, the Lord Chancellor (Lord Cottenham) held that he was not at liberty to adopt those proceedings, and directed a fresh reference in the usual manner.(h)

It has been decided by Lord Cottenham, that the act authorizes the appointment of a new trustee in the place of one, whom the Master on a reference has reported to be of unsound mind, although he may not have been found a lunatic by inquisition.(i) (2) But no order will be made on a petition under the act, where the fact of the lunacy is contested.(k) And mere infirmity or incapacity of a trustee is not sufficient to give the court jurisdiction to appoint a new one on petition.(l)

Where the existing trustee has not been found lunatic on inquisition, it was stated by Lord Brougham, C., that the reference to the Master on a petition for the appointment of a new trustee ought in future to embrace the following points:—First, An inquiry as to the lunacy, &c., of the trustee;—Secondly, Whether he was seized or possessed of the property mentioned in the petition, either alone or jointly, as a trustee upon any and what trusts;—Thirdly, Whether he took any beneficial interest therein;—Fourthly, Whether there was

(f) Anon, 5 Sim. 322.

(i) Re Welch, 3 M. & Cr. 292.

(g) Re Shorrocks, 1 M. & Cr. 31; re Mount, 12 Law Journ. N. S. Chanc. 95.

(k) Re Walker, 1 Cr. & Ph. 147.

(h) Re Prideux, 2 M. & Cr. 640.

(l) Re Wakeford, 1 Jones & Latouche, 2.

(1) A petition under the act, praying that the committee of a lunatic trustee might be ordered to convey, should be entitled in the lunacy, and need not be entitled in the matter of the act of parliament. Re Fowler, 2 Russ. 449.

(2) It has been decided, that such a case was within the stat. 36 Geo. III. c. 90. *Simms v. Naylor*, 4 Ves 360; *West v. Ayles*, T. & R. 330.

any power in the instrument to appoint new trustees; Fifthly, A direction to inquire and certify, who was a proper person or persons to be appointed such new trustee or trustees in his place;—and Sixthly, To appoint a proper person to convey to such new trustee or trustees. (m)

Where a trustee has been found a lunatic on inquisition in England, but the trust property is situated in Ireland, and the committee of the estate is appointed by the Lord Chancellor there, the Lord Chancellor of England has no power under the act to order the committee of the estate to convey or transfer to a new trustee. (n)

2d. In case of the infancy of the existing trustee.

Where the infancy of the existing trustees is the ground for the application for the appointment of a new one under the act, the court will refer it *to the Master to inquire, whether the party is an infant trustee within the meaning of the act; (o) and if so, [*202] to approve of a proper trustee in his place; and then acting upon the Master's report it will order the infant himself to convey the trust estate to the new trustee.

The several statutes, which were passed from time to time, for enabling trustees under disability, to convey, (p) (1) were all repealed and their provisions adopted and extended by the act of 6 Geo. IV. c. 74, which last act itself was also repealed by the 1 Will. IV. c. 60, though the substance of its provisions were also adopted by that statute.

The earlier decisions, therefore, on such of the provisions of the previous acts as are still in force from having been re-enacted, must be regarded as valid authorities at the present day.

It is to be observed, that the act of 1 Will. IV. applies only to the infancy of trustees of real estate. In case of the infancy of the personal representative of a trustee of personalty, the inconvenience might be remedied according to the existing law, by taking out letters of administration *durante minore ætate*.

If an infant trustee refuse to comply with an order to convey to

(m) Re Pigott, 2 R. & M. 683.

(p) 7 Ann. c. 19. [In force in South

(n) Re Tottenham, 2 M. & Cr. 39; Carolina, 2 Cooper's Stat. 547.] 2 Geo. S. C. 1 Jur. 653.

II. c. 10; 36 Geo. III. c. 90; 6 Geo. IV.

(o) Ex parte Marshall, 17 Ves. 383, c. 74.
n.; Ex parte Anderson, 5 Ves. 240.

(1) It was expressly decided by the Master of the Rolls, in Ex parte Anderson, 5 Ves. 240, that the statute 7 Ann. c. 19, did not authorize an order upon petition for an infant trustee to convey to another trustee, which could only be obtained by a bill. However, an order of that description was made under that statute on petition in another case where the trust was for a charity, and a mere naked conveyance of the legal estate was all that was required. Attorney-General v. Pomfret, 2 Cox, 221. See Rigg v. Sykes, 1 Dick. 400.

the new trustee, the course will be to move for an order, that the infant should convey within a week after service of the order, and then if he continue to refuse, to move that he may be committed.(g)

The fifteenth section of 1 Will. IV. c. 60, expressly extends its provisions to trustees (otherwise within the meaning of the act), who have a beneficial interest in the trust property, but by the same section a discretionary power is given to the court to direct a bill to be filed in such cases. We have seen that in the case of a lunatic trustee, part of the reference to the Master is to inquire whether the trustee has any beneficial interest:(r) and the court would unquestionably extend the same protection to an infant trustee.

The order for the infant trustee to convey to the new one operates *in personam*; and it is therefore no objection to the jurisdiction, that the trust estate is situated out of the limits of the jurisdiction, as in Ireland,(s) or Calcutta,(t) or the Island of Nevis.(u) However we shall see presently, that these acts apply only in plain cases,(x) and in other cases the court will not act without a bill filed.

3d. The next cases for applications by petition under the 1 Will. IV. c. 60, for the appointment of a new trustee, are those coming within the 8th section. The first being, where the existing trustee is out of the *jurisdiction. The eighth section,(1) by which such [*203] an emergency is provided for, has been held by Lord Cottenham, when Master of the Rolls, to relate only to positive or naked trustees, and not to trustees by construction or operation of law.(y) The reason appears to be, that in cases of constructive trust, the alleged trustee may claim a beneficial interest adversely to the *cestui que trust*; and in that case by the 18th section no order can be made under the act, until the party has been declared a trustee by the court in a suit regularly instituted.

With regard to the question of who are to be considered out of the jurisdiction, it is very seldom that any doubt can arise. On one occasion Sir L. Shadwell, V. C., decided, that a trustee who was a captain of a merchant vessel on a voyage to the West Indies, was not out of the jurisdiction within the meaning of the act.(z)

The affidavit in support of the petition should state the country

(g) Re Beech, 4 Mad. 128; see 1 Will. IV. c. 60, s. 13.

(r) Re Pigott, 2 R. & M. 684.

(s) Evelyn v. Forster, 8 Ves. 96.

(t) Ex parte Anderson, 5 Ves. 240.

(u) Ex parte Prosser, 2 Bro. C. C. 325.

(x) Vide post.

(y) Re Dearden, 3 M. & K. 508, 12. The same construction was applied to the 6 Geo. IV. c. 74; Dew v. Clark, 4

Russ. 511; King v. Turner, 2 Sim. 550;

Re Moody, Taml. 4.

(z) Hutchinson v. Stevens, 5 Sim. 498.

(1) The 8th section provides for the trustees of land being out of the jurisdiction, &c.: the 9th section for trustees of leaseholds or terms for years: and the 10th section for trustees of stock.

where the existing trustee is resident.(a) And in Ireland no order will be made for the appointment of a new trustee in the place of one residing in England, except upon an affidavit of service of notice of the application on him.(b) But it does not appear that this practice has been conversely adopted in England with regard to persons resident in Ireland.

The other grounds for the application to the court under the 8th section are,—the uncertainty as to who was the survivor of several trustees;(c) or whether the last known trustee be living or dead;(d) or (in case of real estate) its not being known, who is the heir of the last known trustee: or the refusal of the trustee, or his heir or executor (as the case may be), to convey, assign, or transfer, when properly required.(e) In all these cases the jurisdiction of the court is conferred by the same sections, and in the same words that apply to the case of a trustee being out of the jurisdiction; and the decisions and observations, that have been just considered with reference to this last case, will apply with equal force and authority to all the others.(1)

*By the act for the amendment of the Law of Escheat of Property held in trust (4 & 5 Will. IV. c. 23), the provisions [*204] of the 1 Will. IV. c. 60 are extended to cases where a trustee dies without having an heir, an event, which had been purposely left un-

(a) *Ex parte Hughes*, 1 Jones & Lat. 32.

(b) *Ibid.*

(c) *Re Nightingale's Charity*, 3 Hare, 336.

(d) *Ex parte Dover*, 5 Sim. 501.

(e) *Ex parte Winter*, 5 Russ. 294; *Ex parte Hoggen*, 1 Beav. 98; *Ex parte Foley*, 8 Sim. 395; *Warburton v. Vaughan*, 4 Y. & C. 247; *Prendergast v. Eyre*, 1 Ll. & G. 11; *Robinson v. Wood*, 5 Beav. 246; *Cockell v. Pugh*, 6 Beav. 293.

(1) The 8th section, which applies to trustees of real estate, is as follows:—"Where any person, seized of any land upon any trust, shall be out of the jurisdiction of, or not amenable to the process of the Court of Chancery; or it shall be uncertain (where there were several trustees) which of them was the survivor; or it shall be uncertain, whether the trustee, last known to be seized as aforesaid, be living or dead; or (if known to be dead) it shall not be known who is his heir; or if any trustee seized as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days, next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by any person entitled to require the same; then and in every such case, it shall be lawful for the said Court of Chancery to direct any person, whom such court may think proper to appoint for that purpose in the place of the trustee or heir, to convey such land to such person, and in such manner as the said court shall think proper, and every such conveyance shall be as effectual as if the trustee seized as aforesaid, or his heir, had made and executed the same." The 9th section contains the same provisions *mutatis mutandis* respecting trustees of terms for years; and the 10th section respecting trustees of stock: both these two last sections omitting the provision, as to the heir not being known; and the 10th section containing an additional provision giving the court jurisdiction on the refusal or neglect of a trustee of "stock to receive and pay over the dividends."

provided for by the latter act, in order not to deprive the crown or other lords of their escheat.

It will be observed, that the act makes no provision for the want of a personal representative to a single, or sole surviving, trustee of *personal estate*. This omission can occasion no practical inconvenience; as administration may at any time be taken out, limited to the trust property; and indeed it was stated judicially by Sir E. Sugden, that the distinction between the 8th and the 9th and 10th sections was made purposely, as it was not intended to render administration unnecessary, by supplying a personal representative, but to provide only for the want of a real representative, because there was no other way of supplying such a representative.(f)

Therefore, in a case where the surviving trustee of a property, consisting partly of real and partly of personal estate, died intestate; *and no administration had been taken out to him*, and his heir was out of the jurisdiction, a petition was presented under the act for the appointment of new trustees; but Sir E. Sugden, Lord Chancellor of Ireland, held, that the act did not authorize the court to appoint a new trustee of the personalty, but that the parties must go to the Ecclesiastical Court to obtain a personal representative; and that when a personal representative was obtained, they could not apply under the act to have a new trustee of the personalty appointed, as the administrator would be under no disability; and they must therefore file a bill for the purpose. And as the same person must of course be trustee of both properties, his Lordship refused to make any order on the petition for the appointment of a new trustee of the realty.(g)

It is to be observed, that the 18th section provides for the case of a trustee of stock refusing to receive and pay over the dividends; and therefore in such a case, a new trustee may be appointed under the 22d section; but there is no such provision in the 8th or 9th sections for the case of a trustee of land refusing to pay over the rents, &c.(h)

An application for a conveyance or transfer to a new trustee under the act, on the ground that the existing trustee refuses to convey, may be made either where there has been an order of the court for the old trustee to convey;(i) or where the instrument creating the trust contains a valid power to appoint new trustees, which has been properly exercised by appointing the new trustee.(k)

(f) *In re Anderson*, Cas. Temp. Sugd. Coll. 247; *Prendergast v. Eyre*, 1 Ll. & G. 11; *Robinson v. Wood*, 8 Beav. 246.

(g) *Re Anderson*, Cas. T. Sugd. 27. (k) See *Williams v. Bird*, 1 V. & B.

(h) 6 Jarm. Byth. Conv. 432, n., 3d ed. 3, see *Ex parte Foley*, 8 Sim. 395; 2 Sugd. Pow. 532, 6th ed.

(i) *Warburton v. Vaughan*, 4 Y. &

And in such cases the person, whom the court appoints to convey to *the new trustee, may at once execute the deed, which had been tendered to the refusing trustee, the attestation [*205] clause expressing, that it was executed by him in place of the refusing trustee, in pursuance of the order of the court made on the petition.(l)

It has been expressly decided in a recent case by Sir. L. Shadwell, V. C., that the court has power to appoint new trustees under the act, in proper cases of disability, &c., although the instrument creating the trust itself contains a power for that purpose.(m) In the absence of this judicial decision, there might have been considerable doubt from the wording of the 22d section, whether the jurisdiction existed in such a case.(n) However, it seems that it will be part of the reference to the Master in these cases to inquire, whether the instrument contains any power for the appointment of new trustees.(o)

The same learned judge has also held, that the act applies only to cases where conveyances are to be made; and therefore, where one of three trustees for *sale* was out of the jurisdiction, his Honor refused to appoint a person in his place, *to sell*, observing that the course would have been to have sold, and then for the purchaser to have come to the court for a trustee to convey.(p) However, it is difficult to understand clearly the foundation of this distinction.

Where it is suggested, that the trustee named in the deed or will has not accepted the trusts, the court will not appoint new trustees, without proof that the trusts have acquired existence by being accepted.(q) The case of a sole trustee, or all the trustees, renouncing, or refusing to act *ab initio*, is clearly not provided for by the act: and the court will not appoint new trustees on petition on that ground.(r)

An executor, who has assumed the character of a trustee of stock or other securities, which had formed part of the assets, by setting them apart for the purposes of the trust, is a trustee within the operation of the act.(s) So executors, *who refuse to prove* the will, are trustees within the act.(t) And a person who is named executor in the will of a last surviving trustee, but *who refuses to state whether he will prove the will or not*, is a trustee within the meaning of

(l) Ibid.

(q) Re Clark, 1 Jur. 737.

(m) Re Fauntleroy, 10 Sim. 252; re Roche, 1 Conn. & Laws. 306.

(r) Re Hartford, 2 Dr. & W. 292.

(n) See 6 Jarm. Byth. Conv. 433, n.

(s) Ex parte Dover, 5 Sim. 500.

(o) Re Ryley, 3 Hare, 619.

(t) Ex parte Winter, 5 Russ, 284; Ex parte Hagger, 1 Beav. 98; re Needham, 1 Jones & Lat. 34.

(p) Re Down, 2 Jur. 886; and see re Chasteney, Jac. 56.

the act, and will be ordered to transfer the trust stock to new trustees.(u)

The husband of a *feme* trustee for the sale of an estate, is a trustee within the meaning of the act.(x)

In a late case two trustees were appointed by a settlement, but one of them never executed the deed, or acted in the trust; and on the death of the sole acting trustee, twenty-three years after the making of the settlement, the other trustee expressly declined to act. A petition was then presented under 1 Will. IV. c. 60, for the appointment of new trustees, but Sir E. Sugden, Lord Chancellor of Ireland, [*206] refused to make the *order, on the ground that the surviving trustee must be considered to have accepted the trust after such a lapse of time.(y)

Where one of several trustees is out of the jurisdiction, the court will appoint a new one in his place on petition, although he has a direct beneficial interest in the subject of the trust.(z)

We have already seen, that the 22d section empowers the court to appoint new trustees on petition only in cases "where the recent creation or declaration of the trust or other circumstances may render it safe and expedient" for the court to direct a conveyance or transfer.(a) Therefore, even where the disability, &c., of the existing trustee brings the case within the preceding sections, the court will not make any order upon a petition under the 22d section, for the appointment of new trustees, unless the case be a plain one, and the title of the parties by the recent creation of the trust, or otherwise, be clearly established.(b)

And the insecure nature of the trust property is of itself no ground for the interference of the court.(c)

It is of course very difficult to lay down any general rule, as to what will or will not amount to a sufficiently clear case for the court to act upon petition under the act: this obviously must depend upon the discretion of the court, which will be controlled and governed by the nature and circumstances of each individual case.(d) There are but few decisions on the point, but on one occasion Sir E. Sugden, L. C., instanced a trust created within ten years, or a simple trust

(u) Cockell v. Pugh, 6 Beav. 293.

(c) Re Whitley, Cas. T. Sugd. 23.

(x) Re Ryley, 3 Hare, 614.

(d) See re Merry, 1 M. & K. 677, and

(y) Re Uniacke, 1 Jones & Latouche, 1.

re De Clifford Estates, 2 M. & K. 624, stated supra; and see also Ex parte

(z) Moore v. Winter, 12 Sim. 161.

Dover, 5 Sim. 500; re Fareswell, 2 Tur. 987.

(a) See the 22d section, stated ante.

(b) Re Nicholls, Cas. T. Sugd. 17; re Whitley, id. 23.

for *A.* for life, with remainder to *B.* in fee, as cases in which the court would act.(*e*)

By the eleventh section of the act, it is provided that a petition, whose object is to vest trust property in new trustees duly appointed under a power or by the court, is to be presented either by the trustee or one of the trustees, in whom the property is proposed to be vested,(*f*) or by some person having an interest therein. A person having an interest in part only of a trust fund, may present a petition under this section.(*g*)

The new trustees, in order to have a sufficient interest to enable them to present a petition under the act, must have been duly appointed either by virtue of a power created by the trust instrument,(*h*) or by the court. Therefore a person, who is merely *proposed* as the new trustee, has no interest to enable him to be a petitioner.(*i*)

The petition must be headed in the matter of the trust, and also in the matter of the act of parliament :(*k*) although this is not essential to its validity.(*l*)

Where the application to the court is made on the ground of the existing trustee being out of the jurisdiction, and not to be found, affidavits of his absence and the inquiry for him may be read at the hearing, *under the 24th section of Sir E. Sugden's Act, as [*207] evidence of those facts.(*m*)

And in all these cases of application to the court by petition, the statement of the facts of the case must be corroborated by affidavit.(*n*)

In every case of an application to the court for the appointment of new trustees, by petition as well as by suit, the general rule of practice is, that the court will not in the first instance make an order for the conveyance of the property to the person proposed as the new trustee; but will refer it to the Master,(1) in the first place to ascertain whether the case comes within the summary jurisdiction of the court,(*o*) and then to approve of a proper person to be the new trustee, and also (if necessary) of a proper person to convey to the

(*e*) *Re Nicholls*, Cas. T. Sugd. 18, 19.

(*l*) *Ibid.*; and see *re Fowler*, 2 Russ.

(*f*) *Ex parte Swan*, 2 Dick. 749; See 449.

ton Decrees, 252, 3; *re Law*, 11 Law Journ. N. S., Chanc. 112; 4 Beav. 509.

(*m*) *Moore v. Penten*, 10 Law Journ.

N. S., Chanc. 345; *De Crespigny v. Kitson*, id. 346, n.; S. C. 12 Sim. 161.

(*g*) *Re King*, 10 Sim. 605, 607.

(*h*) *Re Law*, 4 Beav. 509.

(*n*) See *Ex parte Winter*, 5 Russ. 284.

(*i*) *Re Odell, jr.*, Exch. Rep. 257.

(*o*) *Re Law*, 4 Beav. 509.

(*k*) *Re Law*, 11 Law Journ. N. S., Chanc. 118; 4 Beav. 509.

(1) By the practice of the Court of Review, the reference is made to the registrar.

newly appointed trustee.(p)(1) There must then be a second petition to confirm the Master's report.

In cases of charity indeed it has been said, that the court will never appoint new trustees without a reference, although the amount of the property may be very small. But in the case alluded to, Sir Thomas Plumer, M. R., on account of the smallness of the property, ordered that the Master should appoint the new trustees at once, without coming back to the court.(q) And this was done in a recent case by Vice-Chancellor K. Bruce in a private trust.(r)

In cases of bankruptcy of the existing trustee, however, the rule of the court is by no means so strictly adhered to: in such cases there is no necessity for a reference to ascertain the jurisdiction, which is evidenced by the application itself: and it is the frequent practice of the court to appoint a new trustee in the place of the bankrupt *without a reference*, on affidavit of the solvency and fitness of the proposed trustee.(s) And the smallness of the property will always be a reason for dispensing with the reference.(t) And so if all parties (being competent) appear, and consent to the appointment of the person proposed, the court will act at once upon such an assurance.(u)

Where the application is made under the 1 Will. IV. c. 60, it is the *invariable* practice to direct a reference in the first instance; unless the case be clearly within the jurisdiction, and all the parties interested consent to the proposed appointment.(x) In one instance, however, Sir L. Shadwell, V. C., appointed a new trustee without a reference on the petition of a married woman, where the trustee had [208] gone to settle in America, *on the ground that the petitioner was the only person interested in the property.(y)

And where there was a power in the instrument for appointing new trustees, and the power had been exercised, and a new trustee nominated under it, but the survivor of the old trustees refused to convey to the newly appointed trustees, and the parties therefore came to

(p) Att-Gen. v. Arran, 1 J. & W. 229; re Roche, 2 Dr. & W. 287; Ex parte Wish, 2 M. & A. 214; re Sharrocks, 1 M. & Cr. 31; re Welsh, 3 M. & Cr. 292; re Pigott, 2 R. & M. 683; Ex parte Anderson, 5 Ves. 240; Ex parte Dover, 5 Sim. 500; re De Clifford Estates, 2 M. & K. 624, 6.

(q) Att-Gen. v. Arran, 1 J. & W. 229.

(r) Neale v. Dell, 9 Jur. 99.

(s) Ex parte Page, 1 D. & Ch. 321; Ex parte Buffery, 2 D. & Ch. 576; Ex

parte Beveridge, 4 D. & Ch. 455; Ex parte Walton, 2 M. & A. 242; Ex parte Inkersole, 2 Gl. & J. 230; Ex parte Palmer, 4 Deac. 177.

(t) Ex parte Wish, 2 M. & A. 214.

(u) Ex parte Wish, ubi supra.

(x) See O'Keefe v. Calthorpe, 1 Atk. 18.

(y) Ex parte Shick, 5 Sim. 281; and see re Trapp, 13 Law Journ. N. S., Chanc. 168. [8 Jur. 437.]

(1) In the Master's report on such a reference it is not sufficient to state, that the party is a trustee within the act, but the documents, which establish the trust, should be stated on the face of the report. Re Purdon, 1 Dr. & W. 500.

the court under the act for the appointment of a person to convey, the court adopted the appointment of the new trustees, which had been made by the deed, without any reference, and directed a person to be appointed to execute a conveyance to them.(z)

Where the trustee, whom it is sought to change, is an infant, the order will be made upon him, to execute the conveyance or transfer to the newly appointed trustee.(a) And where the trustee is a lunatic, found so by inquisition, the 22d section directs that the committee of his estate shall be the party to transfer the trust stock to the new trustee.

Where there is a co-trustee or co-executor of the old trustee, the same section provides that the transfer shall be made by such co-trustee or co-executor, or by some officer of the company whose stock is the subject of the trust; and in case of the public funds that officer is to be the secretary, or deputy-secretary, or accountant-general, of the Bank of England.

In other cases, under the act 1 Will. IV. c. 60, it will be part of the reference to the Master to approve of a person to convey or transfer to the new trustee.(b)

Where it is part of the order that arrears of dividends shall be received and paid over by the officer of the Bank, he will be directed to pay them over to the new trustee, and not to the parties beneficially entitled.(c)

When the Master has made his report upon the order of reference, the proper course is to apply by petition(d) to have the report confirmed,(1) and that the person approved of by the Master may be appointed the new trustee, and also that the person approved of by him for that purpose may be directed to convey or assign to the new trustees.(e)(2)

It seems that the Master will not exceed his powers by approving of four persons to be the new trustees in the place of one surviving

(z) *Ex parte Foley*, 8 Sim. 395.

(d) *Re Welch*, 3 M. & Cr. 293; and

(a) *Vide supra*, re *Beech*, 4 Mad. 128. it must not be on *motion*, see *Evelyn v.*

(b) See re *Pigott*, 2 R. & M. 684; re *Forster*, 8 Ves. 96; *Anon.* 1 Y. & Coll. 75; *Baynes v. Baynes*, 9 Ves. 462.

(c) *Re King*, 10 Sim. 605.

(e) See re *Welch*, 3 M. & Cr. 293.

(1) According to the practice of the Court of Review, where the reference is to appoint a new trustee, the report does not require confirmation; otherwise, if the reference be to consider and report, who will be a proper person to be appointed. *Anon.* 3 Deac. 223; *Ex parte Mansfield*, 3 M. & A. 487.

(2) Exceptions do not lie to reports on references under these statutes, but any party, who is dissatisfied, may bring the report before the court by petition, when it will either be confirmed, or referred back to the Master to be reviewed. *Price v. Shaw*, 2 Dick. 732; *Ex parte Swann*, 2 Dick. 749; *Ex parte Burton*, 1 Dick. 395; *Seton Decrees*, 253.

trustee who was of unsound mind, although the original number of trustees was not more than three.(f) And where the survivor of [*209] two original trustees *becomes bankrupt, the court may appoint two new trustees, one in the place of the deceased one, and the other of the bankrupt.(g)

The assignees of a bankrupt trustee, in whose place a new one is appointed, need not join in the conveyance to the new trustee, where they disclaim all interest in the property; (h) but the bankrupt himself will be ordered to convey.(i) Where a mortgage is made to a trustee who becomes bankrupt, the mortgagor must be a party to the conveyance to a new trustee.(k)

The court has jurisdiction to compel the surrender of copyholds by the person it appoints to convey, and the lord must accept such surrender.(l)

According to the general rule, the costs of trustees, occasioned by an application for them to convey under any statute, will be borne by the trust estate, in the absence of any misconduct on the part of the trustees.(m) And the 25th section expressly confers on the court the power of directing such costs to be raised and paid out of the estate.

Thus the necessary costs of an infant trustee, ordered to convey under the statute of Queen Anne (7 Ann. c. 19), were allowed him:(n) and this case is doubtless an authority on an application under 1 Will. IV. c. 60.

In the case of *Ex parte Brydges*,(o) as reported in Cooper, Lord Eldon is stated to have established a different rule with regard to the costs of lunatic trustees in similar applications. His Lordship is there reported to have determined, that the estate of the *cestui que trust* must not bear the expense, but that it must be paid out of the lunatic's estate, and that the rule was so.

However, if his Lordship ever in fact entertained such an opinion as to the rule of practice in such cases, he certainly did not adhere to it; for in a subsequent case the same eminent judge directed the whole costs of the committee of a lunatic trustee, both those of the original petition and the reference and consequent and incidental proceedings, to be paid by the *cestui que trusts*; and declared the general rule to be, that the costs of the committee of a lunatic trustee conveying under the statute must be paid by the *cestui que trusts*.

(f) *Re Welch*, ubi supra.

(g) *Ex parte Wilkinson*, 3 M. & A.

145.

(h) *Ex parte Walton*, 2 M. & A. 242; *Ex parte Painter*, 2 D. & Ch. 584; but see in *re Remington*, 3 D. & Ch. 24.

(i) *Ex parte Painter*, 2 D. & Ch. 584.

(k) *Ex parte Orgill*, 2 D. & Ch. 413.

(l) *Reg. v. Pitt*, 3 Jur. 1028.

(m) See *Ex parte Cant*, 10 Ves. 554;

re King, 10 Sim. 605; *re Bedford Charity*, 2 Sw. 532.

(n) *Ex parte Cant*, 10 Ves. 554.

(o) *Coop.* 290.

Ex parte Brydges, therefore, is unquestionably overruled by this last decision.(p) However, it seems that the estate of a lunatic mortgagee is still liable to these costs.(q)

It has been decided that a bankrupt trustee is entitled to his costs of appearance on a petition, presented under the 79th section of the act, for the appointment of a new trustee in his place.(r)

If an improper order be made on a petition under the act, the court has jurisdiction to give the party resisting it the costs of the application for that purpose.(s)¹

*III.—WHOM THE COURT WILL APPOINT TO BE NEW TRUSTEE, [*210]
AND THE EFFECT OF THE APPOINTMENT.²

It has been already seen that the court will not generally in the first instance appoint any particular person to be the new trustee, but will refer it to the Master to inquire whether the party proposed for the office is a proper person;(t) although an immediate appointment may be made, where all the parties interested consent to the appointment in the first instance.(u) Where the reference is in general terms to approve of some proper person to be trustee, the court upon application for that purpose will give leave to any individuals, to whose appointment there is no apparent objection, to propose themselves before the Master;(x) and such a direction will of course have its due weight with the Master in the exercise of his discretion upon the matter referred to him.

However, an unmarried woman will not be allowed to offer herself as the new trustee, on the ground of the inconvenience which might possibly be occasioned in the administration of the trust in the event of her marriage.(y) Neither will the old trustee, who had become bankrupt, and been removed, be allowed to propose himself as the new trustee, though he had obtained his certificate.(z)³

(p) Ex parte Pearse, T. & R. 325, 7; [The court pays great attention to the recommendation of majority of *cestui que trusts*. *Thornburg v. Macauley*, 2

(q) Ex parte Richards, 1 J. & W. 264.

Johnson, Maryl. Ch. Dec. 427.]

(r) Ex parte Whitley, 3 M. & A. 696; S. C. 1 Deac. 478.

(y) *Brook v. Brook*, 1 Beav. 531.

(s) *Re King*, 10 Sim. 605.

[Though see *Gibson's Case*, 1 Bland, 138. It seems that a *nun* may be appointed. *Smith v. Young*, 5 Gill. 197.]

(t) *Vide supra*, 196, and *Seton's Dec.*

249.

(u) *O'Keeffe v. Calthorpe*, 1 Atk. 18.

(z) Ex parte *Smith*, re *Dry*, 3 Jur.

(x) *Att.-Gen. v. Shore*, 1 M. & Cr.

1129.

394; *Att.-Gen. v. Clack*, 1 Beav. 474.

¹ The retiring trustee is entitled to have the accounts taken. *Nott v. Foster*, 1 Eng. L. & Eq. 125.

² See note ante p. 190.

³ Where one of several trustees refused the trust by a formal instrument, it was

But it will be no objection to allowing parties to propose themselves before the Master, that the same parties were previously nominated trustees in an illegal appointment, which was set aside by the same decree that directed the reference.(a)

In a charity case, where there had been a reference to the Master to settle a scheme, and to approve of new trustees, two distinct sets of petitioners having each a *prima facie* claim, applied to the court to be allowed to attend before the Master, and propose trustees of their own: Lord Cottenham, C., gave permission to both of them to attend, on the understanding that only one bill of costs should be allowed against the charity estate.(b)

In one case where four executors and trustees were appointed by a testator, and a suit had been instituted for the administration of the trust: one of the trustees was alleged, and admitted, to be incapable of joining in the execution of the trust, and to be desirous of being discharged: and Lord Camden, C., without directing the appointment of a new trustee, ordered the trust to be carried on by the other three.(c)

Where a trustee, who had been originally appointed, by his answer declined to act, and on hearing it was referred to the Master to appoint new trustees; the original trustee afterwards agreed to act, but the court refused to vary that part of the decree, although it thought the master was at liberty, on statement of the circumstances, to decline the appointment of new trustees.(d)

If the devisees in trust for a charity die in the lifetime of the testator, it *has been decided that the conduct of the charity will [*211] devolve upon his heirs-at-law as trustees for that purpose.(e)

Indeed in all such cases, where the legal estate devolves upon the heir or other party as a constructive trustee, and the heir is willing to act, and no improper conduct is suggested, there can be no ground for the court to interfere, for the purpose of appointing a new trustee in his place.

We have already seen that there are instances, in which the court has sanctioned the appointment of two or more trustees in the place of one: although there is some doubt of the propriety of this exercise

(a) Att.-Gen. v. Clack, 1 Beav. 474.

(d) Miles v. Neave, 2 Cox, 159.

(b) Att.-Gen. v. Shore, 1 M. & Cr. 394.

(e) Att.-Gen. v. Downing, Ambl. 571;

(c) Bennet v. Honeywood, Ambl. 710.

Att.-Gen. v. Bowyer, 3 Ves. 714.

held that he could not be reinstated while any of his co-trustees continued to act. Matter of Schoenhoven, 5 Paige, 559. But that in the case of an executor, a formal renunciation will not in general preclude his subsequently entering on the administration, see Harrison v. Harrison, 2 Rob. Ecc. 406; Venables v. East India Co., 2 Exch. 648; Wood v. Sparks, 1 Dev. & Batt. 396; Judson v. Gibbons, 5 Wend. 224; Robertson v. McGeoch, 11 Paige, 640.

of jurisdiction, as of one of universal application.(f) And in one case such an authority was expressly repudiated by the court.(g)

When a person has been appointed a trustee by the order or decree of the court, and a conveyance or assignment of the trust estate to him has been duly executed, he sustains the character of trustee as completely as if he had been at first invested with it.(h)¹ As a general rule he will be considered to have taken upon himself all the duties and liabilities incident to the office, and therefore will be invested with all the powers and authorities requisite for its due discharge; such, for instance, as the power of giving receipts;(i) for the conveyance to the new trustee binds the legal estate; and the decree of the court binds the equity.

Where, however, a power given to the original trustee is of a kind that indicates a personal confidence, it will *prima facie* be confined to the individual to whom it is given, and will not without express words pass to others, to whom by legal transmission the character of trustee may happen to belong: and though the estate with the trust attached to it will be in the trustee appointed by the court, yet the power (being one of that description) will be extinct.(k)

Therefore, where a discretionary power of selection, and the apportionment of the trust estate among several objects, or of distribution in charity, is given to the original trustees, such a power cannot be exercised by the trustee in whom the estate becomes vested under the direction of the court.(l) It seems indeed that a power of that nature cannot be exercised even by the legal representatives of the original donees, unless it be given to them in express terms by the creator of the trust.(m) (1)

(f) Ante, Ch. 1 of this division; see Welch, 3 M. & Cr. 293.

(g) Devey v. Peace, Taml. 77.

(h) Cole v. Wade, 16 Ves. 44.

(i) Drayson v. Pocock, 4 Sim. 283; 2 Sugd. V. & P. 51.

(k) Per Sir Wm. Grant, M. R., in Cole v. Wade, 16 Ves. 44. [Newman v. Warner, 1 Sim. N. S. 457. See post, notes to pps. 226 and 485, &c.]

(l) Att.-Gen. v. Doyley, 2 Eq. Ca. Abr. 194; S. C. 7 Ves. 58, n., and cited 16 Ves. 47; 1 Sugd. Pow. 151, 6th edit. Hibbard v. Lambe, Ambl. 309.

(m) Att.-Gen. v. Doyley, cit. 16 Ves. 47; Cole v. Wade, 16 Ves. 45, 6; see Eaton v. Smith, 2 Beav. 236; [post, 485, &c.]

(1) In a late case a testator appointed three executors and trustees with the usual power of appointing new ones in case of death, &c., and he gave 300*l.* to each of the trustees, with a declaration, that if any of them should die without having acted, their legacies should go to the trustees, "who *under the power in his will* should be appointed in their stead." Two of the trustees died in the

¹ The mere appointment of a new trustee does not amount to a substitution of him in prior suits pending, brought by or against old trustees. Davant v. Guerard, 1 Spear's Law, 242; Greenleaf v. Queen, 1 Peters' S. C. 148. See, however, in Virginia, Revised Code of 1849, page 675.

But where the discretionary power is of that nature, that any one is capable of exercising it, as where tenants for life under a will were [*212] *empowered to cut timber *with the consent of four trustees*, the court will take upon itself the exercise of such a discretion; and in that case Lord Northington, after taking two years' time for consideration, directed, that the tenant for life should be at liberty to cut timber from time to time with the approbation of the Master.(n)

It has been previously observed, that where there is no power of appointing new trustees in the instrument creating the trust, the court cannot delegate to others its power of supplying vacancies in the trust; and therefore the trustee appointed by the court will not in general be empowered to nominate others to act in his place,(o) (1) although this may be done in settling a scheme for the administration of a *charity*.(p)

Where circumstances render such a course desirable, the court, on a motion in the cause, supported by an affidavit verifying the circumstances, will sometimes appoint a receiver of the trust estate, until a new trustee is appointed;—and an affidavit, that the property has been misapplied, and is in danger in the hands of the existing trustee, will be sufficient to induce the court to accede to such an application.(q) And a receiver has been appointed, where the trustee is guilty of *laches* or other misconduct in administering the trust;(r) or becomes bankrupt;(s) or dies or goes abroad;(t) or declines or is unable to act.(u)

(n) *Hewitt v. Hewitt*, Ambl. 508.

(o) Ante, p. 176; *Bayley v. Mansell*, 4 Mad. 226; *Southwell v. Ward*, Tambl. 314; *Brown v. Brown*, 2 Y. & Coll. 395; 2 Sugd. Pow. 533; but see *Joyce v. Joyce*, 2 Moll. 275.

(p) Att.-Gen. v. *Winchelsea*, 3 Bro. C. C. 373; S. C. *Seton Decrees*, 131; re 52 Geo. III. c. 101; 12 Sim. 262; 2 Sugd. Pow. 533.

(q) *Middleton v. Dodswell*, 13 Ves. 266; *Havers v. Havers*, Barn. 23.

(r) Att.-Gen. v. *Boyer*, 3 Ves. 714; *Bainbrigge v. Blair*, 10 Law Journ. N. S. Chanc. 193.

(s) *Langley v. Hawk*, 5 Mad. 46.

(t) *Tidd v. Lister*, 5 Mod. 433.

(u) *Brodie v. Barry*, 3 Mer. 695; *Bainbrigge v. Blair*, 10 Law Journ. N. S. Chanc. 103.

testator's lifetime, and two other persons were appointed *by the court* in their place, in a suit for the administration of the estate. It was held by the Vice-Chancellor of England, that the new trustees appointed by the court were not entitled to the legacies of 300*l.* *Walsh v. Gladstone*, 8 Jur. 51; 14 Sim. 2.

(1) But in a recent case, where both the trustees of a will had died in the testator's lifetime, and there was a suit for the appointment of new trustees, Lord Langdale, M. R., directed, that the Master should be at liberty to insert in the conveyance to the new trustees a power for them to appoint other trustees in the manner and under the circumstances mentioned in the will. The will in this case contained the ordinary power for the appointment of new trustees. *White v. White*, 5 Beav. 221. And see *Lampay v. Gould*, 12 Sim. 426. [These cases are now overruled; *Holder v. Durbin*, 11 Beav. 594, 18 L. J. Ch. 479; *Oglander v. Oglander*, 2 De G. & Sm. 381; 12 Jur. 786; 17 L. J. Ch. 439; *Bowles v. Weeks*, 14 Sim. 591.]

But the court will not thus interfere with the management of the estate by a trustee unless a sufficient reason be assigned.(x)

Where there are *two or more trustees*, the court will not appoint a receiver upon the death, absence, disclaimer, or misconduct, &c., of some or one of them, nor as long as there remains any trustee to act in the trust; this, however, will be done by the desire or with the consent of the remaining trustees.(y) But a receiver will necessarily be appointed, where the co-trustees cannot act through disagreement amongst themselves.(z) The fact of a trustee and executor being poor, or not of affluent fortune, will not be a sufficient reason for the court to appoint a receiver.(zz) But a receiver has been appointed upon an affidavit, that the trustee is insolvent.(a)

*Upon the appointment of new trustees the receiver will be discharged on the application of any party interested in the [*213] cause, although the discharge be opposed by some of the *cestui que trusts*.(b)

DIVISION IV. [*214]

OF THE ACCEPTANCE OR REFUSAL OF THE OFFICE OF TRUSTEE.

THE mere gift of property by any mode of assurance to a person upon trusts, or the nomination or appointment of a party to be trustee, will not of itself invest him with the character of a trustee:—for this purpose there must also be an acceptance of the office on the part of the donee.

The law will not compel any person to accept an estate, either as trustee or otherwise, against his will; and he is consequently at liberty at any time to disclaim or refuse the office, and the estate to which it is annexed, provided that he has never done any act to show his assent to it.¹

(x) *Barkley v. Lord Reay*, 2 Hare, 308.

(y) *Middleton v. Dodswell*, 13 Ves. 266; but see *Tait v. Jenkins*, 1 N. C. C. 492; *Brodie v. Barry*, 3 Mer. 695; *Tidd v. Lister*, 5 Mad. 433; *Browell v. Read*, 1 Hare, 434.

(z) *Bagot v. Bagot*, 10 Law Journ. N. S., Chanc. 116.

(zz) *Hawthornethwaite v. Russell*, 2 Atk. 126; *Howard v. Papera*, 1 Mad. 142.

(a) *Scott v. Beecher*, 4 Price, 346.

(b) *Bainbrigge v. Blair*, 10 Law Journ. N. S., Chanc. 103.

¹ See *McCubbin v. Cromwell*, 7 Gill & Johnson, 157; *Trask v. Donoghue*, 1 Aik. 370; and statutes of different states; stated ante, p. 190.

We will now proceed to consider, what acts of conduct of an intended trustee will amount to an acceptance of the office: and when and how he may refuse or disclaim.

CHAPTER I.

WHAT WILL BE AN ACCEPTANCE OF THE OFFICE OF TRUSTEE.

EVERY gift, by deed, or will, or otherwise, is supposed *prima facie* to be beneficial to the donee; consequently the law presumes, until there is proof to the contrary, that every estate is accepted by the person to whom it is expressed to be given.(a)

Where the creation of the trust is by deed, the most obvious and effectual mode of testifying the acceptance of the trust by the trustees is their execution of the deed.¹ All the provisions of the instrument will then be binding on those parties, by whom it is executed. Where the trust property consists of money or stock, which is placed under the exclusive control of the trustees, and more especially if there be only a single trustee, it is peculiarly desirable that he should testify his acceptance of the trusts by executing the deed.(b)

Where the trust is created by will, and the same person is appointed executor and trustee, the probate of the will by him will be an acceptance of the trusts.(c)²

(a) Per Ventris, J., in *Thompson v. Leech*, 2 Ventr. 198; Per Bayley, J., in *Townson v. Tickell*, 3 B. & Al. 36; 5 Mart. Conv. 607; 3 Jarm. Byth. Conv. 698; 4 Cruis. Dig. 404, 6. [*Wilt v. Franklin*, 1 Binn. 502; *Eyrick v. Hetrick*, 13 Penn. St. 494; *Read v. Robinson*, 6 W. & S. 331; *Wise v. Wise*, 2 J. & Lat. 412; *King v. Phillips*, 15 Eng. L. & Eq. 7; 4 Kent Comm. 500, and notes. The renunciation must be by "express rejection, or tacit refusal to act," 6 W. & S. 333.]

(b) *Lord Montfort v. Lord Cadogan*, 17 Ves. 488, 9; S. C. 19 Ves. 638; *Small v. Marwood*, 9 B. & Cr. 300.

(c) *Mucklow v. Fuller*, Jac. 198; *Booth v. Booth*, 1 Beav. 128; *Williams v. Nixon*, 2 Beav. 472; See *Clarke v. Parker*, 19 Ves. 1; *Ward v. Butler*, 2 Moll. 533. [*Worth v. M'Aden*, 1 Dev. & Batt. Eq. 209.]

¹ But the signature of the deed by the trustee, is not *necessary* unless there be some covenant, &c., on his part. *Flint v. Clinton Co.*, 12 N. H. 432.

² See *Peebles v. Reading*, 15 S. & R. 39; *Worth v. McAden*, 1 Dev. & Batt. Eq. 209; *Venables v. East Ind. Co.*, 2 Exch. 633; *Easton v. Carter*, 5 Exch. 8; *Cummins v. Cummins*, 3 J. & Lat. 64. Giving bond it would seem is sufficient, *Sears v. Dillingham*, 12 Miss. 80. In *Vanhorne v. Fonda*, 5 J. C. R. 403, it was held that where an executor who had never qualified, took possession of a part of the personal property and paid some of the debts he had elected to act as executor, At the common law, indeed, most acts before probate are valid. See *Easton v.*

*Where the same person is appointed both executor and trustee, it is difficult, though sometimes of importance, to [*215] determine when the office of executor has ceased, and that of trustee has commenced. The rule appears to be, that if a part of the assets has been clearly set apart and appropriated by the executor to answer a particular trust, he will be considered to hold the fund as trustee for those trusts, and no longer as a mere executor.(d)

In the absence of any such conclusive evidence, as the execution of the trust deed, or the probate of the will, the actions and conduct of the person who is appointed trustee, may constitute equally binding proof of his acceptance of the office.

Therefore, if the persons who are nominated trustees in a deed, in any way act in the management of the trust estate, they will be considered to have undertaken the trust, exactly as if they had executed the instrument;(e) and the same rule obtains where the trust is created by will.(f)¹

(d) *Ex parte Dover*, 5 Sim. 500; (e) *Lord Montfort v. Cadogan*, 17
vide post, Part II. Ch. 1, sect. 2; *Phil- Ves. 488, 9; S. C. 19 Ves. 638.*
lipo v. Munnings, 2 M. & Cr. 309. (f) *Conyngham v. Conyngham*, 1
[See *Knight v. Loomis*, 30 Maine, 204; Ves. 522; *Doyle v. Blake*, 2 Sch. &
Wheatley v. Badger, 7 Barr, 461; *Wil- Lef. 231; James v. Frearson*, 1 N. C.
son Estate, 2 Barr, 325.] C. 370.

Carter, 5 Exch. 8; *Venables v. East Ind. Co.*, 2 Exch. 633; *Mitchell v. Price*, 6 J. J. Marsh. 625. It has been ruled, however, in states where an executor, in addition to oath and letters, is obliged to give security, that a different rule obtained, and that until qualification he has no power to act. *Monroe v. James*, 4 Munf. 195; *Mitchell v. Price*, 6 J. J. Marsh. 625; *Carter v. Carter*, 10 B. Monr. 327; *Robertson v. Gaines*, 2 Hump. 381; *Trask v. Donoghue*, 1 Aik. (Verm.) 373. Therefore where one of several executors had been qualified, had delivered up, before probate, a note to be cancelled, believing herself to be acting in accordance with the testator's desire, it was ruled that it was not binding on the others, and did not amount to an acceptance. *Carter v. Carter*, *ut supra*. In *Monroe v. James*, *ut supra*, a neglect to qualify by one of several executors, was held to be a conclusive renunciation; while in *Robertson v. Gaines*, it was considered only *prima facie* evidence. See also *Carter v. Carter*, *ut supra*, page 330; and *Wood v. Sparks*, 1 Dev. & Batt. 396. In *Miller v. Meetch*, 8 Barr, 417, where nothing appeared in the register's office, other than an endorsement on the will that an executor had been duly sworn, there being, however, no affidavit on record thereof, nor letters testamentary, it was held insufficient proof of acceptance. Where two executors, who were directed by will to sell a particular piece of land to a person named, and also other land for the payment of debts, joined in the conveyance of the first parcel, it was held that a purchaser from only one executor, of the last-mentioned land, was not precluded from showing that the other executor had refused and neglected to act. *Roseboom v. Mosher*, 2 Denio, 61.

¹ *Flint v. The Clinton Comp.*, 12 N. H. 432; *McCubbin v. Cromwell*, 7 G. & J. 157; *Chaplin v. Givens*, Rice, Eq. 133; *Latimer v. Hanson*, 1 Bland. 51.

Where one of two executors obtains probate, the right of the other being reserved, it enures to the benefit of both; and on the death of the one proving the

And in such a case a trustee cannot limit his acceptance and consequent liability to any particular portion of the trust. But if he act at all (though it be only as to part, and though he expressly disclaim the intention of interfering generally), he will be fixed with the acceptance of the entire trust, and with all the responsibilities attending it.(g)

And if one of several trustees, with notice of his appointment, interfere in the management of the trust property, so as to render it ambiguous whether he had accepted the trust or not; he cannot afterwards get rid of his liability to account as a trustee, by alleging that he acted merely as the factor or agent of the *cestui que trust*.(h)

If however one of several trustees and executors, who had never proved the will, or otherwise accepted the trust, should interfere in the disposition of part of the trust property, not from any intention of acting in the trust, but only as agent and under the immediate directions of the acting trustee, he will not be considered to have accepted the trust, although he may not have executed any formal renunciation or disclaimer.(i)

In a case, where one of two trustees and executors named in a will *formally disclaimed and renounced*, but afterwards acted in the disposition of the trust estate, *as the agent of the other trustee*, who had accepted the trust, but who was not so competent to the management of the property; and the renouncing party accounted with the other trustee for all his receipts and proceedings in the course of his dealing with the trust estate: it was held by Sir John Leach, M. R., that the party who had renounced, *had not by his [*216] subsequent conduct become accountable as trustee and executor, and his Honor dismissed a bill as against him with costs.(k)

With regard to what acts or conduct of a trustee will be held an acceptance of the trust; it is a question of considerable nicety, and one which may still be considered as not altogether settled, whether the execution of a release or conveyance of the trust estate by a

(g) *Doyle v. Blake*, 2 Sch. & Lef. Wms. Exors. 151. [*Chaplain v. Givens*, 231; see *Read v. Truelove*, Ambl. 417; 1 Rice, Eq. 154.]
 and *Urch v. Walker*, 3 M. & Cr. 702. (i) *Stacy v. Elph*, 1 M. & K. 195;
 [Post 221, ante 196; *Vanhorn v. Fonda*, Lowry v. Fulton, 9 Sim. 115; and see
 5 J. C. R. 403.] *Orr v. Newton*, 2 Cox, 274; *Balchen v.*

(h) *Conyngnam v. Conyngnam*, 1 Scott, 2 Ves. jun. 678. [*Carter v. Car-*
Ves. 522; see *Harrison v. Harrison*, 1 ter, 10 B. Monr. 327; *Judson v. Gib-*
P. Wms. 241, n. (y), 6th ed.; S. C. 1 bons, 5 Wend. 224.]

(k) *Dove v. Everard*, 1 R. & M. 231.

will, a slight act of intermeddling in the surviving executor will amount to an acceptance. *Cummins v. Cummins*, 3 J. & Lat. 64. But see *Carter v. Carter*, 10 B. Monr. 327; *Mitchell v. Price*, 6 J. J. Marsh. 625, contra; and note to p. 214.

trustee, made with the intention of disclaiming or refusing the trust, will or will not amount to an acceptance of the trust by him.¹

This doctrine, which at first sight may appear somewhat paradoxical, was established by Lord Rosslyn in the case of *Crewe v. Dicken*.^(l) In that case, one of two surviving trustees for sale, being unwilling to act, by deed conveyed and released the estate and all his interest therein to the other trustee and his heirs; and it was held by Lord Rosslyn, that if the retiring trustee *had merely renounced*, the whole estate would have been in the remaining one; he would have been the only person: but that, according to the way they had managed it, *he had accepted the trust, and conveyed away the estate*: and he was therefore bound to join in the receipt for the purchase-money.^(l)

The point came again before the court in the case of *Nicloson v. Wordsworth*.^(m) There one of three trustees being desirous of disclaiming the trust, executed a conveyance and release of the estate to the other two trustees. The two acting trustees alone then entered into a contract for the sale of part of the estate to the plaintiff, who, being advised that the concurrence of the trustee, who had released, was necessary to perfect his title, filed his bill against all the three original trustees for a specific performance of the contract by them, and to restrain an ejectment, which had been commenced in the mean time.^(m)

Lord Eldon in his judgment commented upon the decision of Lord Rosslyn in *Crewe v. Dicken*, and questioned the soundness of the distinction established by that case. "If," said his Lordship, "the essence of the act is disclaimer, and if the point were *res integra*, I should be inclined to say, that if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer, that the release amounts to more than a disclaimer, is much more technical than any reasoning that deserves to prevail in a court of equity." And his Lordship subsequently observed,

^(l) *Crewe v. Dicken*, 4 Ves. 101.

^(m) *Nicloson v. Wordsworth*, 2 Swanst. 365.

¹ Where a testator by his will appointed A. and B. his trustees, and directed that if his trustees thereby appointed, should die, or desire to be discharged from, or refuse, or decline to act, it should be lawful for the surviving or continuing trustee or trustees, or if there should be none such, then for the trustee so desiring to be discharged, or refusing, or declining to act, to appoint new trustees, it was held that B. having declined to act except for the purpose of appointing new trustees, had the power of appointing new trustees in the place of A. and B. *Hadley's Trust*, 16 Jur. 98; 21 L. J. Ch. 109; 9 Eng. L. & Eq. 67.

"My opinion is, that if a person, who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, *when the meaning and intent of that conveyance is disclaimer*, the distinction is not sufficiently broad for the court to act upon. I can find no case which has decided, nor can I see any reasons for deciding, that *where the intent of the release is disclaimer*, the inference that the releasor has accepted the estate shall prevent the effect of it."⁽ⁿ⁾

It will be perceived on examination, that in *Nicloson v. Wordsworth* there was no direct adjudication on the point in question. Lord Eldon said, that the form of the record was such, that no judgment could then *be pronounced :^(o) and it appears from the [*217] report, that the declaration that the trustee, who had released, was not a necessary party to the conveyance, was taken by consent: it cannot therefore be considered as the judicial decision of the court.^(p)

In this state of the authorities upon this question, the point was again raised in the recent case of *Urch v. Walker*, which came before Lord Cottenham, C., on appeal from the decree of the Vice-Chancellor (Sir L. Shadwell). There a testator gave a legacy of 1,100*l.* to the defendant and another person upon trust for the plaintiffs; and then, after making other devises and bequests, gave a leasehold messuage to the same trustees, upon trusts ultimately to convey to his grandson at twenty-one. The grandson became absolutely entitled to this property under the trust, and the two devisees in trust then executed an indenture made between them and the grandson, which recited the facts, and that thereby "it became unnecessary for (the devisees) to act in the trust declared by the will, and in fact they never intermeddled therein; *but inasmuch as the legal estate in the said messuage and lands was still outstanding in them, by virtue of the will*, they had consented, at the request of the grandson, to convey such estate to him in manner thereafter mentioned." And the two devisees then, "in pursuance and performance of the agreement, *and of the trusts so reposed in them*, granted and released the messuage, &c., to the grandson in fee." There was no proof that the trustees had in any other manner acted in or accepted the trust. The bill was filed by the persons interested in the legacy of 1,100*l.*, praying that the defendant, who was the survivor of the two trustees named in the will, might be declared personally liable to make good that legacy with interest, on the ground that he had accepted and acted in the trusts. The decree of the Vice-Chancellor declared, that he had accepted the trusts of the will,

(n) *Nicloson v. Wordsworth*, 2 Swanst. 370, 1.

(o) 2 Swanst. 369.

(p) See Lord Cottenham's observations in *Urch v. Walker*, 3 M. & Cr. 710.

and directed an inquiry, whether, but for his wilful default, he might have received the 1,100*l.* legacy; and that decree was affirmed on the appeal by the Lord Chancellor.(*q*) His Lordship said, "The question is, whether execution of this deed was not of itself an acceptance of the trusts of the will. I think it would be sanctioning a gross deceit on the part of the appellant, if it were to be construed otherwise, because it was for the purpose of giving effect to the devise of the property. *If the trustees never did accept the property, then they had no means of doing that which they professed to do, and which by this deed they held out that they were doing.*"(*r*) (1)

It is not easy upon any principle to reconcile these conflicting authorities. According to Lord Eldon's observations in *Nicloson v. Wordsworth*, a conveyance executed by a person who is appointed trustee, only with the meaning and intent of disclaiming, will not in equity differ in its effects from an ordinary disclaimer: and his Lordship endeavored to reconcile* his opinion with Lord [*218] Rosslyn's decision in *Crewe v. Dicken*, on the ground that in that case the individuals were particularly described, and that the directions for the form of the receipt were such as made it impossible that a proper receipt could be given, unless the trustee who had disclaimed joined.(*s*)

It is to be remarked, however, that, according to the report of *Crewe v. Dicken* in *Vesey*, Lord Rosslyn does not seem to have founded his decision on those particular circumstances, but rather to have rested it on the general principle, that the execution of the conveyance of *itself* amounted to an acceptance of the trust;(*t*) a principle which appears to have been expressly recognised and adopted by Lord Cottenham in *Urch v. Walker*.(*u*)

Moreover, the dicta of Lord Eldon in *Nicloson v. Wordsworth*, although entitled to the greatest possible weight, as proceeding from such a quarter, were certainly extra-judicial; and their authority has been much shaken, if not altogether overruled, by what fell from Lord Cottenham in the case of *Urch v. Walker*.(*x*)

On the whole, therefore, a trustee, whose object is to disclaim, cannot be advised to execute any deed, purporting to be a conveyance or release of the trust property, lest by so doing he should be held to have fixed himself with the acceptance of the trust, which he attempts to repudiate. Although where such a deed may have been executed *solely with the purpose of disclaiming*, it might possibly be still open

(*q*) *Urch v. Walker*, 3 M. & Cr. 702.

(*r*) 3 M. & Cr. 708.

(*s*) See 2 Swanst. 370; sed vide contra *Adams v. Taunton*, 5 Mad. 435.

(*t*) 4 Ves. 100.

(*u*) 3 M. & Cr. 708.

(*x*) See 3 M. & Cr. 710.

(1) A similar distinction as to the effect of a disclaimer or a surrender of a copyhold was recognised by the Court of Common Pleas, in the recent case of *Doe d. Wyatt v. Hogg*, 5 Bing. N. C. 564.

to contend (although at considerable disadvantage) that such an act would not amount to an acceptance of the trust.

It is scarcely necessary to advert with any particularity to the various other acts on the part of a person appointed trustee, which have been held to amount to an assumption of the office. If such a person with notice of his appointment continue to receive the income arising from the trust estate; *(y)* or execute a power of attorney; *(z)* or sign a joint draft or order, *(a)* to enable another person, who was also named a trustee, to receive the assets; *(z)* or raise and invest a legacy; *(b)* or give notice to the occupying tenant of the trust estate to pay the rent to him; *(c)* or bring an action respecting the trust property; *(d)* or interfere generally in the management of the trust property, by ordering it to be sold, and being present at the sale in the capacity of trustee, or giving directions implying authority or ownership, or by frequently making inquiries of the acting trustee as to the affairs of the trust; *(e)* any one of these facts, if established in evidence, will doubtless fix the party with the acceptance of the trust and all its responsibilities; unless, indeed, as has been already stated, those acts be done not in the character of a principal, but solely as the agent and on behalf of the acting trustee. *(f)*

[*219] *So where a person is present when the instrument is read by which he is made a trustee, and makes no objection to the appointment; that, though scarcely conclusive, will form a material item of evidence to prove his assent to the trust. *(g)* But the mere fact of a person named trustee taking possession of the deed for the purpose of keeping it in safe custody until another trustee can be appointed, is not enough to fix the party with the acceptance of the trust. *(h)* It is, perhaps, unnecessary to remark, that where a party has once fixed himself by any means with the acceptance of a trust, he cannot afterwards by disclaimer renounce or repudiate the duties and responsibilities of the office. *(i)*¹

(y) Conyngham v. Conyngham, 1 Ves. 522. 375, 7. [Sheppard v. McEver, 4 J. C. R. 136; see 3 McLean, 67.]

(z) Harrison v. Graham, 1 P. Wms. 241, n., 6th edit.; S. C. 1 Wms. Exors. 151; Hanbury v. Kirkland, 3 Sim. 265. *(f)* Dove v. Everard, 1 R. & M. 231; Orr v. Newton, 2 Cox, 274; Stacy v. Elph, 1 M. & K. 195; Lowry v. Fulton, 9 Sim. 115; Balchen v. Scott, 2 Ves. jun. 678. [Ante, 215].

(a) Saddler v. Hobbs, 2 Bro. C. C. 114; Broadhurst v. Balguy, 1 N. C. C. 16. *(g)* James v. Frearson, 1 N. C. C. 375.

(b) Doyle v. Blake, 2 Sch. & Lef. 231. *(h)* Evans v. John, 4 Beav. 35.

(c) Lord Montfort v. Lord Cadogan, 17 Ves. 487. *(i)* Conyngham v. Conyngham, 1 Ves. 522; Read v. Truelove, Ambl. 417; Doyle v. Blake, 2 Sch. & Lef. 231; Stacy v. Elph, 1 M. & K. 195.

(d) Lord Montfort v. Lord Cadogan, 17 Ves. 489. [Penny v. Davis, 3 B. Monroe, 314.]

¹ Sheppard v. McEver, 4 J. C. R. 136; Cruger v. Halliday, 11 Paige, 319; Per-

Parol evidence of admissions and conversations are admissible against a party for the purpose of proving his acceptance of a trust; (*k*) but where persons are appointed general trustees and executors by will, parol evidence of the testator's conversations cannot be received on their behalf, in order to show, that it was his intention that they should only act as to part of the property. (*l*)

Where the defendant by his answer denies the truth of the facts alleged by the bill as evidence of his having accepted the trust, the court will not at the hearing decide that point, although the facts as alleged by the bill are borne out by the evidence of two witnesses; but it will direct an inquiry before the Master as to the fact of the defendant having accepted the trust. (*m*)

The rule is otherwise, where the fact, from which the acceptance of the trust is drawn as a legal consequence, is admitted, but the legal conclusion denied, as in the case of the execution of a release for the purpose of disclaiming. In that case no reference is requisite, but the court will itself decide on the point at once. (*n*)

The court will presume the acceptance of a trust by the trustee named in the instrument after the lapse of many years without any express disclaimer or refusal by him; although he may never have executed the trust deed, or otherwise by any positive act accepted or interfered in the trust. And this presumption has been made after an interval of twenty-three or even thirty-four years. (*o*) (*1*)¹

(*k*) *Urch v. Walker*, 3 M. & Cr. 703; 377; see *Urch v. Walker*, 3 M. & Cr. James v. Frearson, 1 N. C. C. 375. 707.

(*l*) *Doyle v. Blake*, 2 Sch. & Lef. 240. (*n*) *Urch v. Walker*, 3 M. & Cr. 702.

(*m*) *James v. Frearson*, 1 N. C. C. (*o*) *Re Uniacke*, 1 Jones & Lat. 1; re Needham, *ibid.* 32. [See post, 221, n.]

(1) The London Jurist, of the 2d of August, 1845 (No. 447, vol. 9), thus comments on these two decisions of Lord Chancellor Sugden:—"It is clear, that in this case (*Re Needham*), the legal estate was in the trustee until disclaimer. And if the Lord Chancellor had merely considered him as having the dry legal estate, it is submitted, that he would have ordered him to assign or disclaim, an order which would not have necessarily implied that he was clothed with the trusts; but the order, that he should assign, without more, is consistent with the expression, that the court 'must presume that he accepted the trust,' and shows that the court actually fastened the trust upon the trustee by force of the pre-

kins v. McGavish, 3 Hey. 265; *Jones v. Stockett*, 2 Bland, 409; *Strong v. Willis*, 3 Florida, 124; *Chaplin v. Givens*, 1 Rice, Eq. 133; *Latimer v. Hanson*, 1 Bland, 51.

¹ Where a conveyance had been of record more than twenty-five years, and there had been a possession by the *cestui que trust* in accordance with the deed, it was held, that an acceptance by the trustee, though a lunatic, might be presumed. *Eyrich v. Hetrick*, 13 Penn. St. R. 493. See *Penny v. Davis*, 3 B. Monroe, 314. So it seems where a recorded conveyance had been signed by the trustees, after twenty-five years. *Lewis v. Baird*, 3 McLean, 65. *Query* as to this presumption, where the trustee is ignorant of the trust. See *Read v. Robinson*, 6 W. & S. 333.

[*221]

*CHAPTER II.

OF THE REFUSAL OR DISCLAIMER OF THE OFFICE OF TRUSTEE.

I. WHEN A TRUSTEE MAY DISCLAIM [221]. III. THE EFFECT OF A DISCLAIMER [225].

II. HOW HE MAY DISCLAIM [223].

I.—WHEN A TRUSTEE MAY DISCLAIM.

THERE has been already occasion to remark, that the law does not force any one to accept a gift of an estate, whether made in trust or otherwise; and that it is therefore competent for a person appointed trustee to refuse both the estate and the office attached to it, provided he has done nothing to deprive himself of that right.(a)

It has been seen, moreover, that if a party have once by any means accepted the trust, the effect of such an acceptance is conclusive;

(a) Ante, p. 214; Sheph. Touchst. Hawkins v. Kemp, 3 East, 410; Denn 285, 318; Smith v. Wheeler, 1 Vent. v. Judge, 11 East, 288; Townson v. 128; Thomson v. Leech, 2 Vent. 198; Tickell, 3 B. & Ald. 31.

sumption afforded by lapse of time, and neglect to disclaim. Assuming the decision to be good law, the question is, to what, if any, extent, the doctrine is applicable to cases of trust generally, as distinguished from the case of a trust presumed merely for the purpose of a petition, under the 1 Will. IV. c. 60.

In the first case, the court did not necessarily decide, that the trustee must be presumed to have accepted the trusts, but only that it would not, on petition, decide that he had not. But, in the second, it seems, as we have shown, to have actually clothed him with the trusts by making a substantive order upon him, incompatible with his being anything else than actual trustee. It seems difficult, therefore, to distinguish this from the general case. On the other hand, it must be observed, that presumption of law being an inference founded on a specific state of circumstances, there may be a difference between presuming acceptance of a trust, on the ground of lapse of time, without disclaimer, where the object of the presumption is merely to determine whether a new trustee is, or is not, requisite; and, if he be requisite, to vest in him, beyond the possibility of doubt, the trust estate; and presuming such acceptance generally, where the object is, or may be, to fasten upon alleged trustees the liabilities of implied breaches of trust. The court would be, in the one sort of case, astute to raise the presumption for the benefit of all parties; and in the other, it might be, on the contrary, astute to avoid raising a presumption merely for the purpose of fastening a legal liability on a person morally innocent. We leave the difficulty, however, to our learned readers; regretting only, that a doctrine of so new a kind, and the consequences of which it may not be easy to foresee, should have been laid down." T.

and he cannot afterwards by renunciation or disclaimer throw off, or repudiate, the duties and responsibilities of the office.(b)¹

A disclaimer in writing has in itself no operation; it is merely useful, as being the most perfect and convenient evidence of the refusal of the donee. Therefore it is immaterial at what time the formal instrument of disclaimer is executed,—the actual disclaimer or refusal of the estate will be held to have been made at the time of the gift, if the disclaiming party have never done any act, inconsistent with a refusal of the estate.(c) However, it is unquestionably advisable, that the disclaimer should be made at the earliest period after the creation of the trust.

One of two persons named executors and trustees who had never acted, may renounce and disclaim after the death of the acting trustee; and it is immaterial that the party so disclaiming is the last surviving trustee.(d)

It does not appear to have been ever directly decided, whether the heir or personal representative of a trustee, who during his life had never acted or assented to the trust, can disclaim the trust after his death. The question was raised in the case of *Goodson v. Ellison*.(e) There, by indenture, made in the year 1767, a fine was covenanted to be levied of certain lands to the use of Richard Ellison and his heirs on certain trusts. The fine was levied; and Richard Ellison died intestate in 1774, leaving his brother his heir-at-law: [*222] the brother afterwards died intestate, leaving his two daughters the defendants his co-heiresses at law. In the year 1822, the bill was filed against them as the co-heiresses of Richard Ellison, by a person who had purchased a portion (consisting of two-thirds) of the trust estate from the parties in whom the beneficial interest had become vested, and it prayed, that the defendants might be decreed to execute a conveyance to him of those two-thirds. The defendants by their answer stated, that their ancestor Richard Ellison never

(b) Ante, p. 219; *Conyngham v. Conyngham*, 1 Ves. 522; *Reed v. True-love*, Amb. 417; *Doyle v. Blake*, 2 Sch. & Lef. 231; *Stacey v. Elph*, 1 M. & K. 199. (c) 5 Mart. Conv. 607, 8; see *Stacey v. Elph*, 1 M. & K. 199. (d) *Stacey v. Elph*, 1 M. & K. 195, 9. (e) *Goodson v. Ellison*, 3 Russ. 583, 7. 195.

¹*Drane v. Gunter*, 19 Alab. 731; *Sheppard v. McEver*, 4 J. C. R. 136; *Cruger v. Halliday*, 11 Paige, 314; *Perkins v. McGavork*, 3 Heyw. 265; *Jones v. Strebett*, 2 Bland. 409; *Strong v. Willis*, 3 Florida, 124; *Latimer v. Hanson*, 1 Bland. 51; *Chaplin v. Givens*, 1 Rice, Eq. 133. Even a provision in a will for the appointment of new trustees, in case the number should be reduced by death, removal from the United States, or otherwise, does not authorize a trustee to resign. *Cruger v. Halliday*, ut supr. There are various statute provisions, in most of the States, enabling trustees who have accepted or acted as such, to resign, which will be found stated ante, p. 190.

accepted the trust, and referred to several transactions of importance with respect to the property since the execution of the deed of 1767, in which the concurrence of any person as trustee had not been required; but they concluded with an intimation (wholly unsupported by evidence), that they themselves had a beneficial interest in the estate. The title of the parties of whom the plaintiff had purchased to the beneficial interest was clearly established: there does not appear to have been any evidence as to the acceptance or refusal of the trust by Richard Ellison or his representatives. The point, that the trust had never been accepted by the ancestor of the defendants, though raised by the answer, does not appear to have been pressed in argument by the defendant's counsel; and Lord Gifford, M. R., in his judgment did not even allude to that part of the defence, but treated the case as one of a capricious refusal on the part of *trustees* to convey, and decreed against them with costs.^(e) This decree was reversed on appeal by Lord Eldon, on the ground that a trustee could not be required to convey the trust estate in different parcels. His Lordship alluded in his judgment to the question, raised by the answer, as to the non-acceptance of the trust, but gave no opinion on the point. The case therefore cannot be considered an authority upon the present question.

However, in the absence of any express decision on the subject, it is submitted, that upon principle a disclaimer by the heir or personal representative of a donee in trust may well be supported, where the original donee has done no act in his lifetime to testify his acceptance of the trust. Wherever such a question could arise, it would almost invariably be found, that the trust estate is expressly limited to the heir or representative of the original nominee (as indeed was the case in *Goodson v. Ellison*); and where the persons to take the estate by representation to the original trustees are so designated, there does not seem to be any valid reason why they should not also take the power to repudiate the gift, equally with their original trustee, provided that that power has not been defeated by any previous act of the latter. And even where there are no such words of limitation of the trust estate, the estate of the heir or personal representative is merely a continuation of the previous estate; and as part of that estate consisted of the power or right to call the office of trustee into existence by any act of acceptance, or to repudiate it by a proper act of dissent, the continuation of the estate in the heir or representative would not be perfect if it came to them shorn of that power or right. The argument derived from the absurdity and injustice of forcing a person to accept an estate against his will ap-

(e) *Goodson v. Ellison*, 3 Russ. 583, 7.

plies with equal force to an heir or personal representative, as to the original donee.¹

*It is well known to have been long established, that an executor may accept the executorship of his own testator, but [*223] at the same time decline that of another person, to whom his testator was executor ;(f) and though not altogether an analogous case, that rule would seem to be strongly in favor of the power of an heir or representative to disclaim a trust, which had never been accepted by the principal.

Where the legal fee has once become vested in the original trustee by his act or assent during his life, the law casts the estate upon the heir immediately upon the death of the ancestor.(g) It is, therefore, no longer competent for the heir to repudiate by a simple disclaimer the estate, which is already vested in him ; although he would unquestionably have the right to come to the Court of Chancery, in order to be relieved from the trust thus cast upon him.²

Where the subject-matter of the trust is personal estate, the probate of the will of the trustee immediately vests in the executor all his testator's trust estates : and there does not appear to be any power for an executor on taking probate to disclaim the acceptance of any estate vested in his testator as trustee ; although the analogous case of his power to refuse an executorship vested in his testator, might possibly seem to sanction the existence of such a power. Where the trustee dies intestate, administration if granted generally of *all* the testator's effects will have the same effect as the probate of his will. But in these cases the executor or administrator will doubtless be entitled to come to the court to be relieved from the trust, and to have other trustees appointed in his place.

If the heir or personal representative of the original trustee be so named in the trust instrument, as to take by purchase at his death, he may doubtless disclaim in the same manner as the trustee originally appointed might have done ; and whether the original trustee has accepted the trust or not.

(f) *Hayton v. Wolfe*, Cro. Jac. 614 ; 1 Dev. & Batt. Eq. 199 ; *Mitchell v. Wangford v. Wangford*, Freem. 521 ; 1 Adams, 1 Ired. Eq. 298.]
Wms. Exors. 153. [Worth *v.* McAden, (g) Co. Litt. 9, a ; 3 Cruis. Dig. 318.

¹ But in *King v. Phillips*, 15 Eng. L. & Eq. 7, the survivor of several trustees, who was not shown himself to have accepted or proved the will, but who, on the other hand, had never disclaimed, after the lapse of seventeen years, devised in general terms all his mortgage and trust estates to two persons, who proved his will and acted under some of its trusts, but who denied all knowledge of the former trust and disclaimed, it was held that the legal estate was in them, and that they were necessary parties to a suit with reference thereto.

² See Rev. Stat. Maine, tit. "Testamentary Trustees," Ch. III., § 5 ; and of New York and Virginia, &c., ante. p. 190.

Some doubt appears to have arisen in practice, as to whether the 77th sect. of the Fines and Recoveries Act (3 & 4 Will. IV. c. 74), authorizes a *feme covert* trustee to disclaim by a deed acknowledged according to the act: although it seems to be the better opinion that she may so disclaim; for before the act a *feme covert* trustee might have disclaimed by fine. In the Irish Fines and Recoveries Act (4 & 5 Will. IV. c. 92), this doubt has been removed by the express introduction of the word "disclaim" into the 68th sect., which corresponds with the 77th sect. of the English Act.^(h)

II.—HOW A TRUSTEE MAY DISCLAIM.

As a gift is not perfect at law until ratified by the assent of the donee, and a disclaimer operates merely as evidence, that such assent was never given, and that the estate consequently never vested in the donee; ⁽ⁱ⁾ it would seem to follow, that a simple expression of dissent by the donee, though it were only by a parol declaration, would be sufficient to avoid the gift.

*Accordingly it has been long established, that a parol disclaimer of a gift, either by deed or will, of copyholds, or leaseholds, or chattels personal, would be sufficient; ^(k) and authorities are also to be found in favor of the validity of a parol disclaimer of a similar gift of *freeholds*.^(l)

But the expression of refusal must be unequivocal; and must extend to a renunciation of *all* interest in the property: and if they are coupled with a claim to the estate, although made in a totally distinct character, they will not amount to a disclaimer.^(m)

Again, the *conduct* of a party may amount to a disclaimer, although there may not be any formal declaration of dissent either in writing, or by parol. As, for instance, where one of several devisees in trust purchased part of the trust estate, and took a conveyance from the

^(h) See 4 Cruis. Dig., by White, 19, n.; 7 id. App. 12, 13.

⁽ⁱ⁾ Townson v. Tickell, 3 B. & Al. 31; Stacey v. Elph, 1 M. & K. 198. [Peppercorn v. Wayman, 13 Eng. L. & Eq. 199.]

^(k) Bonifant v. Greenfield, Cro. Eliz. 80; Smith v. Wheeler, 1 Ventr. 128; Thomson v. Leech, 2 Ventr. 198; Rex v. Wilson, 5 Man. & K. 140; Shep. Touch. 285 & 452; and see Small v. Marwood, 4 Man. & R. 190, and cases

cited in note. [See as to parol renunciation by an executor, Thompson v. Meek, 7 Leigh, 419; Roseboom v. Mosher, 2 Denio, 61; Comm. v. Matear, 16 S. & R. 416.]

^(l) Thomson v. Tickell, 3 B. & Al. 39; Per Holroyd, J., Doe d. Smith v. Smith, 6 B. & Cr. 112; Shep. Touch. 452; Bingham v. Clanmorris, 2 Moll. 253.

^(m) Doe v. Smith, 6 B. & C. 112. [See Judson v. Gibbons, 5 Wend. 224.]

devisee for life, and the heir of the testator, in whom the estate could have vested only by the disclaimer of the trustees.(n)

However, as was observed by Sir John Leach, M. R., in the case of *Stacey v. Elph*,(o) "it is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust; because such deed is clear evidence of the disclaimer, and admits of no ambiguity."(o)¹

In the case of *Townson v. Tickell*,(p) it was contended that where the freehold was in question a dissent or disclaimer could be made only in court by matter of record; however, the Court of King's Bench decided in that case, that a renunciation by deed under the hand and seal of the donee was a sufficient disclaimer; and the law is now clearly so established.(p)

In the same case *Holroyd, J.*, said, that the disclaimer need not be even by deed;(q) and that opinion, though certainly extrajudicial in the particular case, seems to be well founded on principle, and is also supported by other authorities, implying that a refusal of a gift, testified by any written instrument, or an answer in Chancery, will be sufficient, although probably not so convenient for title.(r)

However, it is obviously of the last importance for a trustee, who is desirous of disclaiming, as well as for the other parties interested, to avoid the possibility of any future question as to the sufficiency or effect of the disclaimer. With this view a trustee can never be advised to trust to the sufficiency of a verbal refusal, or even to one contained in a simple writing; but the disclaimer should be made by deed under his hand and seal, and as soon as possible after the appointment is made known to him; and the most advisable form of such an instrument is a *deed poll*, and not an *indenture* between the disclaiming party and his co-trustees or *cestui que trusts*, to preclude any question as to the instruments operating as a *conveyance*.(s) [*225]

(n) *Stacey v. Elph*, 1 M. & K. 195, 8. [Ayres v. Weed, 16 Conn. 291; Thornton v. Winston, 4 Leigh, 152; ante, note to p. 214. May be presumed after 20 years' neglect to qualify or act. *Man v. Peay*, 2 Murph. 85.]

(o) *Stacey v. Elph*, 1 M. & K. 199.

(p) *Townson v. Tickell*, 3 B. & Ald. 31; *Begbie v. Crook*, 2 Bing. N. C. 70; and see *Nicloson v. Wordsworth*, 2 Sw. 369; *Adams v. Taunton*, 5 Mad. 435; *Bingham v. Clanmorris*, 2 Moll. 253.

(q) *Townson v. Tickell*, ubi supra.

(r) 5 Mart. Conv. 608; *Stacey v. Elph*, 1 M. & K. 198; *Miles v. Neaves*, 1 Cox, 159; *Sherratt v. Bentley*, 1 R. & M. 655; *Norway v. Norway*, 2 M. & K. 278; *Bray v. West*, 9 Sim. 429.

(s) 3 Jarm. Byth. Conv. 704, 3d. edit.

¹ In *Judson v. Gibbons*, 3 Wend. 224, it was held, that a trustee might execute at any time, though there had been a previous refusal; it was necessary that he should have released or executed a deed of disclaimer. And see *McCubbin v. Cromwell*, 7 G. & J. 165.

The greatest care, moreover, should be taken in the framing and wording of the deed of disclaimer, lest its execution should produce a directly contrary effect to that intended by the party, and (as in the cases of *Urch v. Walker*, and *Crewe v. Dicken*) should fix him with the acceptance of the trust, which it was his object to renounce.

For this purpose the deed should merely recite the deed or will, by which the disclaiming party was appointed trustee; and after stating that the disclaiming party had never executed the instrument (if a deed), and had never assented to or accepted or acted in the trust, and never intended to do so; (t) it should witness, that he had and thereby did absolutely renounce and disclaim the estate and trust expressed to be given or reposed in him by the deed or will. The introduction or addition of any release or conveyance of the trust estate to the co-trustees or any other party, or the addition of any expressions, which could be construed to have that operation, should be carefully avoided. For this reason also the disclaimer should be made simply and absolutely, and should not be expressed to be made *unto* the co-trustees or *cestui que trusts*, as is sometimes done.

In the case of *Nicloson v. Wordsworth*, Lord Eldon intimated an opinion, that where there was a conveyance to uses, a disclaimer could only be made by release with intent to disclaim.(u) This, however, is a distinction which does not appear to have been attended to in practice; and it is certainly difficult to discover any solid foundation on which it rests.

Where a trustee has never accepted or acted in the trust, he will not be precluded by mere lapse of time from executing a valid disclaimer.(x) But where *no disclaimer is executed*, the acceptance of the trust will be presumed after the lapse of time, as after thirty-four years,(y) or even twenty-three years.(z) This presumption, like other presumptions, may of course be rebutted by the execution of a deed of disclaimer, or other sufficient evidence of the refusal of the trust.

III.—THE EFFECT OF A DISCLAIMER BY A TRUSTEE.

Where the person who is appointed trustee makes a proper refusal or disclaimer, the effect is that all parties are placed precisely in the same situation relatively to the trust property, as if the disclaiming

(t) See *Urch v. Walker*, 3 M. & Cr. 709.

(u) *Nicloson v. Wordsworth*, 2 Swanst. 372.

(x) *Stacey v. Elph*, 1 M. & K. 195; see 5 Mart. Conv. 608.

(y) *Re Needham*, 1 Jones & Lat. 34.

(z) *Re Uniacke*, 1 Jones & Lat. 1.
[See ante, p. 219.]

party had not been named in the trust instrument, whether it be a deed or will.(a)

Therefore, where a sole trustee, or all the trustees, disclaim a devise in trust, the legal estate will vest in the heir of the devisor;(b) and if the *person disclaiming be one of two or more trustees, the entire estate is vested in the other trustee or trustees.(c)¹ [*226]

Whenever the disclaimer may be made, if it be valid at all, it will have relation back to the time of the gift; therefore, although no disclaimer is executed until after the death of one or more of the co-trustees, yet the estate will vest in the representative of the deceased trustee, or of the survivor of the deceased trustees, exactly as though the person disclaiming had never been named as a trustee.(d) But we have seen, that in the absence of any disclaimer, the acceptance of the trust will be presumed after lapse of a considerable time.

Where one of two or more trustees disclaims, the remaining trustees or trustee will take not only the entire legal estate, but also all the powers and authorities vested in the trustees as such, and which are requisite for the administration of the trust. Therefore, they will be able of themselves to grant leases of the trust estate,(e) to sell and convey to the purchaser,(f) and to give valid receipts for the purchase-money.(g) And the concurrence of the disclaiming party in any of these acts is not necessary, and cannot therefore be enforced; and it is immaterial that he is expressly named in the trust instrument as one of the parties by whom the power is to be exercised.(h)

It has been seen, also, in a former chapter, that a power given to the trustee or the “survivor,” may be well exercised by the “acting” trustee on the refusal of the others.(i)

(a) *Smith v. Wheeler*, 1 Ventr. 128; *Small v. Marwood*, 9 B. & Cr. 307. *Townson v. Tickell*, 3 B. & Ald. 31; (f) *Cooke v. Crawford*, 11 Law Journ. *Hawkins v. Kemp*, 3 East, 410; *Begbie N. S. Chanc. 406; [13 Sim. 71;] Crewe v. Crook*, 2 Bingham. N. C. 70. *N. S. Chanc. 406; [13 Sim. 71;] Crewe v. Dicken*, 4 Ves. 97, 100; *Nicolson v. Wordsworth*, 2 Sw. 375; *Adams v. Taunton*, 5 Mad. 435.

(b) *Stacey v. Elph*, 1 M. & K. 195, 9. (g) *Smith v. Wheeler*, 1 Ventr. 128; *Hawkins v. Kemp*, 3 East, 410; 2 Sugd. V. & P. 51. (c) *Bonifant v. Greenfield*, Cro. Eliz. 80; *Smith v. Wheeler*, 1 Ventr. 128; *Thomson v. Leach*, 2 Ventr. 198; *Hawkins v. Kemp*, 3 East, 410; *Denn v. Judge*, 11 East, 288; *Thomson v. Tickell*, 3 B. & Ald. 31; *Begbie v. Crook*, 2 Bingham. N. C. 70.

(d) *Stacey v. Elph*, 1 M. & K. 195; 5 Mart. Conv. 608. [Even after sale by acting trustees. *Peppercorn v. Wayman*, 13 Eng. L. & Eq. 199.] (h) *Crewe v. Dicken*, 4 Ves. 100; *Adams v. Taunton*, 5 Mad. 435.

(i) *Sharp v. Sharp*, 2 B. & A. 405. [Peppercorn v. Wayman, 13 Eng. L. & Eq. 199.]

¹ *King v. Donnelly*, 5 Paige, 46; *Trask v. Donoghue*, 1 Aik. 370; *Putnam Free School v. Fisher*, 30 Maine, 520; *Jones v. Moffet*, 5 S. & R. 523; *Taylor v. Gal- loway*, 1 Hamm. 232; *Corlies v. Little*, 2 Green, 373; *Bruer v. Stern*, 1 Sandf. Ch. 357; see *Smith v. Shackelford*, 9 Dana, 452; *Leavans v. Butler*, 8 Porter, 380.

It is scarcely necessary to add, that if the trustee has once accepted the trust in any manner, a purchaser cannot safely dispense with his concurrence in the sale, and in the receipt for the purchase-money, although he may have attempted to disclaim, and has released his estate to his co-trustees.^(k)

It is no objection to a disclaimer in the case of copyholds, that it was made to defeat the lord's right to fines.^(l)

Powers, however, that imply a personal confidence in the donees, can only be exercised by the persons to whom they are expressly given.^(m) Such powers, therefore, if given only to the particular persons named, will not be transferred on the disclaimer of one of them to his co-trustees, but will be absolutely gone.¹

But where the expressions used by the donor import an intention that the power shall be exercised by the *acting* trustees or trustee, a power even of this description will be well exercised by those who accept the trust upon the disclaimer of the others. Thus, in a recent case, a testator stated in his will that he had purposely omitted the [*227] name of his son John; *but in the hope that his conduct might change, and that he would behave and demean himself with affection to his brothers and sisters, and with respect towards his (the testator's) executors and trustees thereinbefore named, he thereby gave unto his *said* trustees and the *survivors* of them, and the executors and administrators of the survivor, full power and authority to permit his son John to have an equal share of his estate with his brothers and sisters. One of the three executors and trustees alone proved the will and acted as trustee: *of the two others, one renounced, and the other declined proving.* The only acting trustee made a statement in a state of facts laid before the Master to the effect, that the testator's son John had conducted himself well and properly, and to his (the trustee's) entire satisfaction: and it was held by Lord Langdale, M. R., that *the acting trustee* had executed

(k) *Crewe v. Dicken*, 4 Ves. 97; 2 Sugd. V. & P. 50, 1. (m) Vide supra, 211; et post, Part III. Div. I. Ch. II. sect. 3.

(l) *Rex v. Wilson*, 10 B. & Cr. 80.

¹ Upon this subject see notes, post, 486, 473; 4 Kent, Comm. 326. In *Lancashire v. Lancashire*, 2 Phill. 657, a trustee of a will, who had formally renounced by a deed, which purported, but ineffectually, to appoint a successor, being applied to, eleven years after, to join with his original co-trustee in a deed purporting to be an exercise of a discretionary power, which could only be exercised by the two trustees of the will for the time being, refused to do so without an indemnity, but ultimately, on being indemnified, executed the deed. And it is held that he could not resume his position as trustee for such a purpose; and that, even if he could, his execution of the deed, under the circumstances stated, could be regarded only as a mere formal act, and not as an exercise of that discretion which was essential to a due execution of such a power.

the power, *which was vested in him*, and that John's representatives were therefore entitled to an equal share in the testator's estate with his other children.⁽ⁿ⁾ This decision must have proceeded upon the principle established (as we have already seen) in the case of *Sharp v. Sharp*, that by the term "survivor" the "acting trustee was intended."^(o)

Where a power is given to persons expressly by name in their *individual* character and not as trustees, it can only be exercised by the persons to whom it is given, and will therefore fail on the disclaimer of any one of them; unless that event be provided for by the terms of the power.^(p)

Where a trustee has disclaimed by *deed* no case has ever occurred in which he has been allowed to revoke the disclaimer, and assume the office of trustee. A disclaimer, moreover to be valid, must be absolute;^(q) it is conceived, therefore, that a power of revocation attached to a deed of disclaimer would invalidate it; and if there be no power to revoke the deed, the party who executes it would be estopped from claiming the estate.

In one case, however, where a trustee had disclaimed by his *answer* to a bill (which answer, however, was not put in on oath), the court appears to have permitted him to revoke the disclaimer, and accept the trust.^(r)

It is for the benefit of the *cestui que trust*, that the disclaimer of a trustee should be testified by a deed executed by him for that purpose. Therefore the expense of such a deed must doubtless be borne by the trust estate.

A trustee who has never acted, *and who has already disclaimed*, ought not to be joined as a party to a suit respecting the trust property.^(s)

But a person who has been named in an instrument, as a trustee, *and has not actually disclaimed*, will be properly made a defendant to such a suit.^(t) And if he then disclaim by his answer, and the bill is dismissed as against him, he will be entitled to his costs only *as between party and party*, and not *as between solicitor and client*. In the case of *Sherrat v. Bentley*,^(u) indeed, Sir J. Leach, M. R., gave a defendant under *such circumstances his costs, *as between solicitor and client*. But in a subsequent case, where [*228] *Sherrat v. Bentley* was cited, the same learned Judge laid it down as the general rule, that a person named trustee, who declines to

(n) *Eaton v. Smith*, 2 Beav. 236; vide post (Discretionary Powers), 481, &c.

(o) 2 B. & A. 405.

(p) 1 Sugd. Pow. 139, &c.

(q) Ante, p. 224. [*Judson v. Gibbons*, 5 Wend. 224.]

(r) *Miles v. Neaves*, 1 Cox, 159.

(s) *Richardson v. Hulbert*, 3 Anstr. 68.

(t) See *Norway v. Norway*, *ubi supra*; *Bray v. West*, 9 Sim. 429.

(u) 1 R. & M. 655.

accept the office, is in the situation of any other defendant, against whom a bill is dismissed, and therefore could only have the ordinary costs as between party and party.^(x) And this last decision was afterwards acted upon by Sir L. Shadwell, V. C., where the plaintiffs, instead of dismissing the bill at once against the trustee or his disclaimer, continued him as a party up to the hearing, and thereby occasioned him additional costs.^(y) The decision in *Sherrat v. Bentley*, must therefore be considered as overruled. However, if there be any vexation in the conduct of the plaintiff towards the defendant who has disclaimed, as where he replies to the answer, and serves a *subpœna* to rejoin, that might make a difference in the mode of taxing the costs in favor of the defendant.^(z)

^(x) *Norway v. Norway*, 2 M. & K. 278.

^(z) See *Williams v. Longfellow*, 3 Atk. 582.

^(y) *Bray v. West*, 9 Sim. 429; see 3 Dan. Ch. Pr. 77.

OF THE ESTATE OF TRUSTEES.

OF THE NATURE, EXTENT, AND LEGAL PROPERTIES,
OF THE ESTATE OF TRUSTEES; AND OF ITS DISPO-
SITION, AND LEGAL REVOLUTION.

CHAPTER I.

OF THE NATURE OR QUALITY OF THE ESTATE OF TRUS-
TEES; AND THEREIN WHERE THEY TAKE THE LEGAL
ESTATE.

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| I. WHERE THE TRUST PROPERTY
CONSISTS OF REAL ESTATE
[229]. | II. WHERE IT CONSISTS OF PER-
SONAL ESTATE [236]. |
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I.—WHERE THE TRUST PROPERTY CONSISTS OF REAL ESTATE.

AT law the trustee is regarded as the real owner of the estate vested in him, whether it be real or personal; and the nature and quality of that estate will, in general, depend upon the limitations contained in the instrument under which he takes. However, notwithstanding the apparent simplicity of this general rule, very many cases have arisen in practice, which depend solely upon whether the legal estate is or is not vested in the trustee. The question to which we are now addressing ourselves, is—not whether the person named in the instrument shall hold *beneficially*, or as a *trustee* (for we are now supposing, that the expressions are such as to preclude any beneficial claim); but the point to be considered is—whether any legal interest *at all* passes to him under the limitations.

It has been already stated, that, according to the construction put upon the Statute of Uses, the legal estate in many cases will not be executed by the statute in the *cestui que use* on a conveyance or devise to uses, but will vest in the donee to uses, as a trustee for the

cestui que use, or *cestui que trust*, as it would have done before the statute.^(a)¹

We have seen, moreover, that three direct modes of creating a trust of real estate arise from this construction—1st, Where a use is limited upon a use; 2d, Where a copyhold or leasehold estate is limited to uses; and 3d, Where the donee to uses is intrusted with [*230] duties or powers, for the *due discharge of which it is requisite that he should take the legal estate.^(b)²

(a) Ante, Part I. Div. I. Chap. II. 12, Ch. 1, s. 4. [Ramsay v. Marsh, 2 Sect. 1, page 63. McCord, 252; Norton v. Leonard, 12

(b) Ibid. Co. Litt. 272, a, Butl. note Pick. 157; McNish v. Guerard, 4 Strob. VIII.; Ibid. 290, b. n. II.; Cruis. Dig. tit. Eq. 74.]

¹ The intent of the statute, it was said in *Vandervolger v. Yates*, 3 Barb. Ch. 243, was not to defeat the beneficial interest of the *cestui que use*, but only to change his mere equitable interest into a legal estate of the same quality or duration; and therefore, if for any reason, it could not take effect otherwise, as in the case of a trust for an unincorporated society, the trustees will take the legal estate; and see *Reformed Dutch Ch. v. Veeder*, 4 Wend. 494.

² The Statute of Uses is in force in most of the United States. See 4 Kent's Comm. 299; *French v. French*, 3 N. H. 239; *Marshall v. Fish*, 16 Mass. 31; *Norton v. Leonard*, 12 Pick. 156; *Bryan v. Bradley*, 12 Conn. 474; 2 Binn. App. 619. *Ramsay v. Marsh*, 2 McCord, 252; *West v. Biscoe*, 6 H. & J. 465. In Virginia, however, though at first a part of the colonial law of the State, the statute has been repealed (in 1792), and supplied by the Revised Code (ed. 1849, p. 502); which in deeds of bargain and sale, covenants to stand seised, and of lease and release provides that the possession of the bargainor, &c., shall be transferred to the bargainee, &c., for the interest that the party has in the use, as perfectly as if the latter had been enfeoffed with livery. This is understood not to apply to any other assurances than those enumerated; (1 Lomax Dig. 188); and consequently not to a devise; *Bass v. Scott*, 2 Leigh, 359. The Acts of North Carolina, Rev. Stat. (1836) 259, and of Kentucky (Morehead & Brown, 443,) are substantially the same words. The Revised Code of Delaware (1852) 266, provides generally that lands may be transferred by deed without livery, and that the legal estate shall accompany the use and pass with it. In Ohio, the Statute of Uses is said never to have been in force. *Helferistrine v. Garrard*, 7 Hamm. (Ohio) 276, In Massachusetts, it was said in *Norton v. Leonard*, 12 Pick. 157, that owing to the absence of a Court of Chancery there, the general rule was to treat the use as executed, except where repugnant to the manifest intention of the instrument.

There is a very marked difference in this country as regards the effect of conveyances nominally operating under the Statute of Uses, from that stated in the text. In most of the States, as Maine, New Hampshire, Vermont, Massachusetts, and others (see 1 Greenleaf, Cruise Dig. 340, note), there are statutory regulations, which provide in substance that deeds executed in the prescribed manner shall be valid to pass the estate to the grantee without any other formality; and in many, livery of seisin is expressly abolished: Wisconsin, Delaware, Texas, Ohio, North Carolina, and other States. See Thornton on Conveyancing, sub. cap. In Pennsylvania, by the Act of 1715 (Dunlop, Dig. 72), all deeds and conveyances, proved or acknowledged according to the Act, are to have the same force and effect for the giving possession and seisin, &c., as deeds of feoffment with livery of seisin. In Delaware, the legal estate is to accompany the use and pass with it.

The first two of these rules originated in a strict and technical construction of the words of the statute, which is expressed to apply to cases, "where any person *is seised* of any *lands or tenements* to the use of any other person." It was decided, therefore, that a use limited upon a *preceding use*, did not come within the provisions of the statute; as the second *cestui que use* could not be said to be *seised* to the use. And it was held, that the legal estate was executed in the first *cestui que use*, who was thereupon treated in equity as a trustee for the person to whom the ultimate use or trust was limited.(c)

Thus if land were conveyed by feoffment¹ or other mode of assurance to *A.* and his heirs to the use of *B.* and his heirs to the use of *C.* and his heirs(d)—or to *B.* and his heirs to the use of *B.* and his heirs to the use of *C.* in fee or for life with remainders over(e)—or to *B.* and his heirs to the use of *B.* and his heirs, in trust to permit *C.* and *D.* to receive the rents (f);—in all these cases it has been held, that the statute executes the first use in *B.* and his heirs,

(c) *Tyrrell's Case*, Dyer, 155, a; 1 146; *Wagstaff v. Wagstaff*, id. 258; *Doe Cruis. Dig. tit. 12, Ch. 1, s. 4 to 14; 1 v. Passingham*, 6 B. & Cr. 305. Pow. Dev. 220.

(d) 2 Bl. Com. 336.

(f) *Att.-Gen. v. Scott, Forrest*, 138.

[See *Jones v. Ball*, 4 Harr. (Del.) 1.]

(e) *Whetstone v. Bury*, 2 P. Wms.

In all these cases it is believed the Statute operates a transmutation of the seisin, as in common law conveyances, to the first use. See 19 Am. Jurist, 1; *Durant v. Ritchie*, 4 Mason, 68. In Pennsylvania, it is said that a deed not recorded in pursuance of the Act, does not execute the possession to any use therein limited. (*Sprague v. Woods*, 4 W. & S. 195, *Sergeant, J.*); but that it merely operates as a bargain and sale if there were a valuable consideration, or as a covenant to stand seised, if that of blood alone. As to the doctrine of *Tyrrell's Case*, that a use upon a use is void at law, it was disapproved in *Thatcher v. Omans*, 3 Pick. 528; and it is indeed doubted by Mr. Greenleaf, in his edition of *Cruise's Digest*, vol. 1, page 340 (see also 12 Pick. 157), whether it can be regarded as a rule of construction in the United States generally. But, though in some of the States, as New York (since the Revised Statutes), Rhode Island, and Indiana, from the language of their Acts, it cannot be considered as any longer applicable, it was referred to in *Ramsay v. Marsh*, 2 McCord, 252; *Calvert's Lessee v. Eden*, 2 Harris & McHenry, 331; *Jackson v. Myers*, 3 John. R. 396; *Jackson v. Cary*, 16 Id. 304; and many other cases; as existing. (See 4 Kent's Comm. 301.) And as the statutes of the majority of those States, where the 27 Hen. VIII. is not actually in force, as it is in some, appear merely to be intended to supply the want of livery of seisin, and to make all deeds, executed, &c., with the required formalities, equivalent to feoffments, it is conceived that so deeply-rooted a rule of conveyancing as the one stated ought not to be deemed abolished in the absence of any more express provision. Indeed, to do so, would be to destroy all passive trusts created in the conveyance of land; and this can be hardly supposed to have been in the intention of the various legislatures.

¹ So of a lease and release. *Hurst's Lessee v. McNeil*, 1 Wash. C. C. R. 70; *Durant v. Ritchie*, 4 Mason, 65; *Williams v. Waters*, 14 M. & W. 166.

and that the legal estate is vested in him as a trustee for the parties, to whom the beneficial interest is given.¹ And in the case of a devise the rule of construction is the same; (g) for it is settled, on principle and authority, that the Statute of Uses applies to uses created by will. (h)

So, where lands are conveyed by covenant to stand seised, bargain and sale, or by appointment under a power, to A. and his heirs to the use of B. and his heirs; the *legal* estate will vest in A., and B. will take only a *trust* or *equitable estate*; for in each of these instances the conveyance does not operate by transmutation of the *seisin* to A., but merely passes the use to him, while the *seisin* to serve the use remains undisturbed in the original owner. (i)

The second case in which the legal estate will be vested in the trustee, is—where copyhold or leasehold estates are limited to uses. It was resolved by all the Judges in the 22d of Elizabeth, that the word “*seised*” was only applicable to freeholds; consequently the statute was held not to apply to copyholds or terms for years; of which no *seisin* can be had; and where lands of either of those tenures are limited by deed or will to one person to the use of another, the first taker will have the legal estate, which he will hold as a trustee for the other. (k)²

These two principles of construction, however narrow and technical, are now so well established, and so universally recognised and understood, that *at the present day a question can rarely [*231] arise, as to whether a trustee in any of those cases does or does not take the legal estate in land under a conveyance or devise.

(g) *Jones v. Lord Saye and Sele*, 1 Eq. Ca. Abr. 383; *Hopkins v. Hopkins*, 1 Atk. 581; *Marwood v. Darell*, Ca. Temp. Hard. 91; 1 Pow. Dev. 220.

(h) 1 Sugd. Pow. 172, 7th edit.; see Co. Litt. 271, b. Butl. note; 1 Sand. Us. 195; 2 Fonbl. Tr. Eq. 24, n. c.; 1 Pow. Dev. 209. [*Ramsay v. Marsh*, 2 McCord, 252.]

(i) *Gilb. Uses*, 67, 347, n.; 1 Cruis. Dig. tit. 12, Ch. 1, s. 9; 1 Sugd. Pow. 10, 240, 6th edit. [*See Jackson v. Fish*, 16 John. 304.]

(k) *Gilb. Ten.* 182; *Gilb. Us.* 67, n.; *Cowp. R.* 709; *Dyer*, 369, a; *Bac. Read.* 42; 1 Cruis. Dig. tit. 11, Ch. 3, s. 22, and tit. 12, Ch. 1; *Pow. Dev.* 232; 1 Sugd. Pow. 10.

¹ In a conveyance to A. and his heirs, “in trust for the use of B. (a married woman) and her heirs, with power to the said B. to dispose of the same, by an instrument in writing duly executed in the nature of a last will and testament,” the legal estate is vested at once in B. and her heirs. *Moore v. Shultz*, 13 Penn. St. R. 98. The mere addition of the words “for her sole and separate use,” in a trust for a married woman, will not by itself convert a use executed into a trust. *Williams v. Waters*, 14 M. & W. 166.

² *Rice v. Burnett*, 1 Spear’s Eq. 579; *Pyrom v. Mood*, 2 McMullan, 293. But in Virginia the Revised Code, using the word “possessed” instead of “seised” (see note to page 229), is understood to apply to both personal and real estate. *Tabb v. Baird*, 3 Call, 482; but see the remarks of Judge Lomax in 1 Lom. Dig. 196.

We shall see presently, however, that there may be considerable difficulty in defining the extent and duration of the estate thus vested in him.

The third and last rule of construction, as it is less technical, and founded more on general principles, so it may be sometimes found more difficult of application. This rule is—that the legal estate will be held to vest in the donee to uses, in order to enable him to perform the duties with which he is intrusted; and it was established at a very early period, and has since been generally acted upon.^(l)¹

Thus where there is a conveyance,^(m) or devise,⁽ⁿ⁾ of real estate to trustees and their heirs, to sell or mortgage for the payment of debts; or with the money to purchase other lands to be settled to certain uses; the legal estate will be vested in the trustees, and not in the persons to whom the use is subsequently limited.^(o) (1) And

(l) Fearn's Op. 422; 1 Cruis. Dig. tit. 12, ch. 1, s. 14, 25.

(m) Keene v. Deardon, 8 East, 248. [Chamberlain v. Thompson, 10 Conn. 244.]

(n) Bagshaw v. Spencer, 1 Ves. 142.

(o) Bagshaw v. Spencer, 1 Ves. 142; Keene v. Deardon, 8 East, 248; Fearn's Op. 422; Sanford v. Irby, 3 B. & Al. 654; 1 Cruis. Dig. tit. 12, Ch. 1, s. 21; 1 Pow. Dev. 221, n. 7; but see Popham v. Bampfild, 1 Vern. 79.

(1) In an early case, where a testator devised lands to trustees *for the payment of his debts, and after his debts paid*, then in trust for the use and benefit of A. and his heirs male; it was held, that the legal estate was executed by the Statute of Uses in A. This decision might well be consistent with the fact of the trustees taking a chattel interest for a term of years for the payment of the debts: but from the report of the case in Vernon, the court seems to have considered that they did not take *any* legal interest. However, no claim was raised by the trustees, who on the contrary seem expressly to have admitted the legal title of A. The decision therefore cannot be regarded as a binding authority on that point. Popham v. Bampfild, 1 Vern. 79.

¹This rule has been generally adopted in America. Brewster v. Striker, 2 Comst. 19; Norton v. Leonard, 12 Pick. 157; Morton v. Barrett, 22 Maine, 261; Porter v. Doly, 2 Rich. Eq. 52; McNish v. Guerard, 4 Strobh. Eq. 74; Striker v. Mott, 2 Paige, 387; Vail v. Vail, 4 Paige, 317; McCosker v. Brady, 1 Barb. Ch. 329; Ashhurst v. Given, 5 W. & S. 323; Vaux v. Parke, 7 W. & S. 19; Posey v. Cook, 1 Hill, S. C. 413; Wood v. Wood, 5 Paige, 596. In Massachusetts, however, it was said to be the general rule to treat the use as executed, except where it would be manifestly repugnant to the intention. Norton v. Leonard, 12 Pick. 157. See Leggett v. Perkins, 2 Comst. 297. But where a tract of land was conveyed to a father in fee to have and to hold in trust for his children then alive and named in the deed, and such other children as might be born of the body of his wife, "to be divided among them equally, share and share alike; and until such division shall take place, to be occupied and used entirely and specially for the maintenance and support of the aforesaid children," it was held, that the legal estate vested in the children named in the deed, subject to open and let in after-born children. McNish v. Guerard, 4 Strobh. Eq. 66.

this construction will not be affected by the existence of a power given to one of the beneficial tenants for life to control the sale of part of the estate by the trustees.(p)

And although the direction for the payment of debts or legacies out of the proceeds of the land is only in aid of the personal estate, the trustees will notwithstanding take the legal estate *instantly*, independently of the fact of its eventual applicability.(q)

However, it is otherwise where the charge of debts, &c., on the real estate is expressly *contingent* upon the insufficiency of the personalty, or on the deficiency of any particular fund, which is designated for the payment in the first instance; for in that case the trustees will not take an immediate vested legal estate.(r)

And a mere *charge* of debts or legacies on real estate will not of itself vest the legal estate in the trustees, unless they are also expressly directed to pay them, or the will contains some other indication of an intention to create a positive trust for the purpose.(s)

For instance, where a testator, as to his real and personal estate, subject to his debts, legacies and funeral expenses, devised the same unto *M.* and *W.* and their heirs, upon trust, and to and for the several uses, &c., *following, that is to say, to the intent that [*232] they (the trustees) should in the first place apply his personal estate in discharge of his debts, &c.; and as to his real estate, *subject to his debts and such charges* as he might then or thereafter think proper to make, he gave and devised the same unto *R. P.* for life with remainders over. The court held that the legal estate was executed in *R. P.* for his life. Lord Alvanley said, unless it appeared manifestly that the testator intended *that the trustees should be active in paying the debts*, the legal estate would not vest in them; and although his Lordship admitted that it would be much more convenient that the trustees should take the legal estate, yet he held, that as there was no such apparent intention on the face of the will, the court could not from an argument *ab inconvenienti* construe the testator to have said, what he in fact had not said.(t)

Again, where there is a direction for the trustees to demise the estate for a term of years, though at rack rent, the term must take effect out of their interest, and for that purpose it is essential, that

(p) *Wykham v. Wykham*, 18 Ves. 395, 413.

(q) *Murthwaite v. Jenkinson*, 2 B. & Cr. 357; 1 Jarm. Pow. Dev. 224, n.; see *Wykham v. Wykham*, 18 Ves. 395; see 413, 14.

(r) *Goodtitle v. Knott*, Coop. 43; *Hawker v. Hawker*, 3 B. & Ald. 537;

1 Jarm. Pow. Dev. 224, n.; but see *Gibson v. Lord Montfort*, 1 Ves. 485.

(s) 1 Jarm. Pow. Dev. 224, n. [*Doe v. Claridge*, 6 C. B. 659.]

(t) *Kenrick v. Lord Beauclerk*, 3 B. & P. 178; *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636, 668.

they should take the legal estate.(u) And, as we shall see presently, the legal *fee* will vest in the trustees by virtue of such a trust.(x)

However, if a mere *power* of leasing be given to the trustees, a good legal term may be created by the exercise of that power, and the legal estate will not vest in them unless the general construction in other respects require it.(y)¹

So where there is a gift of real estate to trustees, with a direction to convey,(z) or to *pay* the rents and profits to certain persons;(a) or to *receive* the rents, and *apply* them for the maintenance of an individual during his life;(b) or to *pay* an annuity *out of the rents* to a person for life;(c) or *after deducting* rates, taxes, repairs and expenses, to *pay* every year such clear sum as should remain to A. B. ;(d) in all these cases it has been held, that the seisin or possession of the legal estate is requisite for the due performance of the duty imposed on the trustees, and consequently, that the persons to whom the use is subsequently given, take only a trust or equitable estate. In many cases, however, as we shall shortly have occasion to consider, the duration of the legal estate vested in the trustees

(u) *Doe d. Tompkins v. Willan*, 2 B. & Ald. 84; *Doe d. Keen v. Walbank*, 2 B. & Ald. 554. [*Osgood v. Franklin*, 2 J. C. R. 20; *Brewster v. Striker*, 2 Comst. 19, so where the power to lease is only implied from an absolute direction to sell; *Burr v. Sim*, 1 Whart. 266.]

(x) See next chapter.

(y) *Doe d. White v. Simpson*, 5 East, 162; *Doe d. Tompkins v. Willan*, 2 B. & Ald. 84.

(z) *Garth v. Baldwin*, 2 Ves. 645; 1 Pow. Dev. 222; *Mott v. Buxton*, 7 Ves. 201; *Doe d. Shelley v. Edlin*, 4 Ad. & Ell. 582.

(a) *Symson v. Turner*, 1 Eq. Ca. Abr. 383, n.; *Garth v. Baldwin*, 2 Ves. 645; *Robinson v. Grey*, 9 East, 1; *Doe d.*

Leicester v. Biggs, 2 Taunt. 109; Bro. Abr. tit. Feoffmental Use, 52. [*Ramsay v. Marsh*, 2 McCord, 252; *Wood v. Wood*, 5 Paige, 596; *Vail v. Vail*, 4 Id. 317; 2 Comst. 33; *Barker v. Greenwood*, 4 M. & W. 749.]

(b) *Sylvester v. Wilson*, 2 T. R. 444; See *Doe d. Hallen v. Ironmonger*, 3 East, 533.

(c) *Chapman v. Blisset*, Forr. 145; S. C., Ca. Temp. Talbot, 145; *Jones v. Lord Saye and Sele*, 1 Eq. Ca. Abr. 383; *Naylor v. Arnitt*, 1 R. & M. 501; *Curtis v. Price*, 12 Ves. 89; *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636, 668.

(d) *Shepland v. Smith*, 1 Bro. C. C. 74; see *Brown v. Ramsden*, 3 Moore, 612; *Tierny d. Gibbs v. Moody*, 3 Bing. 3.

¹ In *Brewster v. Striker*, 2 Comstock, 19, however, a testator had devised his estate to his three grandchildren and their heirs for ever. He then directed it to be "disposed of" by his executors and the survivors of them, &c., thus, "The said real estate shall not at any time hereafter be sold or alienated, but my said executors, or the survivors, &c., shall from time to time lease or rent the same on such terms as they shall deem most advantageous to my said heirs, and the rents, issues and profits of the same shall be annually paid to my said heirs in equal proportions, and if either of my children should choose to occupy any part of my said estate, he, she, or they shall have a preference over any other applicant, on paying a reasonable rent for the same." The Court of Appeals (Judge Johnson dissenting) held that the executors took the legal estate by implication. But see *Doe v. Cafe*, stated post, 242.

will be limited to the continuance of the duties, which they are required to perform.(e)

Where the rents, &c., are directed to be paid by the trustees *to a feme covert for her separate use*, that will be an additional reason for inducing the court to hold, that the trustees will take the legal estate.(f)

[*233] *The cases, however, have established a very material distinction, where the direction to the trustees is, not *to pay over* the rents and profits to another person, but *to permit and suffer him* to receive them. In the former case the trustees must necessarily receive the rents, and they will take the legal estate for that purpose; but in the latter case no such receipt by the trustees is requisite; and the legal estate will be vested by the statute in the person who is to receive the rents.(g)¹

In the early case of *Burchett v. Durdand*,(h) this distinction was denied; but the decision in that case was afterwards expressly overruled, and the rule of construction as stated above has ever since been recognised and acted upon as law, although on one occasion, Sir James Mansfield, while yielding to the weight and current of the authorities, strongly questioned the soundness and propriety of the distinction.(i)

Where *both* expressions are used, and the direction to the trustees is in the alternative "*to pay unto*" or "*to permit and suffer*" the person to receive the rents, it seems that the construction will be governed by the expression which is posterior in the local order of the sentence. Thus where the direction, to "*permit and suffer*" A. to receive the rents, comes *after* the trust "*to pay to him*," it has been held, that the last expression controlled the effect of the previous direction "*to pay*," and carried the legal estate to A., to the ex-

(e) See next chapter.

(f) *Nevill v. Saunders*, 1 Vern. 415; *South v. Alleyne*, 5 Mod. 63, 101; *Lord Saye and Sele v. Jones*, 1 Eq. Ca. Abr. 383; S. C. 3 Bro. P. C. 113; *Bush v. Allen*, 5 Mod. 63; *Robinson v. Grey*, 9 East, 1; *Hawkins v. Luscombe*, 2 Sw. 375, 91. [*McNish v. Guerard*, 4 Strob. Eq. 75; *Barr v. Scott*, 2 Leigh, 256; *Rogers v. Ludlow*, 3 Sandf. Ch. 104. But a conveyance by a woman by way of marriage settlement, to a trustee after marriage, *in trust* for herself for life, *for her own sole and separate use*, &c., vests

the legal estate in the wife. *Williams v. Waters*, 14 M. & W. 166.]

(g) *Broughton v. Langley*, 2 Ld. Raym. 873; S. C. Salk. 679; *Doe d. Leicester v. Biggs*, 2 Taunt. 109; *Right d. Phillips v. Smith*, 12 East, 455; *Gregory v. Henderson*, 4 Taunt. 772. [*See Parks v. Parks*, 9 Paige, 107; *Ramsay v. Marsh*, 2 McCord, 252; *Barker v. Greenwood*, 4 M. & W. 429.

(h) 2 Ventr. 312.

(i) In *Doe d. Leicester v. Biggs*, 2 Taunt. 109.

¹ A trust to have and hold the estate to the use and benefit, and to *apply* the rents, issues, and profits, to and for each of the children of A., is executed in the children, notwithstanding the word "*apply*." *Laurens v. Jenney*, 1 Spears, 356.

clusion of the trustees.(k) It has been observed by Mr. Jarman, that the repugnancy in such a case might be avoided by construing the devise to give the trustees an option.(l)

However, notwithstanding a direction in a will for the trustees to permit and suffer another person to receive the rents, yet if any additional duty be imposed upon the trustees, either expressly or by implication, which requires that they should have the legal estate, this distinction will not be suffered to prevail; but the legal estate will vest in the trustees, to enable them to perform the trust.(m)¹

Therefore, where a testator devised his freehold and copyhold estate to his executors thereafter named and their heirs, executors, and administrators, for and during the life of his son *to the intent to support the contingent remainders* after limited, but in trust nevertheless *to permit and suffer* the son to receive the rents and profits for his own use during his natural life; and from and after his son's decease, the testator devised the same estate to his son's first and other sons in tail; Lord Eldon held, that the son did not take the legal estate, which was necessarily vested in the trustees for the purpose of preserving the contingent remainders.(n)

And so where a controlling power is given to the trustees; as where *there was a trust *to permit and suffer* a woman to receive the rents, but a direction was added, that her receipts, *with the approbation of one of the trustees*, should be good; the court thought, that the legal estate was vested in the trustees, it being clearly intended, that they should exercise a control.(o) [*234]

Upon the same principle, where the trust is for the trustees *to permit and suffer a feme coverte* to receive the rents *for her separate use*, the legal estate will be held to vest in the trustees, in order to effectuate the testator's intention to give the *feme coverte* the exclusive beneficial interest. For, as was said by Lord Kenyon, if the

(k) Doe d. Leicester v. Biggs, 2 Taunt. 2 Denio, 9; Barker v. Greenwood, 4 M. 109; 1 Jarm. Pow. Dev. 222, n.; and & W. 431.]

see Pybus v. Smith, 3 Bro. C. C. 340.

(l) 1 Jarm. Pow. Dev. 222, n.

(m) Fearne's Op. 422; 1 Cruis. Dig. tit. 12, ch. 1, s. 25; 1 Jarm. Pow. Dev. 222, n.; Keene v. Deardon, 8 East, 248.

(n) Biscoe v. Perkins, 1 V. & B. 485, 9; [See Vanderheyden v. Crandall,

(o) Gregory v. Henderson, 4 Taunt.

772; [cited with approbation in Barker v. Greenwood, 4 M. & W. 430, and see New Parish v. Odiorne, 1 N. H. 232;] but see Broughton v. Langley, 2 Ld.

Raym. 873; Salk. 679; 1 Pow. Dev. 216, 7.

¹ In Barker v. Greenwood, 4 M. & W. 421, where there was a devise in trust to permit and suffer the testator's widow to receive the *net* rents and profits, it was held that the legal estate must remain in the trustees; inasmuch as "the trustees were to receive the *gross* rents, and after paying out of them the land tax and any other charges on the estate, to hand over the net rents to the tenant for life." See White v. Parker, 1 Bingh. N. C. 673, where the same effect was given to the word "clear."

legal estate vested in the married woman, the husband would be entitled to receive the profits, and so defeat the object of the deviser.^(p)¹

So where the devise was to trustees and their heirs, in trust out of the rents to *pay certain life annuities*, and *subject to those annuities*, to *permit and suffer* certain persons to receive and take the rents and profits during their lives, the legal estate was held to vest in the trustees and not in the beneficial tenant for life. In that case there was also a power for the trustees, with the consent of the beneficial tenant for life, and after his death of their own discretion, to sell any part of the estate for the purpose of raising money for the advancement of the children.^(q)

It has been laid down, that in all these cases the question, whether the use with the legal estate is executed in the trustees or not, must depend upon the intention of the deviser, as collected from the will.^(r) This *dictum*, however, as has been explained by Mr. Jarman, means only, that the intention of the testator may *control* the operation of the Statute of Uses by fixing the legal estate in the first devisee; for it clearly will not be suffered to *extend* that operation in contravention of the established rules of law, so as to execute a use limited upon a previous use, or upon a devise of a copyhold or leasehold estate.^(s)

In the cases just considered, the intention, that the trustees should take the legal estate, was collected and acted upon by the court from the circumstances and nature of the duties imposed upon them by the testator. Any particular expressions attached by a testator to a devise to trustees, will also be taken into consideration as evidence, from which such an intention may be collected.

Thus, where a testator gave to his wife 200*l.* per annum in addition to her jointure, and, his just debts being previously paid, he gave unto his younger children 6000*l.* each to be paid when they severally reached twenty-one, and he appointed three persons by name

(p) *Harton v. Harton*, 7 T. R. 652 75; *Barr v. Scott*, 2 Leigh, 256; *Rogers v. Ludlow*, 3 Sandf. Ch. 104.]

[see the remarks on this case in 14 M. & W. 172]; and see *Hawkins v. Luscombe*, 2 Sw. 391; *Bush v. Allen*, 5

Mod. 63; *Neville v. Saunders*, 1 Vern. 415. [McNish v. Guerard, 4 Strob. Eq.

(q) *Naylor v. Arnitt*, 1 R. & M. 501.
(r) Per Lord Kenyon in *Harton v. Harton*, 7 T. R. 653, 4; see 1 Cruis. Dig. tit. 12, ch. 1, s. 25.

(s) 1 Jarm. Pow. Dev. 217, n. 3.

¹ So, when in a marriage settlement, the real and personal estate of the intended wife was vested in a trustee, till marriage, and then "in trust to permit" the husband and wife "to have, use and possess" the same during their joint lives, &c.; and it was provided that the real and personal estate might be altered, sold, and exchanged, with the joint consent in writing of the trustee and *cestui que trust*, provided the proceeds were vested in other property, to be held subject to the same trusts. *Rice v. Burnett*, 1 Spear's Eq. 580. See, as to Marriage Settlements generally, *Magniac v. Thompson*, 1 Baldwin, 344.

as trustees of inheritance for the execution thereof; on a case sent to the Court of King's Bench by the Lord Chancellor (Lord Eldon), the majority of the judges, in consideration of those expressions, certified that the trustees took the legal estate in fee. A previous certificate by the Court of Common Pleas,* that the trustees took no estate, was not considered satisfactory by the Lord [235] Chancellor, who in consequence sent a second case for the opinion of the court.(t)

Where several different trusts are created indiscriminately by the same will, some of which require the legal estate to be vested in the trustees, while the same necessity does not exist as regards the others, the legal estate will vest and remain in the trustees throughout; and will not be divested and re-vested again from time to time, as the different trusts take effect. And this will be the case, although the trusts, which requires the existence of the legal estate in the trustees (as for instance trusts for the separate use of *feme covertes*), are not limited to arise until the determination of previous interests, which would otherwise clearly carry with them the legal estate.(u)

The Statute of Uses in terms expressly applies to persons seised to the *use, trust, or confidence* of any other person. Therefore, if lands are conveyed, or devised, to *A.* and his heirs *in trust* for *B.* and his heirs; or to the *intent and purpose*, that *B.* should receive the rents and profits for life; in either case the use or legal estate will be vested in *B.*, in the same manner as if the estate had been limited to his *use*. The words "use" and "trust," said Lord Ellenborough, are both equally within the operation of the statute.(x)¹

And where a testator in the course of a series of limitations, sometimes uses the word "use," and sometimes "trust;" that will not prevent the statute from executing the legal estate in the latter case, if it appear, that the two expressions were used indifferently by the testator.(y)

So if a gift were made to trustees and their heirs *for the benefit* of *B.*, or any other expression of similar import were used, there can be little doubt but that the legal estate would be executed by the sta-

(t) *Trent v. Hanning*, 10 Ves. 495; *Right v. Smith*, 12 East, 454; *Hummerston's case*, Dyer, 166 a, n. (9); Bacon, S. C. 1 B. & P. N. C. 116; 7 East, 95.

(u) *Hawkins v. Luscombe*, 2 Sw. Uses, 47; 1 Cruis. Dig. tit. 11, ch. 3, s. 375, 391. [See post, 242, note.] 33; Co. Litt. 290, b, Butl. note. [See

(x) *Doe d. Terry v. Collier*, 11 East, *Jackson v. Fish*, 10 Johns. R. 455.]

377; *Eure v. Howard*, Prec. Ch. 338, (y) *Doe d. Terry v. Collier*, 11 East, 345; *Broughton v. Langley*, 2 Salk. 679; 377. [See *Parks v. Park*, 9 Paige, 107.]

¹ A devise of real estate to trustees, to hold the same to them and their heirs in trust, to and for the use and behoof of *A.*, &c., vests the legal estate in the *cestui que use*. *Ramsay v. Marsh*, 2 McCord, 252. See *Moore v. Shultz*, 13 Penn. St. R. 98.

tute in B., unless the general intention of the donor required, that it should be vested in the trustees.(z)

It is almost needless to add, that, where the conveyance or devise is to and *to the use of* the trustees, they will take the legal estate by virtue of the limitation, without the aid of any reasoning derived from the nature of the trust.(a)

It not unfrequently happens, that a testator merely gives his trustees a *power* of disposing of the estate, without making an express devise to them. In this case it is clear, that the trustees will not take the legal estate, although the exercise of the powers may be imperative; but the legal estate will descend to and remain vested in the heir of the testator, until divested by the execution of the power. For instance, where a testator devises that his executors or other persons shall sell, or let, or mortgage, or otherwise dispose of his estate [*236] for payment of his debts, &c.; or directs, *that his executors shall raise his debts out of his estate; it has been decided, that no estate vests in the devisees, but simply a power of disposition.(b)¹

It may be observed here, that the usual estate given to trustees in settlements to preserve contingent remainders is a vested estate.(c)

(z) See Fearn's Op. 422; 1 Cruis. Dig. tit. 12, ch. 1, s. 25.

(a) Whetstone v. St. Bury, 2 P. Wms. 146; S. C. Prec. Ch. 591; Symson v. Turner, 1 Eq. Ca. Abr. 383, pl. 1; Hopkins v. Hopkins, 1 Atk. 581; Hawkins v. Luscombe, 3 Sw. 376, 388; 1 Jarm. Pow. Dev. 224 n.; Keene v. Deardon, 8 East, 248.

(b) Reeve v. Att.-Gen. 2 Atk. 223;

Fowler v. Jones, 1 Cha. Ca. 262; Yates v. Compton, 2 P. Wms. 308; Bateman v. Bateman, 1 Atk. 421; Lancaster v. Thornton, 2 Burr. 1027; Hilton v. Kenworthy, 3 East, 553; Co. Litt. 113 & 290, b, n. IX.; 1 Pow. Dev. 233; 2 Sugd. Pow. 174, 6th edit.

(c) Co. Litt. 265, a, n. 2; 337, b, n. 2. [Laurens v. Jenney, 1 Spears, 365.]

¹ It is the general rule in the United States, that a devise or direction that executors shall sell or charge for payment of debts, gives no estate in the land, but simply a power. Peter v. Beverly, 1 How. U. S. 134; 16 Pet. 532; Burr v. Sim, 1 Whart. 266; Guyer v. Maynard, 6 Gill & Johns. 420; Shellin v. Homer, 5 Mete. 462; Bradshaw v. Ellis, 2 Dev. & Batt. Eq. 20; Hope v. Johnson; 2 Yerg. 123; Jameson v. Smith, 4 Bibb, 349; 4 Kent's Comm. 320. See Dabney v. Manning, 3 Ohio R. 221. But in Pennsylvania, by the act of 1834, § 13 (Dunlop, page 518), where executors have merely a naked authority to sell real estate, they are nevertheless to take and hold the same interest therein, and have the same powers and authorities over such estate, for all purposes of sale and conveyance, and also of remedy by entry, action, or otherwise, as if the same had been devised to them to be sold, except where otherwise directed; and see, as to New York, 4 Kent's Com. 321. In Fay v. Fay, 1 Cush. 94, trustees by will were authorized and empowered "to grant and sell the whole or any part of the testator's estate, real or personal, with full power to execute deed or deeds effectual in law to pass a complete title," and it was held that they had not the legal estate. See post, 471, &c.

II.—WHERE THE TRUST PROPERTY CONSISTS OF PERSONAL ESTATE.

The refinements and complication attending conveyances or devises to uses, are confined to assurances of real estate; and the more simple mode of disposition of chattels personal seldom admits of any question, as to the nature or quality of the estate given to the trustees of such property.

As a general rule, the legal interest in a chattel will pass by an assignment or bequest to the donee in trust.¹

There is an exception to this rule in the case of *choses in action*, which are not assignable *at law*; although it has been long settled, that an assignment of an interest of that description for *valuable consideration* will be recognised and enforced *in equity*.⁽¹⁾ It is there regarded as in the nature of a declaration of trust on the part of the assignor, and an agreement by him to permit the assignee to make use of his name at law in order to recover the possession.^(d)

Therefore if a bond, or other debt, or policy of insurance, the benefit of a decree or judgment, or any other *chose in action*, be assigned or bequeathed to a person in trust, the donee in trust will take only an equitable interest, and the legal title will remain in the assignor, or will devolve on his personal representative upon his death, as a trustee for the person beneficially interested.^(e)

Where the property may be made the subject of a legal transfer,—as is the case with bills, or promissory notes, shares, or stock in the public or other funds,—an assignment, when completed and perfected in the manner prescribed by the law, will of course operate to vest the legal ownership in the trustee. But where the gift is by will, the assent of the executor to the bequest will be necessary to complete the legal title of the trustee.^(f)

(d) Co. Litt. 232 (b), n. 1; 1 Mad. Exors. 547. [See the notes to Ryall Ch. Pr. 686, 3d edit. v. Rowles 2 Lead. Cas. Eq. p. ii, 201.]

(e) 1 Mad. Ch. Pr. 686; 1 Wms. (f) 1 Wms. Exors. 526; 2 id. 843.

(1) The effect of a *voluntary* disposition or attempted disposition of a *chose in action* in trust, and how far such a trust can be enforced, has been considered in a previous chapter.

¹ In the case of personal estate, it not being within the Statute of Uses, the legal title remains in the trustee till the purposes of the trust are accomplished. *Rice v. Burnett*, 1 Spear's Eq. 590; *Schley v. Jones*, 6 Georgia, 530. The equitable interest of a husband in personalty under a marriage settlement, therefore, cannot be taken in execution by his creditors. *Rice v. Burnett* ut suprà, *Iow v. Hodges*, 1 Spear's Eq. 593. But where all the objects of the trust are at an end, the absolute estate is in the person entitled to the last use. Possession in such case is sufficient, without a formal conveyance. *Rice v. Burnett*, 1 Spear's Eq. 587; *Dunkin Ch.* See *Bringhurst v. Cuthbert*, 6 Binn. 398.

It has been already seen that, where the same person is appointed executor of a will as well as trustee, the probate of the will by him will be an acceptance of the trust. (g) It sometimes becomes material to ascertain the period at which the party has assumed the latter character, and divested himself of the former; for the powers and liabilities of trustees and executors with regard to the administration of the estate are not in *all respects identical; (h) and [*237] questions not unfrequently arise on acts of parliament, the provisions of which apply to persons filling the one situation, but do not apply to those in the other. (i)

It is frequently difficult to ascertain the precise time when the possession in the character of executor or administrator ceases, and that in the character of trustee commences. Every case must depend upon its own circumstances. (k)¹ In one case, a testator gave all his real and personal estate to two persons (whom he afterwards appointed executors) in trust to sell for the benefit of his children; and he gave his wife an annuity of 250*l.* for her life, and all the residue of his estate to his children absolutely; the testator died in the year 1816. The executors had long since passed their accounts at the stamp-office, and paid the testator's debts and legacies, and they had purchased in their joint names a sum of stock sufficient to answer the wife's annuity, the dividends on which were duly paid to her down

[Story's Eq. § 591; but in Pennsylvania it is different; *Holloback v. Vanbuskirk*, 4 Dall. 147.]

(g) Ante, p. [214 and notes]; 2 Wms. Exors. 1105; *Mucklow v. Fuller*, Jac. 198; *Booth v. Booth*, 1 Beav. 125.

(h) See *Right v. Cathell*, 5 East, 491; *Denne v. Judge*, 11 East, 288; 2 Wms.

Exors. 620. [*Myers v. Davies*, 10 B. Monroe, 396.]

(i) See *Ex parte Dover*, 5 Sim. 500; *Philippo v. Munnings*, 2 M. & Cr. 309; *Denne v. Judge*, 11 East, 288.

(k) See 1 Wms. Exors. 405, 6; *Byrchall v. Bradford*, 6 Mad. 235. [*De Peyster v. Clendinning*, 8 Paige, 310; *Pyrum v. Mood*, 2 McMull. 288.]

¹ A will contained the following clause: "For the purpose of having my estate properly settled and administered during the minority of my children, I do appoint my dear wife A. my sole executrix, and I do bequeath and devise the same, both real and personal, to her, in trust, with full powers to sell, either at public or private sale, all or any part thereof, and the proceeds to invest and resell at her discretion, for the purpose of paying my debts and legacies, or for a more advantageous investment, and good and sufficient deeds, &c., to make therefor; it being my intention and will that my estate shall be kept together, and held in common for her benefit and that of my children, until they shall come of age respectively, at which time, and as soon after as any one of them comes of age, he or she is to receive their proportion, it being always understood that my wife is to receive an equal proportion of my estate, she and they having share and share alike." It was held that this was a devise in trust to the wife of all the estate, in her individually, and not as executrix, and that her refusal to qualify as executrix did not affect the trust. *Hitchcock v. Bank of U. S.*, 7 Alab. 386.

to January, 1834. The residue had been divided amongst the testator's children. In June, 1834, one of the trustees and executors died; and the other having gone abroad, the widow and children presented a petition, under Sir Edward Sugden's Act (1 Will. IV. c. 60), for the appointment of a new trustee; on the ground that the original executors and trustees had relinquished all control over the stock as executors, and assumed the character of trustees, so as to bring themselves within the operation of the act. The Vice-Chancellor (Sir L. Shadwell), in making the usual reference to the Master, directed an inquiry as to the circumstances under which the stock was originally invested and then remained in the names of the two executors; and upon the Master's report, finding that the surviving executor *was a trustee* within the meaning of the act, his Honor subsequently made the order as prayed by the petition.^(l)

In another case a testator amongst other bequests gave the sum of 400*l.* to Buscall (whom he afterwards appointed executor) in trust to invest, and pay the dividends to a party for life, and finally to pay over the principal as directed by the will. The testator died in 1787. The executor paid all the testator's debts and other legacies, *and set apart the sum of 400*l.* to answer the legacy in trust*; and he died in the year 1799, having appointed the defendant Munnings his executor. The bill was filed in the year 1834 by the parties beneficially entitled to the 400*l.* legacy against Munnings for the payment of that sum. The defendant by his answer admitted, that the sum of 400*l.* *had been set apart*, and invested by Buscall on the trusts of the will, and also that the same fund had been invested, and the income received by himself; but he insisted, that the suit, being to recover *a legacy*, was barred by the 40th section of the recent Statute of Limitations (3 & 4 Will. IV. c. 27). The Lord Chancellor (Lord Cottenham), in deciding in favor of the plaintiffs, observed, "The whole fallacy of the defendant's argument consists in treating this suit as a suit for a legacy. Now the fund ceased to bear the character of a legacy, as soon *as it assumed the character of a trust fund. Suppose the fund had been given by the will to any-^[*238] body else, as a trustee, and not to the executor, it would then be clearly the case of a breach of trust. *What he would have done by paying it to a trustee, he has done by severing it from the testator's property, and appropriating it to the particular purpose pointed out by the will.* It is impossible to consider that the executor, so acting, is acting as an executor: he has all this while been acting as trustee."^(m)¹

(l) Ex parte Dover, 5 Sim. 500.

(m) Phillippo v. Munnings, 2 M. & Cr. 309, 315.

¹ Where one is both executor and trustee, the presumption after twenty years is

This question can only arise respecting *personal* estate; for when *real* estate is given to persons in trust by a will, and the same persons are also appointed executors, they will take the land as *devisees* from the first, although the trust is to sell; and will have nothing to do with the real estate as *executors*.⁽ⁿ⁾

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*CHAPTER II.

OF THE EXTENT AND DURATION OF THE ESTATE OF TRUSTEES.

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|---|--|
| I. WHERE THEIR ESTATE IS
CREATED BY WILL [239]. | ANCE, OR SURRENDER, WILL
BE PRESUMED [253]. |
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CREATED BY DEED [248]. | V. OF THE APPLICATION OF THE
STATUTES OF LIMITATION |
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I.—WHERE THEIR ESTATE IS CREATED BY WILL.

WITH regard to the extent and duration of the estate vested by will in a trustee, previously to the recent Will Act (1 Vict. c. 26), the general rule was, that the trustee took exactly that quantity of interest which the purposes of the trust required; and the question was,—not whether the testator had used words of limitation, or expressions adequate to carry an estate of inheritance; but whether the exigencies of the trust demanded a fee, or could be satisfied by any and what less estate.^(a)¹ Therefore the estate devised to trust-

⁽ⁿ⁾ Denne v. Judge, 11 East, 288. case cited; Co. Litt. 290, b, Butl. note
^(a) 1 Jarm. Pow. Dev. 225, n. and VIII.

that the estate is fully administered, and that the funds are held in the capacity of trustee. Jennings v. Davis, 5 Dana, 127. So, after the actual settlement of the estate. State v. Hearst, 12 Mis. 365. In Graham v. Graham, 17 Jurist, 569, a testator, by his will, devised and bequeathed the residue of his real and personal estate to his wife J. G. and another person upon trust to sell and convert, as therein mentioned, and appointed J. G. sole executrix. By a codicil he revoked the appointment of his wife as executrix, "as the duties were too arduous for a lady to perform," and appointed three other persons "executors in trust" of his will. It was held by the Master of the Rolls that the testator did not revoke the appointment of his wife as trustee.

As to when an executor may renounce as such, without affecting his character as trustee, see ante, note to p. 190.

¹ See Payne v. Sayle, 2 Dev. & Batt. Eq. 460; Norton v. Norton, 2 Sandf. Sup. Ct. 297; Nicoll v. Walworth, 4 Denio, 385; Hawley v. James, 5 Paige, 318;

tees would be either restricted, or extended, as the exigencies of the trust required. And

1st. The estate of the trustees would be confined and restricted to such a partial or less extensive interest, as would be sufficient to carry out the purposes of the trust.

Thus, although the devise were expressly to the trustees *and their heirs*, it has frequently been decided, that if the duties imposed on the trustees required only an estate *pur autre vie* to be vested in them, their legal interest would be cut down to that extent, notwithstanding the express limitation to them in fee.^(b)¹

In the case of *Lord Saye and Sele v. Jones*,^(c) lands were devised to trustees *and their heirs* in trust to pay several legacies and annui-

(b) *Lord Saye and Sele v. Jones*, 1 Eq. Ca. Abr. 383; S. C. 3 Bro. P. C. 113; *Doe d. Player v. Nicholls*, 1 B. & Cr. 342; *Chapman v. Blissett*, Forr. 145; *Shapland v. Smith*, 1 Bro. C. C. 75; *Doe v. Hicks*, 7 T. R. 433; *Nash v. Coates*, 3 B. & Ald. 839; *Warter v. Hutchinson*, 5 Moore, 153, and 1 B. & Cr. 721; 1 Jarm. Pow. Dev. 225, n.; Co. Litt. 290, b, Butl. note; *Heardson v. Williamson*, 1 Keen, 33.

(c) *Lord Saye and Sele v. Jones*, 1 Eq. Ca. Abr. 383; S. C. 3 Bro. P. C. 113. [This case was commented on and questioned in *Ex parte Gadsden*, 3 Richardson's Rep. App. 468] And see *Doe d. Allen v. Ironmonger*, 3 East, 533; *Robinson v. Grey*, 9 East, 1, to the same effect. [*Doe v. Claridge*, 6 C. B. 641.]

Combry v. McMichael, 19 Alab. 751; Mr. Greenleaf's note to *Cruis*. Dig. vol. 1, page 344. Under a statute making the use of the word "heirs," unnecessary to carry a fee in a will, a devise to A., in trust for B. and her children, gives a fee to the trustee, and on the death of the *cestui que trusts* named, the trust does not result, but descends to their heirs. *Gill v. Logan*, 11 B. Monroe, 233.

¹ In *Watson v. Pearson*, 2 Exch. 593, the rule is laid down by Baron Parke, in these words: "It is certainly true that where the purposes of the trust on which an estate is devised to trustees are such as not to require a fee in them, as for instance where the trust is to pay annuities, or to pay over rents and profits to a party for life, there, if, subject to the specified trusts, the estate is given over, the parties taking under such devise over have been held to take legal estates; the estate given to the trustees (even when given with words of inheritance) having been in such cases taken to have been meant to be co-extensive only with the trust to be performed. This rule of construction has probably created much more difficulty than it has obviated. It is, however, too well settled to be now called in question." (See also *Blagrove v. Blagrove*, 4 Exch. 569.) He proceeded, however, to say, "The general rule is that, that where an estate is given to trustees, all the trusts which they are to perform must, *prima facie* at least, be performed by them by virtue and in respect of the estate vested in them." It was accordingly decided, that where a fee was expressly given to trustees, and also a general power of sale, that the legal estate in fee remained in them, though the other trusts did not require so extensive an estate. So, in *Blagrove v. Blagrove*, 4 Exch. 550, a similar conclusion was arrived at from the existence of trusts to raise annuities, and to mortgage for debts, &c.; though in addition to the circumstances of *Watson v. Pearson*, the ulterior limitations were, in terms, legal estates. See *Brown v. Whiteway*; 8 Hare, 156.

ties, and then to pay the surplus rents into the proper hands of a *feme covert*; and after her death to stand seised to the use of the heirs of her body. It was decreed that the trustees took the legal estate during the life of the married woman; but that after her death it vested in the heirs of her body: and the decree was affirmed by the House of Lords after consulting with the Judges.

[*240] *So, in *Chapman v. Blissett*,^(d) a testator devised all his real and personal estate to three trustees, *their heirs and assigns*, in trust to pay his son an annuity quarterly; and he gave the residue of the rents, to be applied during his son's life for the education of his son's children; and he then gave one moiety of the estate to his son's children, and the other moiety to the children of his grandson. Lord Talbot said, the whole depended on the testator's intent as to the continuance of the estate devised to the trustees; whether he intended the whole legal estate to continue in them, or whether only for a particular time or purpose. Where particular things are to be done by the trustees, it was necessary that the estate should remain in them; *so long at least as those particular purposes required it.*^(d)

In like manner, where there were limitations in a *will* to trustees and *their heirs* generally to preserve contingent remainders; and the estate, so given to the trustees, was not in terms confined to the life of the person taking the immediately preceding freehold estate; yet it would be so confined in construction, if the will disclosed no other intention or purpose, inconsistent with that construction.^(e) However, as we shall presently see, great caution must be used in applying this rule of construction to a limitation contained in a *deed*.^(f)

So, where there is a devise to trustees *and their heirs until* A. attains twenty-one or any other age, and then in trust for A.; it has been long settled, that the trustees will take only a *chattel interest* until A. reaches the specified age, notwithstanding the limitation of the fee to them.^(g) And the estate of the trustees has been so restricted although there have been express trusts for the payment of annuities and debts and legacies;^(h) or even a direction to them

^(d) *Chapman v. Blissett*, Forr. 145; *Doe d. Wheedon v. Lea*, 3 T. R. 41; S. C. Cas. Temp. Talb. 145, 150. *Stanley v. Stanley*, 16 Ves. 491; *Warter*

^(e) *Doe v. Hicks*, 7 T. R. 433; *Nash v. Coates*, 3 B. & Ald. 839. The counter decision in *Boteler v. Allington*, 1 Bro. C. C. 72, cannot now be considered of any authority; see Lord Kenyon's remarks in *Doe v. Hicks*, 7 T. R. 437. *v. Hutchinson*, 1 B. & Cr. 721; *Doe d. Badder v. Harris*, 2 Dowl. & Ry. 76; *Doe d. Pratt v. Timins*, 1 B. & Ald. 530; *Doe d. Brune v. Martin*, 8 B. & Cr. 497. [*Tucker v. Johnston*, 16 Sim. 341.]

^(f) Vide post, 248, &c.

^(g) *Goodtitle v. Whitby*, 1 Burr. 228; *Warter v. Hutchinson*, 1 B. & Cr. 721.

to convey to the *cestui que trust* on his attaining the required age.(i) The same construction, restricting the estate of the trustees to a chattel interest in such cases, will be adopted *à fortiori*, where there is no express limitation to them in fee.(k)

Upon the same principle, a devise to trustees *in fee*, in trust for a particular purpose only,—as to raise a sum of money,—has been restricted to a *base fee*, determinable upon the satisfaction of the trust by the raising of the sum.(l)

In all these cases the construction is governed mainly by the intention of the testator as gathered from the general scope of the will. Therefore, where estates in remainder were given to trustees subsequently to a limitation to them in fee, the court would consider that to be sufficient evidence of the testator's intention that the trustees should not take the *entire fee, under the first limitation,(m) for otherwise the subsequent limitations would [*241] be merely nugatory. Indeed, a term of years, limited to the trustees subsequently to a limitation to them and their heirs, has been held a sufficient reason to cut down the estate of the trustees into one for life, even where the limitation was by deed.(n)

It will be doubtless observed, that in all the cases which have been hitherto cited, the devise has been only to the trustees and their heirs, without expressly limiting *the use* to them; consequently, they took the legal estate only by construction, in order to enable them to perform the trust, according to the principle which has been considered in the preceding chapter.

However, it seems that where the estate is limited expressly to the use of the trustees and their heirs, their interest might notwithstanding be restricted to an estate *pur autre vie*, if the trust required that they should take only an estate so limited;—as where the trust was to preserve contingent remainders, or for any other purpose confined to the duration of a particular life.(o) And it has been decided, that this construction may prevail even in the case of a deed.(p) But in these cases the court would require a very distinct manifestation of intent, in order to control the effect of the legal limitation. And it is observable, that in the several instances where a limitation of that nature has been so restricted, the subsequent

(i) *Stanley v. Stanley*, 16 Ves. 491.

(k) *Boraston's case*, 3 Co. 19; *Doe d. Player v. Nicholls*, 1 B. & Cr. 336.

(l) *Glover v. Monckton*, 3 Bingh. 13.

(m) *Doe v. Hicks*, 7 T. R. 437; *Nash v. Coates*, 3 B. & Ald. 839; and see *Warter v. Hutchinson*, 5 Moore, 153; S. C. 1 B. & Cr. 721; this circumstance

also occurred in *Hawkins v. Luscombe*, 2 Sw. 375. [See *Doe v. Claridge*, 6 C. 660.]

(n) *Curtis v. Price*, 12 Ves. 89, 101.

(o) *Hawkins v. Luscombe*, 2 Swanst. 375, 391.

(p) *Curtis v. Price*, 12 Ves. 89; and see *Venables v. Morris*, 7 T. R. 342.

limitations were expressly *to the use* of the persons taking the beneficial interest.(q)¹

Where the limitation is to the trustees *in fee*,—whether they take the legal estate by construction, from the nature of the trusts, or *à fortiori* by the express limitation of the *use* to them(r)—their estate would not be cut down into one *pur autre vie*, or any other partial interest, unless the smaller estate were clearly sufficient to carry out the purposes of the trust.

Thus in *Harton v. Harton* there was a devise to trustees *and their heirs*, in trust to permit and suffer a *feme covert* to receive the rents for her separate use during her life, and after her decease then *to the use* of her first and other sons in tail, with remainder *to the use* of her daughters in tail; with similar devises in remainder (but without repeating the limitation to the trustees) in trust for other *femes covertes* and to the use of their respective children, and with an ultimate devise to the testator's right heirs. It was held by the Court of K. B., that the testator's object was to secure the beneficial enjoyment of the estate to the several *femes covertes*, which could only be accomplished by the legal fee being vested in the trustees; and the Judges returned a certificate to that effect to the Lord Chancellor.(s) Lord Eldon has assigned as a reason for this decision, that there were various trusts for the separate use of married women, after various [*242] trusts not for married women, so that those trusts could not

(q) 1 Jarm. Pow. Dev. 225, n.

(s) *Harton v. Harton*, 7 T. R. 652;

(r) See *Venables v. Morris*, 7 T. R. 342, 438. see *Hawkins v. Luscombe*, 2 Sw. 391; [and the remarks in 14 M. & W. 172.]

¹ In *Ex parte Gadsden*, 3 Rich. R. 467, it was said by Chancellor Harper that the rule appeared to be, so far as he could deduce any from the cases, "that if the gift to the trustee be general, without words of inheritance or limitation, he will be construed to take a chattel interest, a life estate, or a fee, as the purposes of the trust appear to require. But if it be to him and his heirs (provided any estate at all is executed in the trustee), this imports a fee; though these words may be restrained by other circumstances in the deed or will, which show that the donor or deviser contemplated that the estate should be executed in some subsequent taker, or after some event; or which are inconsistent with the notion of the fee's continuing in the trustee." In that case, which was that of a deed, the limitation was to the trustee, his heirs and assigns, in trust, first to raise annually the sum of \$800, to be paid to the grantor during his life, and after his death to permit E. P., the wife of J. P., to hold and enjoy the premises to their sole use and behoof; or in trust to sell the same or any part thereof, and to apply the proceeds to the use of the said E. P. and her children, and have and share alike, to them, their heirs and assigns for ever, freed from the debts and control of the husband. Held, that the legal estate *in fee* remained in the trustee after the death of the grantor and of the husband.

beginning to the end; and he adds, that the court also relied on the non-repetition of the legal estate.^(t)¹

And upon the same principle, where there was a devise to trustees *and their heirs*, in trust *by sale or mortgage to raise money for the payment of debts and legacies*, the whole legal fee will be vested in the trustees; for no less estate would enable them to perform the trust.^(u)² Indeed, as we shall see presently, in such a case the trustees would take the fee by construction *without any words of limitation*.^(x) And so where the trust was *to demise at their discretion*, the trustees have been held to take the entire fee, the gift being to them *and their heirs*.^(y)

In like manner, where the devise was to trustees *and their heirs* to pay the rents to certain persons, and *then to convey to T. G. in fee*: it has been held that the legal inheritance vested in the trustees, to enable them to make such a conveyance.^(z) And a direction, that the real property shall be *equally divided* between the *cestui que trusts* by the trustees, has also been held to give them the legal fee, for that is equivalent to a direction to convey.^(a)

2d. In the absence of any express words of limitation, sufficient to carry the legal inheritance, the estate of the trustees would be en-

(t) *Hawkins v. Luscombe*, 2 Sw. 391. 354. [See *Doe v. Cafe*, 11 Eng. L. &

(u) *Bagshaw v. Spencer*, 1 Ves. 142; Eq. 579.]

Keene v. Deardon, 8 East, 248; *Doe d. (z) Garth v. Baldwin*, 2 Ves. 646; *Doe d. Shelley v. Edlin*, 4 Ad. & Ell. 582; *Cadogan v. Ewart*, 7 Ad. & E. 636, 648.

(x) 1 Ves. 144; and vide post. *Doe d. Booth v. Field*, 2 B. & Ad. 564.

(y) *Doe d. Tomkins v. Willan*, 2 B. (a) *Doe d. Rees v. Williams*, 2 M. & W. 749.
& Ald. 84; *Doe d. Keen v. Walbank*, id.

¹ *Harton v. Harton* was recognised in *Blagrave v. Blagrave*, 4 Excheq. 570; and in a very similar case, *Brown v. Whiteway*, 8 Hare, 156, was followed by Vice-Chancellor Wigram, as binding on him until reviewed by a court of law. But he remarked, at the same time, "I do not see why in that case (*Harton v. Harton*) it was necessary to hold that the intermediate estates should not be good legal estates;" though he added, "I must not be understood to say anything against that case. It is a decision unshaken." In *Tucker v. Johnson* (16 Sim. 341), however, where there was a devise to A. and B. and their heirs to the use of the testator's son for life; remainder in trust that the trustees or the survivor should pay and apply the rents and profits, or so much thereof as they or he should think proper, for the maintenance of his son's younger children, during their minority; and after all the children should have attained the age of twenty-one, to the use of them, their heirs and assigns; it was held, that the son took the legal estate for life, remainder to A. and B. for a chattel interest, remainder to the son's younger children in fee.

² *Watson v. Pearson*, 2 Exch. 594; even though there be subsequent limitations, giving the legal estate in express terms. *Blagrave v. Blagrave*, 4 Exch. 570. But a mere direction to the trustees to pay debts and funeral expenses, and a devise (without words of inheritance) of the estate to them, *subject thereto*, will not give a fee. *Doe v. Claridge*, 6 C. B. 641.

larged and extended into such an estate as the nature and purpose of the trust required.¹

Thus, where there was a devise of real estate to trustees simply (without adding any words of limitation) in trust *to sell*; it has been decided, that the trustees would take the fee by construction.(a) And so where the trust was to sell the whole, or a sufficient part, the construction would be the same; for, said Lord Hardwicke, as it is uncertain what they may sell, no purchaser would otherwise be safe.(b) And it seems that a trust to *convey*,(c) or lease at discretion,(d)² would have the effect; for a less estate would not suffice for those purposes.

And where the devise is to the trustees, *their executors, administrators, and assigns*, in trust expressly to sell, it is settled that the trustees would take *the fee*, and not a mere chattel interest, as the nature of the trust would not be satisfied by a less estate.(e) And this construction would be more readily adopted where personal estate was included in the devise to the trustees; for the limitation to the executors could then operate upon the personalty.(f)

Where there was a devise of real estate to persons *without words of limitation*, in trust to pay debts, annuities, or legacies, *and no sale* [*243] *was expressly directed*, it does not appear to have been settled whether the trustees would take the inheritance, or a chattel interest for a term of years.

(a) *Shaw v. Weigh*, 1 Eq. Ca. Abr. 184; *Gibson v. Lord Montfort*, 1 Ves. 491; S. C. Ambl. 95. [See *Chamberlain v. Thompson*, 10 Conn. 244; *Watson v. Pearson*, 2 Exch. 594.]

(b) *Bagshaw v. Spencer*, 1 Ves. 144.

(c) *Doe d. Booth v. Field*, 2 B. & Ad. 556.

(d) *Doe d. Keen v. Walbank*, 2 B. & Ad. 554.

(e) *Gibson v. Lord Montfort*, 1 Ves. 491, and Ambl. 95; 1 Jarm. Pow. Dev. 226, n.; *Heardson v. Williamson*, 1 Keen, 33, 41.

(f) 1 Ves. 491: [Ex parte Gadsden, 3 Rich. R. 468]: but see *Doe d. White v. Simpson*, 5 East, 162.

¹ *Fisher v. Fields*, 10 Johns. R. 505; *Rackham v. Siddall*, 1 MacN. and Gordon, 607; 2 H. & Twells, 44; *Blagrove v. Blagrove*, 4 Exch. 569.

² See *Brewster v. Striker*, 2 Comstock, 19. But in *Doe v. Cafe*, 11 Engl. L. & Eq. 576, it was said "that a power to lease affords an argument of weight in favor of the legal estate being intended to be given to trustees; but it is not conclusive." In that case a testator devised to trustees a house and premises upon trust to receive the rents and pay the same to his daughter, and after her decease to apply them towards the maintenance and education of his daughter's children then living, during their minority; and upon the youngest living of his daughter's children attaining the age of twenty-one years he devised as follows:—"I give and devise the said house and premises unto all the children of my said daughter, who shall be then living, in equal shares and proportions, share and share alike." Other houses were also devised to trustees, who had a *limited* authority to lease the whole; and an estate in fee was devised to one of the daughter's children on his attaining twenty-one years. It was held, that the estate given to the trustee was restricted to the life of the daughter, and the minority of all her children; that the devise over was a direct devise to the children, and not in trust for them; and that they took life estates as tenants in common in the houses and premises.

In Cordall's case (the earliest in which this question arose), there was a devise to two persons, to hold for payment of debts and legacies, and afterwards to A. for life, with remainders over; and it was resolved, that this was no freehold in the devisees, *but only a term of years*, "though it could not be said for any certain number of years."^(g)

So, in Carter v. Barnadiston, a testator directed, that in case of the deficiency of his personal estate, his executors should *receive the profits* of his whole real estate for the payment of his debts and legacies; and after those should be paid, he devised the real estate to different persons for life and in fee; and it was decided by the House of Lords, that the executors took only *a chattel interest* for the payment of debts.^(h)

In Hitchens v. Hitchens the devise was, that if the testator's stock, &c., should not be sufficient for the payment of his debts and legacies, his executors should pay the same *out of the rents and profits* of his real estate; and when debts and legacies were paid, he devised his real estate to his son in tail with remainder over; the court held, that the estate in the executors was but *a chattel interest*.⁽ⁱ⁾

The decision in Popham v. Bampfield, that the devise of an estate tail to the use of A. in remainder after a devise to trustees for the payment of debts, vested the use and legal estate in A., may, as we have already seen, be reconciled with the other authorities, if the trustees were held to take *a chattel interest* in the devised estate.^(k)

However, in Gibson v. Lord Montfort, a testator gave all his freehold, leasehold, and personal estate, to trustees, *their executors, administrators, and assigns*, in trust to pay several annuities, sums, and legacies, on the deficiency of the personal estate, *out of the rents, issues, and profits arising* by the real estate, and gave the residue of his real and personal estate, after provision being made for the payment of the legacies, &c., over: Lord Hardwicke held, that the purposes of the trust could not be satisfied by the annual perception of the rents and profits by the trustees, *in which case ONLY could they take a chattel interest*: but that the legacies must be raised by the sale of the real estate, for which purpose the trustees must take the legal inheritance.^(l) His Lordship seems to have attached considerable importance to the expression "arising," as showing that the trustees were not to be confined to the annual profits only.

It will doubtless be remarked, that in this case the estate was

(g) Cordall's case, Cro. Ell. 315; see Manning's case, 8 Rep. 96.

(h) Carter v. Barnadiston, 1 P. Wms. 506, 9.

(i) Hitchens v. Hitchens, 2 Vern. 404.

(k) Popham v. Bampfield, 1 Vern. 79; ante, p. 211, n. (1)

(l) Gibson v. Lord Montfort, 1 Ves. 485, 491; S. C. Ambl. 93, 5.

limited to the trustees, *their executors, administrators, and assigns*: at first sight, therefore it would seem not to apply to the question now under discussion, viz., the case of a devise to trustees for payment of debts *without any words of limitation*. But Lord Hardwicke in his judgment observed, that the devise included both freeholds and leaseholds, and on that ground he restricted the operation of the term "executors" to the leaseholds, and *treated the devise of the freeholds as if it had been made to the *trustees and their assigns* without any terms of limitation.^(m) The case is therefore a direct and very strong authority on the point in question, deciding that a devise to trustees to pay debts and legacies without any words of limitation may in certain cases give them an estate *in fee simple*.

In *Wykham v. Wykham*, a tenant for life under a will was empowered to limit or appoint all or any part of the estate to trustees, upon trust *by the rents and profits thereof* to raise and pay a yearly rent-charge as a jointure for his wife. The tenant for life exercised this power by deed, appointing the estate of trustees and their heirs, in trust by the rents and profits to raise and pay a jointure rent-charge of 500*l*. On a case sent to the Court of King's Bench the Judges certified, that the trustees took an estate *in fee*; ⁽ⁿ⁾ the same question was then sent for the opinion of the Court of Common Pleas, and the Judges there held that the trustees took *no* legal estate.^(o) But on the hearing of the cause before Lord Eldon, his Lordship stated the strong inclination of his mind to be, that the proper mode of securing the rent-charge would have been by vesting in the trustees *a term of ninety-nine years*, if the jointress should so long live.^(p) It therefore seems to follow, that if the devise had been directly to the trustees, upon trust, to raise and pay or secure the annuity without any words of limitation, Lord Eldon would have held, that they took a chattel interest for a term of years determinable on the death of the annuitant.

The court will be reluctant to extend the estate of the trustees beyond the interest *expressly given them* by the terms of the limitations.^(q) If therefore the estate be limited in express terms to the trustees, *their executors, administrators, and assigns* for the payment of annuities, or debts, or legacies; it is clear that they would have only a chattel interest, unless the general nature and object of the trust (as in *Gibson v. Lord Montfort*) required that the inheritance should be vested in them.^(r)

In *Doe d. White v. Simpson* a testator devised to two trustees and

^(m) 1 Ves. 491, Ambl. 95.

^(p) *Wykham v. Wykham*, 18 Ves.

⁽ⁿ⁾ *Wykham v. Wykham*, 11 East, 395, 416.

458.

^(q) 1 Jarm. Pow. Dev. 231, n.

^(o) *Wykham v. Wykham*, 3 Taunt.

^(r) *Heardson v. Williamson*, 1 Keen, 33, 41.

316.

the survivor, *and the executors and administrators* of the survivor, certain lands, together with the arrears of rent, and a bond and judgment given by a tenant for rents then due, in trust *out of the rents, and profits, and arrears* to pay two life annuities, and then in trust out of the residue of the rents and profits to pay 800*l.* to certain persons, and after payment of the annuities, and 800*l.* he devised the estate to a person for life with remainders over. There was a power for the trustees and the survivor, his executors, &c., to grant building-leases, as often as there should be occasion, for any number of years. It was held that the trustees took an estate *for the lives of the annuitants*, together with a *term of years* sufficient for raising the 800*l.*, *and not the fee.*(s)

In *Gibson v. Lord Montfort*, Lord Hardwicke recognised the validity of the objection, that the gift of real estate to trustees, their executors, &c., was descriptive of a chattel not passing the inheritance to them; but his *Lordship considered, that the objection had no weight in the case before him by reason of the personal estate, which was included in the devise to the trustees.(t) [*245] However, it is to be remarked, that in *Doe d. White v. Simpson*, the devise was of real and personal estate combined; and the Court of King's Bench not only did *not* consider that circumstance a reason for holding that the trustees should take the *fee*; but on the contrary relied much on that fact in coming to the decision, that they took only for a *term of years.*(u)

The latest case on this subject is that of *Heardson v. Williamson*. There a testator, after his wife's decease, in case certain mortgage debts were not then paid off, gave and devised his real estate to two trustees and the survivor, *and the executors and administrators* of the survivor, in trust to let the same, and apply the rents for payment of the mortgage debts, until the whole should be fully paid off and discharged by the gradual receipt of the rents and profits; and from and after the payment of his mortgage debts, as aforesaid, he gave and devised the estate to his son and his assigns for life; and after his son's decease, to such child or children as his said son should have lawful issue of his body as tenants in common in fee, with remainder in default of such issue to his three other sons in common in fee. The mortgage debts were paid off by the trustees after the death of the wife; and the testator's son, having no child, executed a deed under the Fines and Recoveries Act, with the view of barring the subsequent contingent remainders, and vesting the entire fee in himself. The efficacy of this deed depended upon whether the legal fee was or

(s) *Doe d. White v. Simpson*, 5 East, 491; *S. C. Gibson v. Rogers*, Amb. 95. 162.

(u) *Doe d. White v. Simpson*, 5 East,

(t) *Gibson v. Lord Montfort*, 1 Ves. 172.

was not vested in the trustees of the will, for if it were, that estate would have supported the contingent remainders; and this was the question which called for decision in the case. It was held by the Master of the Rolls (Lord Langdale), that the trustees took only *an estate until the mortgage debts were paid*; and the debts having been paid off, the trust ceased, and the legal estate vested in the plaintiff, the testator's son.(x)¹

It may be observed here, that a limitation of real estate to trustees, *their executors, administrators, and assigns*, will clearly give them an estate in fee simple, *if the purposes of the trust require it.*(y)

A devise to trustees in the first instance simply, *without any words of limitation*, followed by a direction, that they *and their heirs* shall raise and pay debts and legacies, is not tantamount to a direct devise to them in fee, and they will take only such an estate as is sufficient to enable them to discharge the trust by paying the debts and legacies.(z)

On examination of the cases in which the estate of devises in trust for the payment of debts, &c., has been confined to a chattel interest, it will be found, that in all of them the payment was directed to be made *out of the rents and profits*: and it was admitted by Lord Hard-

(x) *Heardson v. Williamson*, 1 Keen, 33, 41. [See *Ex parte Gadsden*, 3 Rich. 33. 468.]

(y) *Gibson v. Lord Montfort*, 1 Ves. 491; *Heardson v. Williamson*, 1 Keen, 879. (z) *Ackland v. Lutley*, 9 Ad. & Ell.

¹ By a will made before 1837, A. directed E. and F. to pay and discharge all his debts and funeral expenses, and *subject thereto*, he devised a freehold messuage to E. and F., in trust to permit and suffer B., his widow, to reside therein for life, free and clear of rent or taxes; and after her decease, he devised the same messuage to E. and F., and the survivor of them, his *executors, and administrators*, in trust to permit and suffer his daughter C. to receive and take the rent thereof for her life, free from the control of her husband; and after his daughter's decease, he devised the same messuage to E. and F., their *executors and administrators*, upon trust to pay and apply the rent thereof for the use and benefit of his grandson D., in the event of his not having attained the age of twenty-one at the time of the decease of the testator's wife and daughter; and upon D.'s attaining twenty-one, the testator devised the same messuage to him for life. Then, after a certain contingent devise, which never took effect, and after giving certain legacies, the testator gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects unto and between his said wife and daughter, share and share alike,—“the share of his said daughter independent of the debts, control, or engagements of her present or any future husband, *in manner aforesaid*,” and he named the said E. and F. executors and trustees of his said will:—C. having survived B., and D. leaving daughters only, it was held, that the legal estate in a moiety of the remainder in fee vested in those daughters, as co-heirs of C., and not in E. and F., the executors and trustees. *Doe v. Claridge*, 6 C. B. 641.

wicke, in *Gibson v. Lord Montfort*, that a chattel interest in the trustees would suffice for that purpose, but for that purpose alone.(a)

*Therefore, if there be a devise to trustees *without any words of limitation*, or *à fortiori* to trustees, *their executors, administrators, and assigns* in trust, *out of the rents and profits* to pay debts or legacies; and if from the amount or nature of the payments to be made, as well as the general scope of the trust, the payments may well be discharged by an annual perception of the profits, and *no sale or other anticipation of the income is necessary* for that purpose; the authorities, without exception, establish that the trustees will take only a term of years sufficient for raising the required moneys, and no estate of inheritance will vest in them.(b) And the fact of the devise being to the persons who are appointed *executors*, would seem to be in favor of this construction.(c)

But if from the terms of the devise, or the nature of the payments to be made, it appears that the devisees in trust are not to be restricted to the perception of the *annual income* of the estate, but are at liberty to raise the required sums *by sale* of all or any part of the estate, then, according to Lord Hardwicke's decision in *Gibson v. Lord Montfort*, the legal inheritance will necessarily be vested in the trustees;(d) and this although the devise be to the trustees, *their executors and administrators*.(e)

If the case of *Doe d. White v. Simpson* cannot stand as an authority with that of *Gibson v. Lord Montfort* (and it is certainly difficult to reconcile the two decisions), the former case appears to be at once more consistent with the stream of authorities than the latter, as well as more in accordance with the general principles of construction which prevail in these cases: for the tendency of the decisions is to confine and restrict, rather than enlarge, the estate of trustees. Even if a sale were necessary for the purpose of raising the required sums, it by no means follows that the entire inheritance must be disposed of for that purpose; for this might obviously be accomplished with equal facility by a sale or mortgage for a term of years only.

However, assuming that in such a case the trustees would take merely a chattel interest, a difficulty still remains to be disposed of, which is left almost untouched by the authorities, viz., the length or duration of the term of years which would be vested in the trustees.

In *Cordall's* case the court expressly refused to decide that

(a) 1 Ves. 491.

589; *Hitchens v. Hitchens*, 2 Vern. 404;

(b) *Cordall's* case, Cro. Eliz. 315;

Co. Litt. 42, a.

Wykham v. Wykham, 18 Ves. 416;

(d) *Gibson v. Lord Montfort*, 1 Ves.

Heardson v. Williamson, 1 Keen, 33.

485; S. C. Ambl. 93.

(c) *Carter v. Barnadiston*, 1 P. Wms.

(e) *Heardson v. Williamson*, 1 Keen, 41.

point.(f) According to the reports of *Carter v. Barnadiston*,(g) and *Hitchins v. Hitchins*,(h) it was left undetermined in each of those cases; and in *Doe d. White v. Simpson* it was merely held, that the trustees took a term of years *sufficient* for the purpose of raising the 800*l.*,(i) certainly a most vague and unsatisfactory limit, whereby to ascertain the determination or continuance of the legal interest in real estate. The circumstances of *Heardson v. Williamson*,(k) rendered it unnecessary to decide the point in that case. The difficulty, therefore, is one for which it is *very difficult to lay down any [*247] satisfactory solution; and it doubtless forms a very serious practical objection to the construction, which gives to the trustees in such cases only a chattel interest, and an equally strong argument in favor of their taking the fee.

A devise to trustees, *without the addition of any words of limitation*, in trust, to pay the rents and profits to a person or persons for life, followed by a gift of the estate over, will give the trustees an estate, during the life of the *cestui que trust*, for life;(l) as we have already seen, that a devise to the trustees and *their heirs* on a similar trust will be cut down into a life estate.(m)

And a similar devise to trustees in trust for an individual *until 21, or any other specified age*, will give them a chattel interest only, determinable upon the *cestui que trust's* attaining that age, or dying before.(n)

Where the trust is to pay an annuity out of the rents to a person during life, the estate of the trustee might in like manner be limited to the continuance of the life of the annuitant; and the difficulty attending the raising and paying of debts, or any gross sum, would not therefore arise.

However, there appears to be some discrepancy in the authorities, as to whether the trustees in such a case would take a *freehold* interest for the life of the annuitant, or a *chattel* interest for a term of years determinable on his death. In *Doe d. White v. Simpson*,(o) it was held that the trustees took a freehold estate;(o) but in *Wykham*

(f) Cordall's case, Cro. El. 315.

(g) 1 P. Wms. 509.

(h) 2 Vern. 404.

(i) 5 East, 162; and see *Ackland v. Luley*, 9 Ad. & Ell. 879.

(k) 1 Keen, 33.

(l) *Shapland v. Smith*, 1 Bro. C. C. 75; *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636, 667.

(m) Vide supra.

(n) *Doe d. Player v. Nicholls*, 1 B. & Cr. 336; *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636, 667. [See *Doe v. Davies*, 1 Q. B. 43.]

(o) 5 East, 162; and see *Jenkins v. Jenkins*, Willes, 650.

¹ See *Payne v. Sale*, 2 Dev. & Batt. Eq. 455, where the use of the inartificial word "lend" by a testator was considered to control other expressions, and to give only a life estate to trustees.

v. Wykham,(p) it appears to have been Lord Eldon's opinion, that the proper interest to be given them would be a term for ninety-nine years, determinable on the death of the annuitant.(p)

The object of the trust would be equally answered in either case; but the question may sometimes become one of practical importance, as determining in whom the first legal freehold estate is vested.

Where a series of limitations are contained in a will, the mere alteration of the language in any of the subsequent limitations, by the use of words of direct gift to the person taking the beneficial interest, instead of the expression "*in trust for*," which had been previously employed, would not have the effect of determining the legal estate in the trustees, and vesting it in the beneficial takers, if the purposes of the will required that the legal interest should continue in the trustees for a longer period.(q) However, such a mode of wording would doubtless have its effect in determining the construction in a doubtful case.

A devise to trustees to preserve contingent remainders, *without any words of limitation*, would give them an estate *pur autre vie*; and this estate would not be enlarged into a fee by a power given to the same trustees "generally, to do all necessary acts to effectuate his intentions as to the disposition of the estate." For such a direction only means, that they should have such powers as are incident to their character of trustees to preserve contingent remainders.(r)

*And an estate to preserve contingent remainders would not in any case be so enlarged, if the effect of such a con- [*248] struction would be to contradict, or disappoint, other dispositions in the will.(s)

The question as to the duration of the estate of the trustees can rarely arise where the subject is personal estate; for in that case the whole legal interest is in general vested in the trustees by a gift, *without any words of limitation*, and will continue in them until divested by a legal transfer or assignment.(t)

Such was the very unsatisfactory state of the law on this subject previously to the recent Will Act (1 Vict. c. 26). The uncertainty and inconvenience of the existing doctrine called imperatively for the legislative remedy, which is provided by that statute. By the 30th section of that act it is enacted, that any devise of real estate (not being a presentation to a church) to a trustee or executor shall be

(p) 18 Ves. 416.

(q) Doe d. Tomkyns v. Willan, 2 B. & Al. 84; Murthwaite v. Jenkinson, 2 B. & Cr. 357; see Sanford v. Irby, 3 B. & Al. 654; 1 Jarm. Pow. Dev. 230, n.

314; see Co. Litt. 290, b, Butl. note VIII.

(s) Thong v. Bedford, 1 Bro. C. C. 315.

(t) See Elton v. Shephard, 1 Bro. C.

(r) Thong v. Bedford, 1 Bro. C. C. 531; 2 Jarm. Pow. Dev. 631.

construed to pass the fee simple, or other the whole estate or interest of the testator, unless a definite term of years or an estate of freehold shall be given him expressly by implication. And by the 31st section where real estate shall be devised to a trustee without any express limitation of the estate, and the beneficial interest shall not be given to any person for life, or if given for life, the purposes of the trust may continue beyond the life of the first *cestui que trust*, the trustee will take the fee simple and not an estate determinable on the satisfaction of the trust.

The provisions of the act of course do not at all affect trusts created by deed, which are still governed by the old doctrine. And they apply only to wills made after the 1st of January, 1838.

The effect of these enactments is, that all devises to trustees, contained in wills made since the 1st of January, 1838, will give them an estate in fee simple without any words of limitation, unless the interest of the *cestui que trust* is limited to him expressly for life, and the trusts are such, that they cannot by any possibility continue beyond the life of the beneficial tenant for life. This, construction, however, is excluded, where a term of years or a partial freehold estate is expressly limited to the trustees.

II.—WHERE THE ESTATE OF THE TRUSTEES IS CREATED BY DEED.

In *wills* the intention of the testator is allowed much greater latitude in controlling and modifying the words, than is admitted in the construction of *deeds*; consequently, the decisions in the former case must be very cautiously received as authorities in the latter.^(u)¹

However, it has been decided that even in a *deed* a limitation to the use of trustees and their heirs may be restricted to an estate *pur autre vie*, by a necessary implication arising from the object of the trust, coupled with the nature of the subsequent limitations. The case alluded to is that of *Curtis v. Price*; (x) there, by a post-nuptial settlement made after the marriage of Martin and Eleanor Barry, [*249] certain lands were conveyed by *the husband to Powell and James, their heirs and assigns, to the use of the husband for life, with remainder to the use of the wife during her life, if she should continue unmarried; but if she should marry, then to the use

(u) Co. Litt. 290, b, Butl. note VIII.; But see *Chamberlain v. Thompson*, 10 see *Colmore v. Tyndal*, 2 Y. & J. 605. Conn. 244; *Nicoll v. Walworth*, 2 Denio, [Dinsmore v. Biggert, 9 Barr, 135; 385.]
Combry v. McMichael, 19 Alab. 751. (x) *Curtis v. Price*, 12 Ves. 89.

¹ In *Welch v. Allen*, 21 Wend. 147, it was held, that a patent to a trustee without words of perpetuity, gave him nevertheless a fee.

and behoof of Powell and James and their heirs, upon trust out of the rents and profits to pay an annuity of 50*l.* to the wife during her life, and with the rest of the rents, &c., to maintain the children of the marriage; and after the death of both the husband and wife *to the use of the same trustees, their executors, &c., for the term of 100 years*, with remainder to the use of the heirs of the body of the wife by the husband, with remainder to the right heirs of the husband. The husband died in the lifetime of the wife, who married again; and one of the questions was whether the limitation to the use of the heirs of the body of the wife was a *legal* remainder: for the remainder in that case would have coalesced with her prior estate for life according to the rule in *Shelley's* case, so as to give her an estate tail. And this depended upon whether the legal estate in fee simple was vested in the trustees by virtue of the limitation to the use of them and their heirs; for if they took the entire legal fee, the subsequent limitations were of course mere equitable estates, which could not coalesce with the wife's prior legal estate for life. It was held by Sir William Grant, M. R., that the trustees took only an estate *during the life of the wife*, although, as we have seen, the limitation in the deed was expressly *to the use of them and their heirs*, without any such restriction.(x)

His Honor rested his decision in this case, partly on the circumstance of the trust requiring only an estate for life in the trustees, as in *Doe v. Hicks*;(y) but principally on *the subsequent limitation of the term of 100 years to the same trustees*. A limitation, which could only be made to take effect by restricting the interest of the trustees to an estate for the life of the wife.(z)

It will be observed, that the limitation in *Curtis v. Price* was expressly *to the use* of the trustees and their heirs: its authority therefore applies *à fortiori* to cases where the estate is limited simply to them and their heirs, without any declaration of the use, and where they consequently take the use and legal estate *by construction* from the nature of the trust.

In *Venables v. Morris*,(a) after some previous limitations contained in a deed, there was a limitation to the use of a *feme covert* for life, with remainder to the *use of two trustees and their heirs*, in trust to support the contingent uses and estates thereafter limited (but without confining the estate of the trustees to the continuance of the preceding life estate), with remainder after certain estates limited in use to the sons and daughters of the marriage, to the use of such persons for such estates, &c., as the wife should appoint.(a)

(x) *Curtis v. Price*, 12 Ves. 89.

(y) 7 T. R. 433.

(z) *Curtis v. Price*, 12 Ves. 100, 1.

(a) *Venables v. Morris*, 7 T. R. 342

& 438.

On a case sent by the Lord Chancellor for the opinion of the Court of King's Bench, the judges certified, that the trustees took the legal fee under the limitation to them in the deed; on the ground, as was observed by Lord Kenyon on another occasion, that if the wife, in [*250] exercising her *power of appointment, had introduced any contingent remainders, they might all have been defeated if the uses were not executed in the trustees.(b)

It is observable, that the court in deciding *Venables v. Morris*, did not rest their judgment upon any difference between the effect of a limitation by deed and one by will. So far therefore it is certainly a negative authority in favor of the non-existence of any such distinction; and was alluded to as such by Sir William Grant in *Curtis v. Price*.(c)

With the exception however of that negative authority, such as it is, the case of *Curtis v. Price* is the only one in which it has been decided, that an estate in fee simple, expressly limited by deed to trustees, can be cut down by mere implication into any less extensive interest. And that case might be regarded as rather a strong decision, even if it had arisen on a will; for there were some trusts relative to an advowson, and to the advancement and preferment of the children, which rendered it open to argument that an estate in fee simple was requisite for the due performance of the trusts, though the limitations had been contained in a will.

However, it is very remarkable, that the decision in *Curtis v. Price*, as far as it affects the present question, was clearly extra-judicial. The Master of the Rolls himself said that the judgment he had formed upon the other branch of the case, rendered it of very little consequence whether his opinion on the first question was well founded or not. That was a question very fit to be submitted to a court of law, which he should otherwise have felt considerable reluctance in deciding by his own opinion.(e) The case of *Doe d. Brune v. Martyn*.(f) also arose on a deed, but in that case the estate given to the trustees *and their heirs* was expressly confined by the terms of the instrument to the infancy of the *cestui que trust*.

On the other hand, authorities are to be met with, which are strongly opposed to the doctrine, that an estate expressly limited in a deed to trustees *and their heirs* may be restricted by implication to any smaller interest. It is laid down broadly by Mr. Butler, that where there is a limitation to one for life, with remainder to trustees *and their heirs* for preserving contingent remainders, and the estate of the trustees is not restrained to the life of the tenant for life; in a

(b) In *Doe v. Hicks*, 7 T. R. 437.

(c) 12 Ves. 100.

(e) *Curtis v. Price*, 12 Ves. 101.

(f) 8 B. & Cr. 497.

deed the trustees would certainly be considered as taking the whole fee, though it might be otherwise in a *will*.(g)¹

In *Wykham v. Wykham*,(h) a case subsequent to that of *Curtis v. Price*, the question was much considered by Lord Eldon, who observed that it appeared to him very difficult to maintain the point, that in a *deed* this doctrine was to be so applied: and his Lordship accordingly refused to cut down the legal effect of the grant in that case to the trustees and their heirs.

So in the modern case of *Colmore v. Tyndall*, by a deed of settlement, after some preceding limitations, an estate was limited to the use of *M.* for life, with remainder to the use of a trustee *and his heirs* in trust to preserve contingent remainders; remainders to *M.*'s first and to her sons in tail male; and then to *C.* for life, with remainder to the same trustee *and his heirs*, to preserve, without confining the estate of the trustees in either case *to the lives of *M.* and *C.*; with remainder to *C.*'s first and other sons in tail [*251] mail, with remainder over in fee. It will be seen that these limitations closely resembled those in the case of *Doe v. Hicks*,(i) which has been mentioned in the last section. However, it was held by the Court of Exchequer Chamber, that the legal estate in fee simple after *C.*'s life estate was vested in the trustee. And the decision appears to have been founded mainly on the limitation being contained in a *deed* and not in a *will*.(l)

If, therefore, the case of *Curtis v. Price* can still be considered as an authority, notwithstanding the decisions and *dicta* by which it is opposed, it is clear that the doctrine which it establishes will be confined strictly within the limits marked out by the circumstances of that case. Therefore the legal operation of a limitation in fee to trustees contained in a *deed* will not be restrained by implication to a smaller estate, unless the intention of the instrument will not only not be answered, but will be defeated and contradicted by giving to such a limitation its full effect. As where a subsequent estate for life or years is given to the same trustees after the limitation to them in fee.(m)

(g) Co. Litt. 290, b. Butl. note VIII.

(l) *Colmore v. Tindall*, 2 Y. & J. 605.

(h) 18 Ves. 395, stated in the preceding section.

(m) *Curtis v. Price*, 12 Ves. 101; *Wykham v. Wykham*, 18 Ves. 422, 3; *Col-*

(i) 7 T. R. 433, stated preceding section.

more v. Tyndall, 2 Y. & J. 605.

¹ Where a conveyance is made by deed to a trustee in fee, in trust to apply the rents and profits to the sole and separate use of a *feme covert*, or to such person as she or her trustee should appoint, and to make sale of the land as convenient, and to apply the proceeds to repay advances, &c., and the balance to her use, or to her, or as she or her trustee, to be named by her, should direct, and to indemnify a third person, it was held that the legal estate continued in the trustees after the death of the *feme*. *Dinsmore v. Biggert*, 9 Barr, 133.

And a subsequent limitation *in fee* in the same deed to the same trustees, will not be considered so contradictory, as to confine the previous limitation to them in fee to an estate for life.⁽ⁿ⁾ Nor will such a construction be adopted, because an estate in fee simple appointed to trustees by a deed made in execution of a power, is inconsistent with the estate limited by the instrument by which that power was created.^(o)

So it is quite clear, that an express limitation of an estate in fee contained in a *deed* will not be cut down, merely because a fee in the trustees is not necessary for the purposes of the instrument. In *Wykham v. Wykham*, Lord Eldon, after remarking that the instrument purported to be a grant in fee, and was a deed, adds, "It purports to be a grant in fee for purposes clearly not requiring a fee; but still it purports to be a fee; and it is, I think, difficult to maintain, that if a man does more by using words, which have a legal effect, than is necessary to execute the purpose he professes to execute, the circumstance that he uses those words of larger legal effect than is required, and his purpose, shall cut down the legal effect of words in a deed."^(p)

And so, any circumstance which is merely corroborative of an intention that the trustees should take an estate only *pur autre vie*—as a covenant for quiet enjoyment by the trustees *during the life of the tenant for life*,—will not authorize the court to restrain the legal operation of a limitation in fee to them.^(q)

There does not appear to be any decided case in which an estate, given by *deed* to trustees *without any words of limitation*, has been constructively *enlarged* into a fee (as in the case of a devise by *will*) in consequence of the nature and purposes of the trust—as from a direction for them to sell or convey; although there is a *dictum* of Lord Hardwicke directly in favor of this construction.^(r)¹

There is certainly no authority for so enlarging a partial or particular **estate expressly limited to them by the deed*,—as where [*252] the gift is to the trustees, *their executors, administrators and assigns*, or the estate is limited to them *during a certain period*, or *until a particular event takes place*.

In such cases, for the reasons already given, the decisions upon *wills* in favor of a constructive enlargement of the estate, cannot be

(n) *Colmore v. Tyndall*, 2 Y. & J. 605.

(q) *Wykham v. Wykham*, 18 Ves.

(o) *Wykham v. Wykham*, 18 Ves. 422.

423.

(r) *Villiers v. Villiers*, 2 Atk. 72.

(p) 18 Ves. 420, see 423.

¹ See *Liptrot v. Holmes*, 1 Kelley, Geo. 390, where on a trust for a feme covert, there were no words of limitation to heirs, it was held the trust ended with her life.

regarded as authorities. Although where the circumstances have prevented the enlargement of the estate in a *will*, *à fortiori* it follows, that the same circumstances would have a similar effect in a question arising upon a *deed*.

III.—OF MERGER OF THE ESTATE OF TRUSTEES.

Where the legal and equitable estates become vested in the same person, the latter will be absorbed and merge in the former; for a man cannot be trustee for himself.^(s)¹ For this purpose, however, the two estates must be co-extensive and commensurate; or (more accurately) the legal estate must be equally extensive with or more extensive than the equitable estate. For the equitable fee will not merge in a partial or particular legal interest.^(t)

Where a partial legal interest (as an estate for life or *pur autre vie*, or for a term of years) is vested in a person upon trusts, and the legal inheritance, or any legal estate in immediate remainder of equal or greater extent than the estate held in trust, is *subsequently* acquired by the trustee, either through his own act or through the operation of law, there will be a merger of the trust estate at law. And the same legal consequence ensues, where a term of years or other partial estate devolves upon or is transferred to a person upon trust, and the legal inheritance is then *previously* vested in the trustee. In such cases, however, equity will interpose, and will preserve the equitable interests from destruction; either by decreeing possession to the *cestui que trusts* during the period of the estate so merged, or by directing a conveyance to revive the legal estate.^(u)

Thus, where a person having a term of 1000 years, assigned it to the owner of the inheritance, in trust for his wife and children, and

(s) *Wade v. Paget*, 1 Bro. C. C. 364. *Thom v. Newman*, id. 603; *Saunders v.*

(t) *Phillips v. Brydges*, 3 Ves. 126. *Bournford*, *Finch*, 424; 1 *Cruis. Dig.*
[*Donalds v. Plum*, 8 Conn. 453; but see *Tit. 8, ch. 2, s. 47, 50*; 6 id. *tit. 39, s.*
James v. Morey, 2 Cow. 284.] 72, 113, 4.

(u) *Nurse v. Yerworth*, 3 Sw. 608;

¹ *Cooper v. Cooper*, 1 Halst. Ch. 9; *Lewis v. Starke*, 10 Sm. & M. 128; *Brown v. Barte*, 10 Sm. & M. 268; *Mason v. Mason*, 2 Sandf. Ch. 433; *James v. Morey*, 2 Cow. 246; *James v. Johnson*, 6 J. C. R. 417. Merger is not favored in equity, *James v. Morey*, 2 Cow. 246; *Donalds v. Plumb*, 8 Conn. 453; *Mechanics' Bank v. Edwards*, 1 Barb. S. C. 272; and therefore never allowed against the intention of the parties. *Ibid.*, *Gardner v. Astor*, 3 J. C. R. 53; *Starr v. Ellis*, 6 Id. 393; *Denn v. Van Ness*, 5 Halst. (N.J.) 102. It will not be permitted to affect intermediate liens. *Lewis v. Starke*, 10 Sm. & M. 128. In *Elliott v. Armstrong*, 2 Blackf. 208, it was held, that where a *cestui que trust* (by resulting trust) purchased the legal estate under an execution on a judgment by him against the trustee, there was no merger, for the execution was void.

the beneficial interest in the term was afterwards assigned to the plaintiff, Lord Nottingham decreed that the plaintiff should hold the premises notwithstanding the legal merger, and that the heir-at-law of the creator of the term should make a further assurance to him for the residue of the term.(x)

So, in another case, a trustee of a term married a woman who had an estate of freehold in the same land; and Lord Nottingham held that, whatever the law might be, there ought to be no merger in equity.(y) And in *Nurse v. Yerworth*,(z) where a devisee in trust of a beneficial term of years afterwards became entitled to the remainder in fee, the same learned judge decided, that the term was not merged in equity, *and decreed an assignment of it to a [*253] person claiming under a devise from the *cestui que trust*.(z)

IV.—OF THE PRESUMPTION OF THE RECONVEYANCE, OR SURRENDER, OF THE LEGAL ESTATE BY A TRUSTEE.

In some cases, where the legal interest has been clearly vested in trustees, either in fee simple,(a) or for a term of years, which has not determined by effluxion of time,(b) it will be presumed that that interest has been reconveyed or reassigned by the trustee to the party beneficially entitled. And this presumption will be made equally in the case of a deed or will.¹

(x) *Saunders v. Bournford*, Finch, 424. 2 S. & St. 154; *Noel v. Bewley*, 3 Sim.

(y) *Thom v. Newman*, 3 Sw. 603, and 103.
see 618; see *Mole v. Smith*, Jac. 490.

(z) *Nurse v. Yerworth*, 3 Sw. 608.

(a) *England v. Slade*, 4 T. R. 682; *Jones*, 7 T. R. 47; *Emery v. Grocock*, 6 Mad. 54; *Doe v. Hilder*, 2 B. & Ald. 782; *Townshend v. Champenown*, 1 Y. & J. 538.
Wilson v. Allen, 1 J. & W. 611; *Hillary v. Waller*, 12 Ves. 239; *Cooke v. Soltah*,

(b) *Lade v. Holford*, Bull. N. P. 110;
Doe v. Syborn, 7 T. R. 2; *Goodtitle v.*

¹ See *Matthews v. Ward*, 10 Gill & J. 443; *Jackson v. Pierce*, 2 John. 226; *Sinclair v. Jackson*, 8 Cowen, 543. After the lapse of thirty-two years, a release to the *cestui que trust* will be presumed against the heirs-at-law of a trustee, *Moore v. Jackson*, ex dem. *Erwin*, 4 Wend. 19. In the *Dutch Ch. v. Mott*, 7 Paige, 77, it was held that where real estate was conveyed to trustees in trust for a church or congregation, as a place of worship, which church or congregation was afterwards incorporated, the court might, after a great lapse of time (142 years), presume a conveyance. Where several persons, being possessed of an undivided tract of land in 1765, made partition, and conveyed the entire tract to A. in trust, to convey to each of the grantees his proportion in severalty, and the land had been since generally held according to that partition, it was held in an ejectment brought in 1807, by persons claiming under the original grantor, that the conveyances might be presumed to have been duly made. *Jackson v. Moore*, 13 John. R. 513. But in *Flouray v. Johnson*, 7 B. Monr. 694, it was ruled that trustees who had the power to relinquish the entire estate in property (slaves) to the *cestui que trust* at their discretion, were not to be presumed

In *Hillary v. Waller*, Sir Wm. Grant, M. R., said that "presumptions do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed merely for the purpose and from a principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates, as otherwise titles must for ever remain imperfect, and in many respects unavailable; when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested." (c)

However, in general, as between trustee and *cestui que trust*, mere length of time will not be sufficient of itself to raise or support this presumption: for the possession of the *cestui que trust* is usually consistent with the title of the trustee, and undisturbed enjoyment for any period however long does not show whether the title be legal or equitable. (d)

The nature and extent of this doctrine of presumption, as laid down by Lord Mansfield in *Lade v. Holford*, (e) were afterwards thus recognised and explained by Lord Kenyon, in the case of *Doe v. Sybourn*. (f) "In all cases," said that learned judge, "where trustees ought to convey to the beneficial owner, he would leave it to the jury

(c) *Hillary v. Waller*, 12 Ves. 252. V. & P. 350, 470 to 510, 9th edit. [See

(d) *Keene v. Deardon*, 8 East, 263; *Doe v. Langdon*, 12 Q. B. 719.]

Hillary v. Waller, 12 Ves. 251; *Goodson v. Ellison*, 3 Russ. 588; 1 Sugd. (e) Bull. N. P. 110.

(f) 7 T. R. 2.

to have done so from the fact that they had permitted it to remain in the possession of the latter, who had paid taxes and sold one slave, but without their knowledge. See Mr. Greenleaf's Ed. of Cruise, vol. 1, page 412.

The doctrine of the implied surrender of trust terms is of little importance in Pennsylvania, and those States where an equitable title may be recovered on in ejectment. The Court of Queen's Bench, in a recent case (*Doe d. Jacobs v. Phillips*, 10 A. & E. (N.S.) 130), held that the statute of limitations of 2 & 3 William IV. was applicable as between *cestui que trust* and trustee, and, therefore, that where the trustee had never been in possession during the period fixed by the statute, the latter barred his right, so that a trust term could not be set up under such circumstances. This case appears to have been met with considerable disapprobation by the profession, and subsequently the same point arose in *Garrard v. Tuck*, 8 M. G. & S. 238, when the Court of Common Pleas, dissenting from the decision in *Doe d. Jacobs v. Phillips*, held that the statute did not apply. The intricate learning of attendant terms has become pretty much obsolete in England since the statute of 8 & 9 Vict. c. 112, which declares (§1) that on the 31st Dec., 1845, all satisfied terms for years attendant on the inheritance, &c., either by express declaration, or construction of law, are to cease and determine, except those by express declaration, which though made to cease and determine thereby, are to continue to afford the same protection against incumbrances, &c., as if subsisting; and (§2), satisfied terms subsisting or thereafter to be created, attendant on inheritance, &c., as above, shall immediately on their becoming attendant, cease and determine. In Virginia, by the Revised Code (Ed. 1849, p. 560), where purposes of trust are accomplished, and *cestui que trust* would be entitled to a decree for reconveyance, trustee cannot recover at law.

to presume, where such a conveyance might reasonably be made, that they *had* conveyed accordingly, in order to prevent a just title from being defeated by a matter of form.”(g)

Hence it appears, that in every case, three circumstances are requisite in order to raise the presumption of a reconveyance by a trustee. 1st, It must have been the duty of the trustee to convey; 2d, There must be sufficient reason for the presumption, and 3d, The object of the presumption must be the support of a just title.

And 1st. It must be the duty of the trustee to reconvey.¹

Where a *cestui que trust* becomes absolutely entitled to the whole beneficial interest in the trust estate, it is clearly the duty of the trustee, when *so required by the beneficial owner,(h) to [254] convey the legal estate to him, or according to his direction.(i) And, therefore, where the beneficial owner has for a long period continued to deal with the property, as if he were possessed of the legal fee, it will be presumed that this requisition has been made, and the consequent conveyance executed. Thus a mortgage in fee simple was made in the year 1712 to a person, as a mere dry trustee for the real mortgagee, and the *cestui que trust* in the following year took a conveyance of the equity of redemption to himself in fee, and subsequently dealt with the estate, as if the legal fee were vested in him; and no further notice was ever taken of the legal estate conveyed to the trustee by the deed of 1712. The reconveyance of the legal fee was presumed on a bill being filed in 1822.(k)

And where there is an express direction or provision in the trust instrument for a conveyance of the legal estate by the trustee at a certain specified period, the duty of the trustee to make such a conveyance becomes yet more cogent, and the presumption of its having been made will consequently more readily arise.(l)

Thus in England *v. Slade*, there was a devise of real estate to the use of trustees, in trust for the testator's son, *and to convey the same to him immediately on his attaining twenty-one*. The son reached twenty-one in September, 1788, and in October in the following year,

(g) *Doe v. Sybourn*, 7 T. R. 3; see 134; *Goodson v. Ellison*, 3 Russ. 583; *Goodtitle v. Jones*, id. 49; *Doe v. Read*, England *v. Slade*, 4 T. R. 682; *Angier v. Stannard*, 3 M. & K. 571.
8 T. R. 118; 1 Sugd. V. & P. 470, 9th edit.

(h) *Langley v. Sneyd*, 1 S. & St. 45, (k) *Noel v. Bewley*, 3 Sim. 103.
55. [See post, 278, &c.] (l) *Hillary v. Waller*, 12 Ves. 239,
252; England *v. Slade*, 4 T. R. 682;

(i) *Carteret v. Carteret*, 2 P. Wms. *Wilson v. Allen*, 1 J. & W. 611, 620.

¹ A jury will not be instructed to presume a reconveyance where the trustee would not be authorized to convey, or it was intended that the legal estate should remain outstanding. *Black v. Black*, 14 Verm. 28.

granted a lease of the property for 88 years. There was no proof of any conveyance from the trustees, but on an ejectment brought in the year 1792 by the lessee, claiming under the lease of October, 1789, Lord Kenyon, with the concurrence of the other Judges of the Court of K. B., held, that the conveyance was to be presumed. His Lordship said, "There is no reason why the jury should not have presumed a conveyance from the trustees to him (the son) upon his attaining the age of twenty-one, in pursuance of their trust. *It was what they were bound to do*, and what a court of equity would have compelled them to have done, if they had refused. *But it is rather to be presumed that they did their duty*. And as to the time, the jury may be directed to presume a surrender or conveyance in much less time than twenty years."(*m*)

In another case a copyhold, in the year 1746, was devised to two trustees in fee, upon trust to pay debts, &c., as well as two annuities and a legacy, *and then to convey and surrender the premises to Thomas Allen, his heirs and assigns*. The trustees were admitted in 1747. There was no entry on the rolls of a surrender by them, but in 1771 Thomas Allen the devisee was admitted, and in the same year devised the estate to other trustees to sell. The sale took place in 1772, and the deed contained a recital that the debts and legacies of the original testator had been paid, and that the annuities had ceased. Sir Thomas Plumer, M. R., held that *as it was the duty of the trustees to convey* on the accomplishment of the primary purposes of their trust, the court under the circumstances ought to presume a surrender to have been made.(*n*)

*And even where the direction for a conveyance by the trustees applies to *part* only of the trust estate, the court will [*255] notwithstanding presume a conveyance of the *whole*, if the general circumstances of the case warrant the presumption.(*o*)

So where the estate has been originally conveyed to the trustee for some particular purpose or trust—as by way of indemnity;(p) or to secure the payment of a mortgage debt;(q) or to raise and pay an annuity or a sum of money for a portion or other purpose;(r) as soon as the particular purpose has been satisfied, it becomes the duty of the trustee to dispose of the legal estate, when required to do so by the *cestui que trust*, exactly as if he had been from the first a mere

(*m*) England *v. Slade*, 4 T. R. 682; *v. Soltan*, 2 S. & S. 154; *Ex parte Holman*, 1 Sugd. V. & P. 509, 9th edit.; and see *Doe v. Sybourn*, 7 T. R. 2.

(*n*) *Wilson v. Allen*, 1 J. & W. 611, 13. *Doe v. Hilder*, 2 B. & Ald. 782.

(*o*) *Hillary v. Waller*, 12 Ves. 239, 252. (*r*) *Emery v. Grocock*, 6 Mad. 54;

(*p*) *Hillary v. Waller*, 12 Ves. 239, 254. *Doe v. Wright*, 2 B. & Ald. 710; *Wil-*

(*q*) *Doe v. Sybourn*, 7 T. R. 2; *Cooke son v. Allen*, 1 J. & W. 611, 619.

dry trustee; and it is immaterial whether the estate vested in the trustee be one in fee simple,^(s) or for a term of years.^(t)

And where from the lapse of time, joined with other circumstances, there is a moral certainty that the original purpose for which the estate was limited to the trustees must have been long since satisfied, the court will act upon that certainty, and presume that satisfaction, as well as the requisition to convey and the consequent reconveyance, although there may be no direct proof of these facts.^(u) Thus, in a case where a term had been created in the year 1711 for raising portions, of the satisfaction of which there was no direct evidence; but in 1744 a settlement had been made, and a recovery suffered, and there was a covenant that the estate was free from incumbrances; and the term did not appear to have been dealt with at any time, and the parties entitled to the portions had attained 21, and died 60 years before; the Vice-Chancellor (Sir J. Leach) held, that both the satisfaction of the portions, and the surrender of the term for securing them, must be presumed.^(x)

However, where an estate is vested in trustees upon trusts which are expressly declared, it is their duty to retain possession of the legal estate until those trusts are fully performed: and consequently as long as any of the trusts are subsisting, the law will never presume a conveyance by the trustees; for such a presumption could only be founded on the supposition of a direct breach of trust, which is never presumed.^(y)

For this reason it would seem to follow, that where a term of years has been assigned to a trustee *expressly to attend the inheritance*, its surrender ought never to be presumed, from mere negative circumstances, such as lapse of time, or the continued omission to deal with it, or to notice its existence; for Sir Edward Sugden observes, "In this case the trustees ought not to surrender the term; to do so would be to commit a breach of trust."^(z)

However, it was held on two occasions by the Court of K. B. that [*256] a *surrender of a term *might* be presumed, although it had been expressly assigned to attend the inheritance:^(a) and those decisions were followed in a subsequent case in the Court of Exchequer.^(b)

(s) *Cooke v. Soltan*, 2 S. & S. 154; *Hillary v. Waller*, 12 Ves. 239, 252.

(t) *Doe v. Sybourn*, 7 T. R. 2; *Doe v. Wright*, 2 B. & Ald. 710; *Ex parte Holman*, 1 Sugd. V. & P. 509, 9th ed.; *Bartlett v. Downes*, 3 B. & Cr. 616.

(u) 12 Ves. 252.

(x) *Emery v. Grocock*, ubi supra; and see *Hillary v. Waller*, 12 Ves. 252.

(y) *Keene v. Deardon*, 8 East, 248, 264; *Doe v. Staple*, 2 T. R. 684.

(z) 1 Sugd. V. & P. 487, 9th ed., and see p. 472.

(a) *Doe v. Wright*, 2 B. & Ald. 710; *Doe v. Hilder*, id. 782; see *Bartlett v. Downes*, 3 B. & Cr. 616.

(b) *Townshend v. Champernown*, 1 Y. & J. 538.

There will be occasion presently to consider this point somewhat more at large: but it is to be observed that the doctrine of *Doe v. Hilder* has been much questioned, and the propriety of the decision in that case denied by Lord Eldon,^(c) as well as by Richards, L. C. B.^(d) Sir E. Sugden, also, in his *Treatise on Vendors and Purchasers*, has entered minutely into the discussion of the question, and has exposed with his usual ability and success, the unsoundness of the doctrine of that case.^(e) The case of *Townshend v. Champernown* appears to be the only one in which the authority of *Doe v. Hilder* has been judicially recognised, and in practice it does not seem to have been acted on. Accordingly, Sir E. Sugden, after a careful review of all the authorities, has stated himself to be justified in considering the law to stand as it did before the decision in *Doe v. Hilder*.^(f)

2d. There must be sufficient reason for presuming a conveyance by a trustee.¹

The execution of a conveyance by a trustee will not be presumed merely because such an act is sanctioned, or even peremptorily required by the trust. But circumstances must also exist, from which the execution of the conveyance may reasonably be supposed to have taken place.

Length of time is an important circumstance whereon to found this presumption, although it has been already mentioned that continued possession by the *cestui que trust*, without dealing with or noticing the estate vested in the trustee (however long the period), will not in general be a sufficient reason *of itself* for presuming a conveyance by the trustee, inasmuch as such a possession is not inconsistent with the trustee's title.^(g)

However, very slight additional circumstances, when coupled with great length of time, have been held sufficient to support the presumption. Therefore, where a conveyance of an estate in fee simple was originally made to a trustee *for a particular purpose*, viz., as a security against a defect of title,—which was intended to last only

(c) *Aspinall v. Kempson*, 1 Sugd. V. [Doe v. Langdon, 12 Q. B. 719; Garrard & P. 508. v. Tuck, 8 C. B. 248.]

(d) *Doe v. Putland*, 1 Sugd. V. & P. 502, 4; *Deardon v. Lord Byron*, id. 506. (g) Ante, p. 253; *Keene v. Deardon*, 8 East, 363; *Hillary v. Waller*, 12 Ves. 250; *Goodson v. Ellison*, 3 Russ. 588.

(e) Vide post, 260.

(f) 1 Sugd. V. & P. 470 to 510; and [Doe v. Langdon, 12 Q. B. 719.] see *Doe v. Plowman*, 3 B. & Ad. 573.

¹ “The current of later authorities shows that where a term has been assigned to attend the inheritance, a surrender ought not to be presumed, unless there has been a dealing with the estate in a way in which reasonable men and men of business would not have dealt with it, unless the term had been put an end to.” Wilde, C. J., in *Garrard v. Tuck*, 8 C. B. 248.

eleven years, Sir Wm. Grant, M. R., held that a reconveyance might be presumed after the lapse of 140 years, without any notice of the estate being outstanding, on the general principle of law; and even for the purpose of compelling a purchaser to accept the title; and the decision was affirmed on appeal by Lord Erskine.(h)

Indeed where the legal estate *in fee simple* has been vested in trustees *for a particular purpose*, which has been long since satisfied, or which from the length of time must be presumed to have been satisfied, there seems to be reason for contending as a general [*257] rule, that a reconveyance *might be presumed *solely* from the lapse of time;(i) for in this case no advantage can result to the beneficial owner from the legal estate remaining vested in the trustee, as is the case where the outstanding estate consists of a *satisfied term of years*; moreover, upon the satisfaction of the purpose for which the estate was created, it becomes the trustee's *duty* to execute a reconveyance. And this reasoning operates yet more powerfully in cases where there is an *express and positive direction* to the trustees *to reconvey* upon the satisfaction of the trusts:(k) for then their retaining the legal estate after the specified period almost amounts to a continuing breach of trust.

However, this argument does not apply to cases where the legal fee is vested in a person as a mere dry trustee, and as a convenient mode of effecting the conveyance; and where there is no particular purpose to be answered, which requires the separation of the legal and equitable estates. And in such a case the court has refused to presume a reconveyance by the trustee *solely* on account of the lapse of time, even after an interval of 120 years, where there have been no mesne transactions or other circumstances to assist the presumption.(l)

And where a *term of years* is vested in a trustee for a particular purpose, upon the satisfaction of that purpose it will in general become attendant upon the inheritance by the construction of law, whether the instrument by which it is created does or does not so direct; and therefore, although no notice be taken of the existence of the term for a period, however long in its duration, the surrender of the term cannot be presumed from the lapse of time *alone*, unaccompanied by other corroborative circumstances.(m)

(h) *Hillary v. Waller*, 12 Ves. 239.

(i) See *Cooke v. Soltau*, 2 S. & S. 154; *Noel v. Bewley*, 3 Sim. 103; *Hillary v. Waller*, 12 Ves. 252, 270.

(k) *Wilson v. Allen*, 1 J. & W. 611; see *England v. Slade*, 4 T. R. 682; *Hillary v. Waller*, 12 Ves. 239; *Doe v. Sybourn*, 7 T. R. 2.

(l) *Goodright v. Swymmer*, 1 Kenyon, 385; and see *Goodson v. Ellison*, 3 Russ. 583, 8; sed vide, *Doe v. Lloyd*, cited in *Matthews on Presumption*, 215; see *Langley v. Sneyd*, 1 S. & St. 45.

(m) *Cholmondeley v. Clinton*, 1 Sugd. V. & P. 506, 7, 9th ed.

But any circumstances tending to show that the equitable owner has acted or dealt with the property as if the legal estate were vested in him, will be material as evidence, when joined with length of time, to raise the presumption of a conveyance by the trustee. Therefore, if the deeds, by which the legal estate was originally vested in the trustee, are in the possession of the beneficial owner, and not of the trustee or his representatives; *(n)* or if the beneficial owner grant or confirm leases of the property for long terms of years, in such a way that they could only take effect out of the legal estate; *(o)* or if his title to, and possession of, the legal fee, be stated by him in a recital in a deed; *(p)* or if he suffer a recovery, and make a settlement, which can only operate on the supposition that the legal estate was not outstanding in the trustee; *(q)* or if he make a conveyance of the property, and the conveyance deed contain a covenant for quiet enjoyment, free from incumbrances; *(r)* all these *circumstances, when joined with considerable lapse of time, have been held [*258] sufficient to support the presumption in question.

And so, if on mesne dispositions of the estate, the title has been examined and accepted by conveyancers; *(s)* or in the case of a copyhold, if the equitable owner have been admitted and accepted by the lord as the *legal* tenant, *(t)* a similar result will follow.

In these cases it is impossible to lay down any general rule as to the number of years, or the precise circumstances, which will or will not be considered sufficient to support the presumption. This is a conclusion to be drawn from the general consideration of the circumstances, which must necessarily vary in every individual case; and the decision in one case can rarely be considered as an authority in any other.

It has been already seen, that where there is an *express direction for the trustee to convey* to a particular person at a certain time, the presumption that the trustee has performed his duty by executing the conveyance, will be more readily raised than if there were no such direction. Therefore, if the person who is entitled to require the conveyance, have done any act which assumes that the legal estate is vested in him,—the court will presume the execution of the reconveyance by the trustees after a very short interval of time, even though it be less than 20 years.

Thus in *England v. Slade*, a testator in December, 1777, devised lands to trustees, *in trust to convey to his son immediately on his*

(n) *Hillary v. Waller*, 12 Ves. 239; *Cooke v. Soltau*, 2 S. & St. 154; *Tenny v. Jones*, 10 Bing. 75.

(o) *Noel v. Bewley*, 3 Sim. 103; *England v. Slade*, 4 T. R. 682.

(p) *Noel v. Bewley*, 3 Sim. 114, 115.

(q) *Emery v. Grocock*, 6 Mad. 54.

(r) *Emery v. Grocock*, ubi supra.

(s) *Stafford v. Llewellyn*, Skinn. 77; *Doe v. Hilder*, 2 B. & Ald. 782; *Emery v. Grocock*, 6 Mad. 55; *Ex parte Holman*, 1 Sugd. V. & P. 509.

(t) *Wilson v. Allen*, 1 J. & W. 611.

attaining 21. The son attained that age in 1788. No conveyance by the trustees was proved, but in 1789 the son granted a lease of the property for 88 years. And on an ejectment, brought by the lessee in 1792, it was held by Lord Kenyon, with the concurrence of the other judges of the Court of King's Bench, that the plaintiff took the legal estate under that lease, "and as to the time, a jury might be directed to presume a surrender or conveyance *in much less time than twenty years.*(u)

Where the estate outstanding in a trustee consists of an old satisfied term of years, it is doubtful whether the continued omission to deal with or notice it on conveyances of the inheritance, will or will not of *itself* be a sufficient reason for presuming its surrender.

This doubt exists equally, whether the term by the termination of the trust has become attendant *through the operation of law*, or whether it has been *expressly assigned to a trustee to attend* the inheritance. The language of Lord Eldon in the House of Lords, on the appeal in *Cholmondeley v. Clinton*,(x) treats the question of presuming the surrender of a term as on precisely the same footing in either case.(x) However, where there has once been an *express direction*, that a term shall be held in trust to attend the inheritance, there certainly appears to be ground for contending strongly in argument, that mere negative circumstances shall not have the effect of raising the presumption of a surrender in direct contradiction to such an express trust, whatever might be their effect, where the trust to attend is created only by the implication or construction of law.

[*259] *Sir Edward Sugden, in his work on Vendors and Purchasers, has entered minutely into the consideration of this subject, and has entirely exhausted the learning connected with it; and that learned writer supports, with his usual ability and force, the position that an express assignment to attend the inheritance will prevent the presumption of its surrender. In such a case he observes, "it were clearly too much to presume a surrender of a term, which the owner has so anxiously kept distinct from the inheritance."(y)

In *Doe v. Staple*,(z) Lord Kenyon, C. J., said that he extremely approved of what was said by Lord Mansfield in *Lade v. Holford*, that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct a jury to presume a surrender.(z) However, this and other similar *dicta* (although doubtless

(u) *England v. Slade*, 4 T. R. 682; and see *Doe v. Sybourn*, 7 T. R. 2.

(x) *Cholmondeley v. Clinton*, 1 Sugd. V. & P. 506, 7, 9th edit.

(y) 1 Sugd. V. & P. 470, 9th ed.; and see p. 472.

(z) *Doe v. Staple*, 2 T. R. 696; and see *Doe v. Sybourn*, 7 T. R. 2; *Goodtitle v. Jones*, 7 T. R. 47; *Doe v. Read*, 8 T. R. 118.

favorable to the presumption of a surrender), cannot be considered to have established judicially a doctrine of so much importance.

The first decided case, in which the presumption of the surrender of an attendant term was made in the absence of any positive corroborative evidence to support it, was that of *Doe d. Burdett v. Wright*.(a) There a term was assigned in 1735 to raise an annuity, which ceased in 1741, and then to attend the inheritance. There had been no sale or other transaction, in which the term could have been dealt with, except a sale in 1801 of a small part of the estate for redeeming the land tax, whereupon the seller covenanted with the purchaser to produce the deeds creating and assigning the term. The surrender of the term was presumed by the Court of King's Bench in 1819. It is to be observed, however, that in this case the question was raised between two persons, each of whom claimed the property by descent.(a)

This case was followed in the same term by that of *Doe v. Hilder*,(b) where a term, which had been assigned to attend the inheritance in 1779, was presumed by the same court to have been surrendered in 1819. And this presumption was made on behalf of a judgment creditor against a purchaser, although the only circumstance in favor of it was the omission to assign or take any notice of the term in a settlement made on the marriage of the owner of the estate in 1814, and again in a conveyance on the sale of his life estate in 1816.(b) In the case of *Ex parte Holman*,(c) a term of 500 years was created in 1735, and was noticed in an intermediate deed dated in July, 1749. There had been three conveyances of the fee upon sales in 1784, in 1791, and 1792; but no notice had been taken of the term in those conveyances or on any other occasion. It was held by Sir John Leach, in 1820, that a surrender of the term must be presumed, and that an assignment of it was not necessary to perfect the title of a purchaser.(c)

In *Bartlett v. Downes*, a satisfied term had been set up by a devisee of the grantor to defeat a grant of the stewardship of a manor to a person *for life. The term had been created in 1712, and had been assigned to attend in 1786; and in 1793 there [*260] was a general declaration as to all outstanding terms. The Court of King's Bench held, that the surrender of this term was properly presumed in favor of the grantee in 1825.(d)

The case of *Townsend v. Champernown*,(e) in the Exchequer, carried this doctrine to a still greater extent. In a deed made in the

(a) *Doe v. Wright*, 2 B. & Ald. 710.

(d) *Bartlett v. Downes*, 3 B. & Cr.

(b) *Doe v. Hilder*, 2 B. & Ald. 782.

616.

(c) *Ex parte Holman*, 1 Sugd. V. & P. 509, 9th ed.

(e) *Townsend v. Champernown*, 1 Y. & J. 538.

year 1758, a term of 1000 years had been recited *to have been assigned to attend*. The Master reported in favor of the title of a vendor, on the ground that the surrender of this term must be presumed after an interval of 70 years; and Alexander, L. C. B., on overruling an exception to this report, observed, "until a different decision be pronounced I shall, on the authority of *Doe v. Hilder*, after the expiration of 70 years—*without payment of interest*—presume the term to be surrendered."^(e) It is difficult to comprehend the meaning of the Lord Chief Baron's observation as to the non-payment of interest; but the effect of the decision, if supported, is, that a term expressly assigned to attend, if not dealt with or noticed for 70 years, must be presumed to have been surrendered, even to the extent of compelling a purchaser to accept the title without an assignment of the term.

But on the other hand, there are several *dicta* and decisions by which the foundation of the doctrine of *Doe v. Hilder* and the cases following it has been very much shaken, if not expressly overturned.

The decision of *Doe v. Hilder* was strongly disapproved of by Richards, L. C. B., and the other barons of the Court of Exchequer, when the circumstances of that case were subsequently brought before them on another ejectment.^(f) Lord Eldon on several occasions questioned the soundness of the same decision in the most pointed terms;^(g) and finally, in *Aspinall v. Kempson*, upon the case of *Doe v. Hilder* being cited, his Lordship observed, that having paid considerable attention to that case, he had no hesitation in declaring that he would not have directed a jury to presume a surrender of the term in that case, and for the safety of titles, he thought it right to declare that he did not concur in the doctrine laid down in that case.^(h)

Again, Sir Edward Sugden, after an elaborate investigation of the law on this subject, as founded both on principle and authority, has laid it down, that a term of years assigned to attend the inheritance, ought not to be presumed to be surrendered, unless there has been an enjoyment inconsistent with the existence of the term, or some act done in order to disavow the tenure under the termor, and to bar it as a continuing interest.⁽ⁱ⁾

In this state of the authorities it was impossible to maintain, in its full extent, the principle of *Doe v. Wright* and *Doe v. Hilder*, much less that of *Townsend v. Champernown*; and it may be confidently [*261] stated, that at *the present day the mere omission to notice the existence of an outstanding term will be held a sufficient

(e) *Townsend v. Champernown*, 1 Y. & J. 538.

(f) *Doe v. Putland*, 1 Sugd. V. & P. 502; and see *Deardon v. Lord Byron*, cited id. 506.

(g) *Townsend v. Bishop of Norwich*,

1 Sugd. V. & P. 505; *Hayes v. Bayley*, id. 506; *Cholmondeley v. Clinton*, id. 506, 7.

(h) *Aspinall v. Kempson*, 1 Sugd. V. & P. 508.

(i) 1 Sugd. V. & P. 472, 9th ed.

reason for presuming its surrender only where there have been intermediate sales or other transactions, in which it is necessary or usual to deal with or notice all existing terms. The decided cases, and to a certain extent the principles on which the doctrine of presumption proceeds, seem to support its application to that extent.^(k)

But this foundation for the presumption wholly fails, where no intermediate transactions have taken place affecting the property, except those in which it is neither requisite nor customary to notice any existing terms, as in the case in marriage settlements or devises by will. In such cases, therefore, it has been decided that the mere omission to notice a term is no reason for presuming its surrender as between a purchaser of the inheritance and a person claiming under a prior title; or on a question of title between a vendor and purchaser.^(l) And the same reasoning applies, *à fortiori*, to cases where the estate has not been dealt with or disposed of *at all* since the assignment of the term.^(m)

However, the presumption of the surrender, even where there have been intermediate sales without any notice of the term, is opposed to the authority both of Lord Eldon and Sir Edward Sugden, who have both strongly denied the necessity of taking an assignment of a term, which has been once assigned to attend, even upon a purchase of the inheritance.⁽ⁿ⁾

The same rules do not apply where the term is made use of by the trustee himself, to defeat or oppose the title of the *cestui que trust*. For in such a case a court of law, in order to prevent the gross injustice attending the enforcing of such a claim, will take advantage of any circumstances, however inconclusive, in order to presume the surrender of the term.^(o)

And the same principle has been acted upon in a contest between two persons, who each claimed an estate as the heir-at-law of a former owner, lest the consideration of the merits of the case should be prevented or delayed by a purely technical objection.^(p) However, the application of the doctrine even to this extent has been much questioned, and the case in which the court arrived at that decision must be regarded at best as but of very doubtful authority.^(q)

(k) *Doe v. Hilder*, 2 B. & Ald. 782; *Emery v. Grocock*, 6 Mad. 54; *Ex parte Holman*, 1 Sugd. V. & P. 509; *Doe v. Plowman*, 2 B. & Ad. 573. [*Doe v. Langdon*, 12 Q. B. 719; *Garrard v. Tuck*, 8 C. B. 247.] other case cited, *Ibid.*; *Hayes v. Bailey*, id. 506; *Cholmondeley v. Clinton*, id. 507; 1 Sugd. V. & P. 477 to 482; *Maundrell v. Maundrell*, 10 Ves. 246.

(l) *Doe v. Plowman*, 2 B. & Ad. 573; 1 Sugd. V. & P. 475, 6. (o) *Lade v. Holford*, Bull. N. P. 110; *Doe v. Staple*, 2 T. R. 696; *Doe v. Sybourn*, 7 T. R. 2; *Goodtitle v. Jones*, id. 47; and see *Bartlett v. Downes*, 3 B. & Cr. 616.

(m) 1 Sugd. V. & P. 473, 4.

(p) *Doe v. Wright*, 2 B. & Ald. 710,

(n) *Marquis of Townsend v. Bishop of Norwich*, 1 Sugd. V. & P. 505; and vide post

(q) *Doe v. Plowman*, 2 B. & Ad. 573.

Where an old satisfied term, though not expressly assigned to attend, has been recently recognised and dealt with as a subsisting [*262] interest, it is *clear that no previous lapse of time, however great, will be a sufficient reason for presuming its surrender.(r) (1)

If a term of years, created to secure certain charges, be mortgaged to the tenant for life, who pays off the charges, no lapse of time will raise a presumption of its surrender as against the tenant for life, or his representatives.(s) For in that case the term would still remain in gross and on foot for the benefit of the tenant for life.

3d.—The object of the presumption must be to prevent a just title from being defeated by mere matter of form.

According to the doctrine laid down by Lord Mansfield and Lord Kenyon, this is the third requisite for raising the presumption of a conveyance or surrender of a legal estate outstanding in a trustee.(t) Its reasonableness and justice is obvious; for otherwise one of the great protections afforded by the law to innocent purchasers would be done away with, and a doctrine, which was introduced for the security and quieting of just titles, would be continually liable to be perverted to the purposes of injustice and oppression.(u)

Accordingly, as a general rule, this presumption will be made in favor only of the person in whom the beneficial title is for the time being clearly vested, although for this purpose it is immaterial whether the person claiming the benefit of the presumption be entitled to the equitable estate in fee simple;(x) or as grantee for life;(y) or as a lessee for a term of years.(y)

In the recent case of *Doe v. Cook*,(z) the Court of C. P. refused to presume the surrender of an outstanding term in favor of a defendant, who showed no other title to the premises which were sought to be recovered, than that of a mere naked possession.(a)

In *Doe v. Wright*, neither of the parties to the action had esta-

(r) *Doe v. Scott*, 11 East, 478.

(x) *Wilson v. Allen*, 1 J. & W. 611,

(s) *Redington v. Redington*, 1 Ball. & Beat. 131.

Noel *v. Bewley*, 3 Sim. 103; *Tenny v. Jones*, 10 Bingh. 75.

(t) *Lade v. Holford*, Bull. N. P. 110; *Doe v. Sybourn*, 7 T. R. 2; *Goodtitle v. Jones*, id. 47.

(y) *Bartlett v. Downes*, 8 B. & Cr. 616.

(u) See *Doe v. Cook*, 6 Bingh. 179; and *Tenny v. Jones*, 10 Bingh. 75.

(z) *Doe v. Cook*, 6 Bingh. 174.

(a) *England v. Slade*, 4 T. R. 682; *Doe v. Sybourn*, 7 T. R. 2.

(1) It nowhere appears to have been decided, what would be the effect of a general declaration, which is not unfrequently inserted in deeds of conveyance, that all terms not then assigned to attend shall be presumed to have been surrendered. However, it is conceived that such a declaration would be conclusive as to the presumption at least against all the parties to such a declaration, who at the time were entitled to the benefit of any terms, as well as persons claiming under them, whatever might be its operation as affecting other persons.

blished an exclusive title to the beneficial ownership, for they both claimed in the same character, viz., as heir. An outstanding term was notwithstanding presumed to be surrendered; for if either claimant had been suffered to set it up against the other, the party who availed himself of the advantage might have turned out not to be the real heir, and thus a just title might have been defeated by the mere formal defect.(b)

All the decisions, therefore, that have hitherto been mentioned, support the position, that the presumption will only be made in favor of a just title, and *also to prevent that title from being defeated*. However, the case *of Doe v. Hilder(c) is directly at variance [*263] with the latter branch of this proposition. In that case both the parties had an equitable interest in the property; one representing a purchaser for valuable consideration, and the other being a judgment creditor of the vendor, who had issued an *elegit* previously to the sale. The equitable rights of the parties were therefore tolerably equal, or rather, as Sir Edward Sugden has shown, the equity of the purchaser was the stronger of the two,(d) and the purchaser then fortified his equitable title by getting in the legal estate, which was outstanding in an old term of years. It was notwithstanding held by the Court of K. B., that the surrender of the term was to be presumed in favor of the judgment creditor, so as to defeat the purchaser's title. However, it has been already observed, that this case cannot now be considered a binding authority.(e)

But there is a series of other cases, in which the latter branch of this proposition, viz., that the presumption is to be made, only in order to prevent a just title from being defeated by a matter of form—appears to have been lost sight of. These are those cases, in which a *purchaser has been compelled to accept a title*, the validity of which is founded on the presumption of a conveyance or surrender of an outstanding legal estate.(f)

The first case in which this doctrine was applied in practice, was that of Hillary v. Waller;(g) where a purchaser objected to the title on the ground, that there was no evidence of the reconveyance of the legal fee, which had been vested in a trustee by a conveyance dated 140 years previously; Sir Wm. Grant, M. R., overruled the objection, and decreed a specific performance of the agreement against the purchaser; and this decision was affirmed on appeal by Lord Erskine.(g)

Sir E. Sugden has observed, that this case has not met with the

(b) Doe v. Wright, 2 B. & Ald. 710.

(c) 2 B. & Ald. 782.

(d) 1 Sugd. V. & P. 501, 2.

(e) Vide supra.

(f) Hillary v. Waller, 12 Ves. 239;

Emery v. Grocock, 6 Mad. 54; Ex parte

Holman, 1 Sugd. V. & P. 509, 10; Cooke

v. Soltan, 2 S. & St. 154; Townsend v.

Champernown, 1 Y. & J. 543.

(g) Hillary v. Waller, 12 Ves. 239.

approbation of the profession; and that it has occasioned considerable difficulties in practice.^(h) But the doctrine, which it established, has since been recognised and acted upon in a series of cases, in which reconveyances and surrenders of outstanding legal estates, as well in fee⁽ⁱ⁾ as for terms of years,^(k) have been presumed against purchasers, by whom a specific performance has been resisted on account of that defect in the title. It is now too late, therefore, to question the soundness or propriety of the principle on which those decisions have proceeded.

V.—OF THE APPLICATION OF THE STATUTES OF LIMITATION AS REGARDS THE ESTATE OF TRUSTEES.

It has been laid down in general terms in some of the older cases, that the Statutes of Limitation do not run against a trust.^(l)¹ However, this position, though generally true, must not be admitted without some qualification.

As between trustees and *cestui que trust*, an *express* trust, constituted *by the act of the parties themselves, will not be [*264] barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being the possession of the *cestui que trust*.^(m)⁽¹⁾² And the law on this point is not

(h) 1 Sugd. V. & P. 350, 1.

(l) *Sheldon v. Wildman*, 2 Ch. Ca.

(i) *Cooke v. Soltan*, 2 S. & St. 154.

26; *Hollis's case*, 2 Ventr. 345.

(k) *Emery v. Grocock*, 6 Mad. 54;

(m) *Beckford v. Wade*, 17 Ves. 97;

Ex parte Holman, 1 Sugd. V. & P. *Hovenden v. Lord Annesley*, 2 Sch. & 509; *Townsend v. Champernown*, 1 Y. Lef. 633; *Wedderburn v. Wedderburn*, 4 M. & Cr. 52.

(1) And where there are several trustees, the Statutes of Limitation will not run against the *cestui que trust*, as long as any one of the trustees is in possession. *Attorney-General v. Flint*, 4 Hare, 147.

¹ See the Statute of New York, stated *antè*, note to page 168. By the Ohio civil code of 1853, tit. ii. ch. 1, § 6, continuing and subsisting trusts are expressly excepted from the operation of the provisions of that title, with regard to the "limitation of civil actions."

² It has been uniformly ruled in the United States, that in the case of an *express* continuing trust, the Statute of Limitations does not begin to run as against the *cestui que trust*, and in favor of the trustee, until there has been some open express denial of the right of the former, and what amounts to an adverse possession on the part of the latter. *Decouche v. Savetier*, 3 J. C. R. 190; *Anstice v. Brown*, 6 Paige, 448; *Kane v. Bloodgood*, 7 J. C. R. 90; *Bohannon's heirs v. Shresley's adm.*, 2 B. Monr. 438; *Foscue v. Foscue*, 2 Ired. Eq. 321; *White v. White*, 1 Johns. Maryl. Ch. 56; *Pinson v. Grey*, 1 Yerg. 296; *Cook v. Williams*, 1 Green, Ch. 209; *Boone v. Chiles*, 10 Pet. 177; *Prevost v. Gratz*, 6 Wheat. 481; *Oliver v. Piatt*, 2 How. U. S. 333; *Zeller's lessee v. Eckart*, 4 Id. 289; *Johnson v. Humphreys*, 14 S. & R. 394; *Finney v. Cochran*, 1 W. & S. 118; *Murdoch v.*

affected by the late Limitations Act (3 & 4 Will. IV. c. 27); for the 25th section of that statute expressly provides, that time shall not run against an express trust, until the land or rent vested in the trustee shall have been conveyed by him to a purchaser for a valuable consideration; and that it shall then run only in favor of the purchaser and the parties claiming under him.¹

Therefore in case of express trust, accounts have been decreed against trustees, extending over periods of thirty, forty, and even forty-five years.(n) And the rights of the *cestui que trust* will not

(n) *Beaumont v. Boulton*, 5 Ves. Atty.-Gen. v. *Brewers' Company*, 1 Mer. 485; *Townsend v. Townsend*, 1 Cox, 495.
28; *Chalmer v. Bradley*, 1 J. & W. 51;

Hughes, 7 Sm. & M. 219; *Starke v. Starke*, 3 Rich. 438; *Perkins v. Cartwell*, 4 Harring. 270; *Varich v. Edwards*, 11 Paige, 259; *Farnum v. Brooks*, 9 Pick. 212; *Smith v. Calloway*, 7 Blackf. 86; *McDonald v. Sims*, 3 Kelly, 383; see *Wickliffe v. City of Lexington*, 11 B. Monroe, 161. And even in cases of adverse possession the knowledge of, or notice to, the *cestui que trust* is necessary. *Fox v. Cash*, 11 Penn. St. R. 207; *Starke v. Starke*, 3 Rich. 438. Where a trustee for the sale of stock actually sells, and incurs a liability for the proceeds, the statute begins to run from that time. *White v. White*, 1 John. Mary. Ch. 56. So, in general, where the relation is terminated by a breach of trust. *Wickliffe v. City of Lexington*, 11 B. Monroe, 161. Where the trust, however, is merely implied or constructive, there has been some disagreement among the cases, but the better opinion appears to be that, as in general the facts out of which such trust arises, from their very nature presuppose an adverse claim of right on the part of the trustee by implication, from the beginning, the statute will commence to run against the *cestui que trust*, from the period from which he could have vindicated his right by action or otherwise; which, however it may be at law, where there has been a difference among the cases, (see Angell on Limit., ch. 18), in equity is considered to be when he has, or, with reasonable diligence, could have made himself acquainted with that right. Angell on Limitation, ch. 16, 35; and cases there cited; 19 Am. Jurist. 389; *Sheppard v. Turpin*, 3 Gratt. 373; *Murdock v. Hughes*, 7 Sm. & M. 219; *Gratz v. Prevost*, 6 Wheat. 481; *Cuyler v. Brant*, 2 Caines Cas. 326; and note antè, p. 168, on the effect of lapse of time in equity, A resulting trust from the payment of purchase-money is barred by the statute, *Strimpfler v. Roberts*, 18 Penn. St. R. 300. As an executor or administrator is a trustee for legatees, next of kin, or creditors, the general rule applies, *Lindsay v. Lindsay*, 1 Desaus. 150; *Carr v. Bob*, 7 Dana, 417; *Blue v. Patterson*, 1 Dev. & Batt. Eq. 457; *Bird v. Graham*, 1 Ired. Eq. 196 (except where there is some statutory limitations, as there is indeed, in most of the States, see post, 341 n.); though there will be a presumption of payment after a great lapse of time. *Bird v. Graham*, ut supr.; *Graham v. Torrance*, 1 Ired. Eq. 210; *Shearin v. Eaton*, Id. 282; *Graham v. Davidson*, 2 Dev. & Batt. 155; *Tate v. Connor*, 2 Dev. Eq. 224; *Hudson v. Hudson*, 3 Rand. 117; *Hayes v. Good*, 7 Leigh, 452; *Skinner v. Skinner*, 1 J. J. Marsh. 594; see Angell on Limitations, ch. 16.

These questions with regard to the statute, only apply as between trustee and *cestui que trust*. *Lyon v. Marclay*, 1 Watts, 275. Among several *cestui que trusts* none can take advantage of possession against the rest. *Foscoe v. Foscoe*, 2 Ired. Eq. 321.

¹ See *Young v. Lord Waterpark*, 10 Jur. 1; 15 L. J. (Ch.) 63; 13 Sim. 204 *Garrard v. Tuck*, 8 C. B. 247.

be affected by a fine levied by the trustees, or a purchaser from him.(o) The law on this subject has recently been fully considered, and the principle, as stated above, adopted in the case of *Wedderburn v. Wedderburn*, which came before Lord Langdale, M. R., and was subsequently brought by appeal before Lord Cottenham.(p) So in a very recent case a testator, who died in 1795, devised his real estates to trustees to sell and pay certain annuities. The trustees entered into possession, and the survivor remained in possession, until 11 years before the filing of the bill, but no payment had been made in respect of the annuities for more than twenty years before the bill was filed. It was contended, that the annuitants were barred by the Statute of Limitation; but the Vice-Chancellor (Sir L. Shadwell) held, that there was no adverse possession during the time that the trustees continued in possession, and his Honor granted the relief prayed by the bill.(q) And in another case, where the heir-at-law of a testator, who was also devisee in trust under his will, entered into possession of the estate as trustee, and received the rents from 1811 down to 1835; it was held by Lord Langdale, M. R., that he could not plead the Statute of Limitation in answer to a bill for an account filed in 1836.(r)

However, these observations apply only to cases, where the relation of trustee and *cestui que trust* is still subsisting. For although an express trust may once have been created, yet if the trustee, with the full knowledge and consent of the *cestui que trust*, have divested himself of that character, by parting with the legal estate, and settling his accounts, and obtaining a release from the person beneficially interested, the court in the absence of fraud will be very reluctant to entertain a claim, arising out of the trust transactions, where there has been such a lapse of time, as in ordinary cases would constitute a bar under the Statute of Limitations. And this distinction was clearly recognised, and maintained, both by the [*265] *Master of the Rolls and the Lord Chancellor, in deciding the case of *Wedderburn v. Wedderburn*.(s)

Where the trust is created merely by implication or construction of law, the plea of lapse of time will be more readily admitted, as a bar to any claim by the *cestui que trust* against the trustee.(t) In such cases, the possession of the trustee is usually to a certain extent adverse to the *cestui que trust*; for it rarely happens that such a

(o) *Thompson v. Simpson*, 1 Dr. & W. 459.

(p) *Wedderburn v. Wedderburn*, 2 Keen, 722; S. C. 4 M. & Cr. 41.

(q) *Wood v. Arch*, 12 Sim. 472.

(r) *Man v. Rickets*, 13 Law Journ. N. S., Chanc. 194.

(s) *Wedderburn v. Wedderburn*, 2 Keen, 749; S. C. 4 M. & Cr. 52; see *Portlock v. Gardner*, 1 Hare, 594. [See *Wycliffe v. Lexington*, 11 B. Monr. 161.]

(t) *Breckford v. Wade*, 17 Ves. 97; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633. [See ante, note, page 264.]

trust is expressly recognised, or admitted by the parties.(u) Therefore, though in strictness the Statutes of Limitation can scarcely be said to apply to these equitable cases, courts of equity have always admitted the validity of a defence founded on the analogy of those statutes, and have refused relief, where the party, with full knowledge or being in a situation to have full knowledge of his rights, has delayed for twenty years to prosecute his claim.(x) On more than one occasion, a delay of eighteen years in enforcing a claim founded on a constructive trust has been held a sufficient reason for dismissing the bill.(y) Where the period of acquiescence has been longer than twenty years, the ground of defence will of course be proportionably stronger, and more difficult to overcome.(z)

However, even in cases of constructive trusts, mere lapse of time will not of itself be always a bar to the relief. The party entitled to the benefit of the trust must also have been aware of his rights, and must have acquiesced in being deprived of them by the trustee; and time as a bar to the remedy runs only from the commencement of such acquiescence.(a) Therefore, where the parties equitably entitled have not been in a situation to become acquainted with their rights, the court in numerous instances has enforced the performance of a constructive trust, notwithstanding the long interval that had elapsed since the title had accrued. Thus in *Stackpole v. Davoren*,(b) an account of rents and profits of an estate was decreed, under peculiar circumstances of fraud and imposition, after an adverse possession of fifty years.(b) And in a recent case, Sir C. Pepys, M. R., set aside a purchase by a steward at an undervalue after an interval of forty-seven years:(c) and many other decisions of a similar tendency are to be met with in the books.(d)

(u) *Collard v. Hare*, 2 R. & M. 683.

(x) *Smith v. Clay*, 3 Bro. C. C. 639, n.; *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 636, 7; *Medlicott v. O'Donnell*, 1 Ball. & Beat. 164; *Cholmondeley v. Clinton*, 2 J. & W. 141, 151; *Pryce v. Byrn*, cited 5 Ves. 681.

(y) *Gregory v. Gregory*, Coop. 201; *Champion v. Rigby*, 1 R. & M. 539; see *Selsea v. Rhoads*, 1 Bl. N. S. 1.

(z) *Norris v. Neve*, 3 Atk. 38; *Andrew v. Wrigley*, 4 Bro. C. C. 124; *Bonny v. Ridgard*, cited id. 138; *Pryce v. Byrn*, 5 Ves. 681; cited *Campbell v. Walker*, 5 Ves. 678, 82; *Morse v. Royal*, 12 Ves. 355; *Ex parte Grainger*, 2 Deac. & Ch. 459; *Bonny v. Ridgard*, 1 Cox, 146; see this subject further considered, post, 525.

(a) *Blennerhasset v. Day*, 2 Ball. & B. 118; *Trevelyan v. Charter*, Rolls, June 2, 1835. [Ante, note, p. 168, and see this subject further considered, post, *Remedies for Breach of Trust*, p. 518.]

(b) *Stackpole v. Davoren*, 1 Bro. P. C. 9.

(c) *Trevelyan v. Charter*, Rolls, 2 June, 1835; [affirmed 11 Cl. & F. 714.]

(d) *Vernon v. Vaudry*, 2 Atk. 119; *Alder v. Gregory*, 2. Ed. 280; *Malony v. L'Estrange*, 1 Beat. 406; *Randall v. Errington*, 10 Ves. 423; *Purcell v. M'Namara*, 14 Ves. 91; *Pickett v. Logan*, id. 215; *Murray v. Palmer*, 2 Sch. & Lef. 487; *Aylward v. Kearney*, 2 Ball. & B. 463; *Gordon v. Gordon*, 3 Sw. 400; *Watson v. Toone*, 6 Mad. 153.

[*266] *Moreover, a *cestui que trust* will not be barred from his right to relief by any length of acquiescence, unless he have an immediate possessory title to the beneficial interest. For instance, where a person was entitled to the trust of a beneficial lease *in remainder after the determination of a previous life estate*, and the trustees suffered the lease to expire in 1798; but the tenant for life did not die until 1830, the *cestui que trust* in remainder was held entitled to relief against the trustees upon a bill filed by him in 1831, although he had been of full age since 1800.(e)

It is almost needless to add, that a *cestui que trust* being an infant or otherwise *non sui juris* cannot be prejudiced by any acquiescence.(f)

Where the conduct of the trustee is tainted with fraud, the same doctrine will be applied with even greater stringency; and the time will commence running only from the discovery of the fraud. And the 26th section of the act 3 & 4 Will. IV. c. 27 expressly enacts, that in cases of concealed fraud, time shall not begin to run until the fraud shall, or with reasonable diligence might, have been known or discovered, with a saving, however, of the rights of *bona fide* purchasers for valuable consideration without knowledge of the fraud.

Acquiescence has not the same effect in barring an equitable right where the parties interested consist of a numerous body of persons, such as creditors, or a society or congregation of dissenters; for relief will be decreed in favor of such objects after very considerable delay.(g) And on the same principle, it has been determined that trusts for charities are not affected by the Statutes of Limitation.(h) And the first section of the new statute 3 & 4 Will. IV. c. 27, has not altered this rule.(i)(1)

For the same reason that the possession of the trustee is not usually a bar to the *cestui que trust*, the possession of the *cestui que trust*, for however long a period, will not in general displace the legal title of the trustee. For the holding in either case is not adverse.¹

(e) *Bennet v. Colley*, 5 Sim. 181; 2 Mackenzie, 3 Bro. P. C. 42; Atty.-Gen. M. & K. 225; and see *Thompson v. Lord Dudley*, Coop. 146.

(f) *March v. Russell*, 3 M. & Cr. 31, 42; [but as regards strangers claiming against legal estate, it is different; *Williams v. Otey*, 8 Humph. 563; see *Smilie v. Biffle*, 2 Barr, 52.]

(g) *Whitchote v. Lawrence*, 3 Ves. 740, 52; *Case in Exchequer*, cited 6 Ves. 632; *York Buildings Company v.*

(h) Atty.-Gen. v. Mayor of Coventry, 2 Vern. 399; Atty.-Gen. v. Mayor of Bristol, 2 J. & W. 321; Atty.-Gen. v. Mayor of Exeter, Jac. 448.

(i) *Irish Incorporation Society v. Richards*, 1 Dr. & W. 258; Atty.-Gen. v. Perse, 2 Dr. & W. 67; Atty.-Gen. v. Flint [4 Hare, 147].

(1) The first section of 3 & 4 Will. 4, c. 27, declares that the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual.

¹ In *Doe d. Jacobs v. Phillips*, 10 Q. B. 130, it was held under the statute of 3 & 4 William IV., that the possession of the *cestui que trust* was ad-

At law the *cestui que trust* is regarded as tenant at will to the trustee, and he cannot be ejected without a previous demand of possession. Therefore, until this tenancy is determined, there can be no adverse possession between the parties.^(k)

In a late case a *cestui que trust* for life, under the trusts of a settlement, acting as the agent of the trustees, who had a power of sale, sold the trust estate for 8,440*l.*, and at the same time purchased another estate for 17,400*l.*, which was conveyed to the tenant for life absolutely in his own name, and he remained in possession for thirty-one years, and then became *bankrupt, but the whole of the 8,440*l.* (the purchase-money of the first estate) was applied [*267] in part payment of the purchase-money for the second estate, so that the second estate was in fact subject to the trusts of the settlement to the extent of the 8,440*l.* It was held that the possession of the *cestui que trust* for life, being consistent with the settlement, created no adverse title as against the trustees, who were therefore entitled to enforce their lien on the estate for the 8,440*l.*, notwithstanding the lapse of time.^(l)

However, if there be a formal denial or disclaimer of the tenancy by the *cestui que trust*, or he continue to deal with the estate in a manner inconsistent with its subsistence, he may doubtless disseise the trustee, and thus acquire an adverse possession, upon which the Statutes of Limitation will then operate, so as to vest in him an indefeasible legal title. However, it must always be a very nice and difficult question to determine, whether and at what time such an adverse possession on the part of the *cestui que trust* has been actually acquired;^(m) and a title based on such a transaction could never safely be accepted.

But it is clear that the legal estate vested in a trustee, together with the equitable interest dependant on it, may be defeated and divested by the disseisin of a stranger who has no notice of the trust.¹

(k) *Right v. Beard*, 13 East, 210; *Doe v. Jackson*, 1 B. & Cr. 448; *Doe v. Jones*, 10 B. & Cr. 718; *Roe v. Street*, 4 Nev. & M. 42; 4 Bac. Abr. 198; Co. Litt. 54, b. [*Young v. Lord Waterpark*, 10 Jur. 1; *Garrard v. Tuck*, 8 C. B. 248; *Angell, Limitat. Ch.* 35].

(l) *Price v. Blakemore*, 6 Beav. 507, 514.

(m) *Keene v. Deardon*, 8 East, 247; *Earl of Portsmouth v. Lord Effingham*, 1 Ves. 435; *Harwood v. Oglender*, 3 Ves. 131; *Cholmondeley v. Clinton*, 2 Mer. 360.

verse against the trustee from the moment he was entitled to possession, and therefore that the statute applied to the case of a term attending the inheritance. But in *Young v. Lord Waterpark*, 13 Sim. 204, 10 Jur. 1, and in *Garrard v. Tuck*, 8 C. B. 248, the opposite conclusion was arrived at; and this appears to be the better opinion in England. See Sugden's Concise View, &c., 356.

¹ *Elmendorf v. Taylor*, 10 Wheat. 152; *Williams v. Otey*, 8 Humph. 563; *Smilie v. Biffle*, 2 Barr, 52. In the case of a separate use of a feme covert, the possession of the husband, consistent with the trusts of the deed, is not adverse to the trustee. *Henson v. Kinnaid*, 3 Strobb. Eq. 371.

And the Statutes of Limitation will in such a case constitute as effectual a bar as if no trust estate had been interposed. However, this doctrine was once not entirely free from doubt. For in an early case Lord Macclesfield is reported to have overruled a plea of the Statute of Limitations, on the ground that the legal estate was in trustees.⁽ⁿ⁾ And on another occasion, Sir J. Jekyll, M. R., laid it down as a rule, that the forbearance of the trustees, in not doing what it was their office to have done, should in no sort prejudice the *cestui que trust*.^(o)

But it was said by Lord Hardwicke, in the case of *Lewellen v. Mackworth*,^(p) that the rule, that the Statute of Limitations does not bar a trust estate, holds only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on the one side and strangers on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without a trust. Therefore, where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both. And the application of the Statute of Limitations, in favor of strangers to the trust, has been affirmed in equally positive language by other judges.^(q) In *Cholmondeley v. Clinton*, Sir Wm. Grant, M. R., alluded to the decision in *Lawley v. Lawley* without any disapprobation.^(r) But when that case subsequently came before Sir Thomas Plumer, M. R., on further directions, that learned Judge decided, that the existence of the legal estate in trustees did not prevent the operation of time as a bar as between parties claiming adversely the equitable interest, and in the [*268] course of his judgment his Honor commented upon and explained the case of *Lawley v. Lawley*, which he showed to have been very incorrectly stated in the printed report.^(s) The decision of Sir Thomas Plumer was affirmed on appeal by the House of Lords, and the doctrine as laid down above must therefore be considered as finally established.^(t)

It seems still somewhat doubtful, how far the infancy of the, *cestui que trusts* will prevent the adverse possession of a stranger from operating as a bar to their claims. In one instance, where the *cestui que trust* was under the disability of infancy at the time of the disseisin, the court interfered, and relieved against the effect of a fine by a stranger, and five years non-claim, by which the legal title of the

(n) *Lawley v. Lawley*, 9 Mod. 32.

Pentland v. Stokes, 2 Ball. & B. 75, per Lord Manners.

(o) *Lechmere v. Earl of Carlisle*, 3 P. Wms. 215. [*Cowling v. Douglass*, 4 Alab. 206.]

(r) 2 Mer. 360.

(p) 2 Eq. Ca. Abr. 579.

(s) *Cholmondeley v. Clinton*, 2 J. & W. 171, 5. [See *Elmendorff v. Taylor*, 10 Wheat. 174.]

(q) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629, per Lord Redesdale;

(t) 2 J. & W. 191.

trustee had been barred.(u) However, Lord Chancellor Parker is reported to have said, that in favor of a *purchaser*, a fine and non-claim should bar the *cestui que trust*, though an *infant*.(x) And this appears to be the true doctrine of the court, although the point might perhaps still be open to argument.¹

Where the *trustee* who has the legal right of enforcing a claim, is under any disability, it would follow conversely from this doctrine, that the Statutes of Limitation would not begin to run, until that disability ceased. However, the point does not appear to have been ever expressly decided.(y)

On the whole it must be admitted, that the effect of the Statutes of Limitation, as applied to the estate of trustees, is left in a very unsatisfactory state by the authorities, and it is extremely difficult to gather from them any very definite rules of general application on the point.

*CHAPTER III.

[*269]

OF THE INCIDENTS TO, AND LEGAL PROPERTIES OF THE ESTATE OF TRUSTEES.

CONVEYANCES to uses before the statute of Henry VIII. were attended with this inconvenience—*viz.*, that the estates of the feoffees to uses, were subject to all their legal incumbrances.(a) But upon the establishment of trusts, it was settled that trustees held only for the benefit of the *cestui que trust*, and that the legal estate should not be subjected to any of their incumbrances.(b)

Therefore the legal inheritance, vested in trustees, is not *in equity* subject to the dower or freebench of their widows, or to the estate by curtesy of their husbands, although those rights will attach on the trustee's estate *at law*.(c) Nor will that, or any other interest, held only in trust, be affected in equity by the judgment, or other debts or engagements, or by the bankruptcy or insolvency of the trustee.(d)²

(u) Allen v. Sayer, 2 Vern. 368.

Abr. 728; Noel v. Jevon, 2 Freem. 43;

(x) Earl v. Countess of Huntingdon,

Hinton v. Hinton, 2 Ves. 631; 1 Sugd.

3 P. Wms. 310, n.; see Wych v. East

V. & P. 358, 9, 9th ed.

India Company, id. 309; and see also

(d) Copeman v. Gallant, 1 P. Wms.

Pentland v. Stokes, 2 Ball. & B. 75.

314; Finch v. Earl of Winchelsea, 1 P.

(y) Vide post, Part III. Div. I. Ch. III.

Wms. 278; Bennett v. Davis, 2 P. Wms.

(a) 1 Cruis. Dig. Tit. XI. c. 2, p. 7.

318; Scott v. Surman, Willes, 402; Car-

(b) 1 Cruis. Dig. Tit. XII. c. 4, s. 1.

penter v. Marnell, 3 B. & P. 40, vide

(c) Casborn v. English, 2 Eq. Ca.

post, p. 530 (Bankruptcy.)

¹ It was so ruled in Williams v. Otey, 8 Humph. 563. See Smilie v. Biffle, 2 Barr, 52.

² Lounsbury v. Purdy, 11 Barb. S. C. 490; Beaver v. Filson, 8 Barr, 327; Bush

Previously to the recent statute 4 & 5 Will. IV. c. 23, if a trustee of real property died without leaving an heir, the legal estate escheated to the crown or other superior lord. And in like manner the real or personal estate vested in a trustee was forfeited to the crown or other superior lord, upon attainder or conviction for treason or felony. And we have seen, that it was then a very doubtful question, whether the trust could be enforced against the crown, or other lord, taking by forfeiture or escheat.^(e) However, as has been already stated, a partial remedy for this inconvenience and injustice was provided by the statute 39 & 40 Geo. III. c. 88, which enabled the sovereign to direct the execution of any trusts, to which any escheated lands were liable. And the recent act (4 & 5 Will. IV. c. 23) effectually does away with the mischief, by providing, that real or personal property held in trust shall not be the subject of forfeiture or escheat. The sixth section also declares, that the provisions of the act shall have a retrospective operation, where the escheat or forfeiture had taken effect within twenty years, and no grant had been made.^(f)

[*270] *The trustee, who has the legal interest in a copyhold, is regarded by the lord as the real tenant, for the performance of

(e) Powlett v. Att.-Gen. Hard. 467; supra (Preliminary Chapter), p. 49, Att.-Reeve v. Att.-Gen. 2 Atk. 223; Penn. v. Gen. v. Duke of Leeds, 2 M. & K. 243. Baltimore, 1 Ves. 453; Eales v. England, (f) Vide supra, p. 49, and note. [And Prec. Chan. 200; Burgess v. Wheate, 1 see Hughes v. Wells, 13 Eng. L. & Eq. Ed. 177; S. C. 1 B. C. 123; Williams v. 401, where it was held under these acts that trust moneys misapplied, could be Lonsdale, 3 Ves. Jun. 752; Hovenden v. traced into land, as against the lord Lord Annesley, 2 Sch. & Lef. 617; vide claiming by escheat.]

v. Bush, 1 Strob. Eq. 379; Elliott v. Armstrong, 2 Blackf. 208; Williams v. Fullerton, 20 Verm. 346; Bostick v. Keizer, 4 J. J. Marsh. 599; Wilhelm v. Folmer, 6 Barr, 296; Manly v. Hunt, 1 Ham. (Ohio) 257; Porter v. Bank of Rutland, 19 Verm. 410. A trustee has not power to confess judgment, even for the purchase-money; Wilhelm v. Folmer, 6 Barr, 296; or for contemporaneous advances; Gordon's Appeal, 19 Penn. St. R. But where the land is already subject to the lien, the trustee may confess judgment on a *sci. fa.* to revive. Dickerson's Appeal, 7 Barr, 255. In Bostick v. Keizer, and Elliott v. Armstrong, ut supra, an execution on a judgment against a trustee, was ruled to be void, even so far as to prevent a merger on a purchase by the *cestui que trust*, at the sale. It is, however, generally held in the United States, that though a judgment creditor, is not protected against secret trusts, yet that a purchaser at sheriff's sale, under such judgment, is. See note to Bassett v. Nosworthy, 2 Lead. Cas. Eq. p. i, page 108; Heistner v. Fortner, 2 Binn. 410; Jackson v. Post, 15 Wend. 488; Orth v. Jennings, 8 Black. 420, and other cases; *contra*, Freeman v. Hill, 1 Dev. & Batt. Eq. 389; Bank v. Campbell, 2 Rich. Eq. 191. In Pennsylvania, accordingly, it is held as to real estate; Peebles v. Reading, 8 S. & R. 484; and it seems, as to personalty, Smith v. Stern, 17 Penn. St. 360; that a *bona fide* purchaser without notice at an execution, takes discharged of secret trusts. A mortgagee without notice is also protected; Cadbury v. Duval, 10 Barr, 265. See as to mortgages, Coutant v. Servoss, 3 Barb. 128.

the feudal services. And accordingly the customary fines and heriots will become due upon the alienation or death of the trustee, and not upon that of the equitable owner.(g)

Before the Statute of Uses, if a *cestui que use* were attainted, or died without heirs, the land did not escheat to the lord, but the feoffee retained it for his own use.(h) And the same rule has since been adopted with respect to trusts.¹

However, the statute 33 Hen. VIII. c. 20, enacted, that if any person should be attainted or convicted of high treason, the king should have the benefit of any uses, &c., to which the attainted party was entitled. And it has been observed by Lord Hale, that this statute applies to cases of trusts since the Statute of Uses, and therefore, upon an attainder for high treason of the *cestui que trust* of an inheritance, the equity or trust was forfeited, though possibly the land itself was not forfeited.(i)

But whatever may be the case in an attainder for *high treason*, it has been determined by analogy to the case of uses before the statute, that on the attainder of a *cestui que trust* of real estate for *felony*, neither the trust nor the land will be forfeited to the crown, but the trustee will hold for his own benefit. This was decided in the case of Attorney-General v. Sands,(k) where the legal estate in lands held of the crown was vested in Sir George Sands, as a trustee for a person who was attainted for murder. On an information preferred against Sir George Sands to obtain a conveyance of the legal estate to the crown, it was held by the Court of Exchequer, that Sir George Sands continued to be seised of the lands, to be the king's tenant, and should therefore hold for his own benefit, discharged of the trust.(k)

Upon the same principle, in the case of Burgess v. Wheate, which was elaborately argued before Lord Keeper Henley, assisted by Lord Mansfield and Sir Thomas Clarke, M. R., it was held, both by the Lord Keeper and the Master of the Rolls, that a trust estate of inheritance did not escheat to the crown by the death of the *cestui que trust* without heirs, but that the trustee should hold the land for his own benefit discharged from the trust.(l) This decision was made in

(g) Trin. Coll. v. Brown, 1 Vern. 441; 34; per Sir Thomas Clarke, M. R., in 2 Lord Raym. 994; 1 Cruis. Dig. 305; Burgess v. Wheate, 1 Ed. 177, 199.
 Earl of Bath v. Abney, 1 Dick. 260; (i) 1 Hale, P. C. 248.
 Carr v. Ellison, 3 Atk. 73, 77; Wilson v. (k) Att.-Gen. v. Sands, 1 Hale, P. C. Hoare, 2 B. & Ad. 350. 249.

(h) Brook. Abr. Tit. Feoff. al Use. pl. (l) Burgess v. Wheate, 1 Black. 123; S. C. 1 Ed. 177.

¹ This proposition can hardly be considered as applicable under the Statutes of Distribution generally adopted in the United States. It is presumed that trusts would escheat here as well as the legal estate. See Matthews v. Ward, 10 G. & J. 443; Darrah v. McNair, 1 Ashm. 236; 4 Kent's Comm. 425; 1 Greenl. Cruis. Dig. 448.

opposition to the expressed opinion of Lord Mansfield, who came to the conclusion that the crown was entitled to a decree; and it was also remarked upon with disapprobation by Lord Thurlow, in the subsequent case of *Middleton v. Spicer*.^(m) But it has been recently recognised and acted upon by the Vice-Chancellor of England, in the late case of *Taylor v. Haygarth*,⁽ⁿ⁾ which must be considered as having finally established the law on this subject.^(o) (1) *However, in such a case, if the trustee has not already the legal possession, he has no equity to compel the lord by escheat to invest him with it—as for instance, by granting admission to a copyhold upon the *cestui que trust* dying without heirs.^(p)¹

The principle of the decision in *Burgess v. Wheate* was, that the legal estate being vested in the trustee, the land could not escheat for want of a tenant. But this principle clearly does not apply to *personal* estate.

And in the case of *Middleton v. Spicer*,^(q) Lord Thurlow refused to extend the doctrine of *Burgess v. Wheate* to a trustee of a *leasehold* estate, who claimed to hold beneficially for want of any next of kin of the testator; and his Lordship decreed in favor of the title of the crown to take the estate by its prerogative as *bona vacantia*.

In that case a testator directed his leasehold estates to be sold,

(m) 1 Bro. C. C. 204; see *Fawcett v. Lowther*, 2 Ves. 300.

(n) 8 Jurist, 135; 14 Sim. 8.

(o) See *Henchman v. Att.-Gen.*, 3 M. & K. 485; *Taylor v. Haygarth*, 14 Sim. 8; 8 Jurist, 135.

(p) *Williams v. Lord Lonsdale*, 3 Ves. 752; but see *King v. Coggan*, 6 East, 431; and. 1 Schriv. Cop. 462.

(q) 1 Bro. C. C. 201; and see *Walker v. Deane*, 2 Ves. jun. 170.

(1) The same doctrine does not apply to an equity of redemption, which escheats to the lord in default of heirs of the mortgagor, for in that case the mortgagee will not hold discharged from the equity of redemption, but the lord will be entitled to redeem him to the same extent as the original mortgagor. *Down v. Morris*, 3 Hare, 394, 404.

¹ In a recent case in England, *Onslow v. Wallis*, 1 Mac. & Gor. 506; 1 Hall & T. 513; 13 Jur. 1085; though not directly decided, the question was very much discussed. There, it appeared, that a trustee, under a deed, held freehold premises in trust for L. S., her heirs and assigns, for her and their own use and benefit. L. S., who was illegitimate, and died without issue, by her will devised these premises among others to trustees in trust to sell, and out of the proceeds to pay debts and legacies, the legacies being specified in a certain paper marked A. This paper not being forthcoming, the trustee of the deed offering to pay the debts, claimed to be entitled to retain the trust premises as for his own benefit. On bill filed, however, by the trustees of the will, a conveyance to them was directed, the Lord Chancellor holding that the will gave them a title as against the trustee of the deed, who had nothing to do with the question how the premises would be disposed of, in consequence of their being unable to carry the trusts into effect.

and he bequeathed the money arising from the sale to his executors in trust, after payment of debts and legacies, to pay the residue to a charitable purpose, which could not take effect; and he gave legacies to his executors. There being no next of kin, the executors filed a bill, claiming the residue for their own benefit. But Lord Thurlow observed, that the executors, having legacies bequeathed, and being clearly trustees, could not by any possibility take any beneficial interest, and he therefore decreed in favor of the crown.^(r) And the principle of this decision was subsequently recognised by Lord Loughborough, C., in the case of *Barclay v. Russell*,^(s) and has since been followed in *Taylor v. Haygarth*.^(t)

But where the will directs, that the *real estate* shall be converted, and the proceeds applied by the trustees upon certain trusts, which fail, or are not declared, or do not extend to the whole; the crown has no equity to compel the trustees to make the conversion, in order to entitle itself to the proceeds as *bona vacantia*.^(u) And though the conversion has been actually made by the trustees in such a case, the crown will not be benefited; but the trustees will take as if the property had remained unconverted.^(x)

Upon the same principle it follows, that where a *cestui que trust* of personal estate is convicted of treason or felony, the beneficial interest will escheat to the crown; and the trustee will not be suffered to hold for his own benefit, as we have seen he would be entitled to do in the case of real estate.

In general the right to the possession of the title-deeds of property belongs to the person, in whom the legal estate is vested,^(y) although he may only have an estate for life.^(z) Therefore, where the legal interest in a *settled estate is given to trustees either by deed or will, the right to the possession of the title- [*272] deeds during the continuance of that interest follows as a necessary consequence, and they may maintain an action at law for the purpose of recovering them.^(a) Or if the deeds have been deposited with the Master under an order in a suit, the court will direct them

(r) *Middleton v. Spicer*, 1 Bro. C. C. 201; see *Walker v. Deane*, 2 Ves. jun. 170.

(s) 3 Ves. 424, 430; and see *Henchman v. Att.-Gen.*, 3 M. & K. 485.

(t) 8 Jurist, 132; [14 Sim. 8; and in *Powell v. Marett*, 22 L. J. Ch. 408.]

(u) *Taylor v. Haygarth*, 8 Jurist, 132; 14 Sim. 8. [See note to page 53.]

(x) *Taylor v. Haygarth*, 8 Jurist, 132; 14 Sim. 8.

(y) *Strode v. Blackburne*, 3 Ves. 225; *Harrington v. Price*, 3 B. & Ad. 170.

(z) *Ivie v. Ivie*, 1 Atk. 431; *Ford v. Peering*, 1 Ves. Jun. 76; *Webb v. Lord Lyvington*, 8 Ves. 322, n.

(a) *Doe v. Passingham*, 6 B. & C. 305; *Barclay v. Collett*, 4 Bing. N. C. 650; see *Denton v. Denton*, 8 Jurist, 388; 7 Beav. 388.

to be delivered to the trustees on a petition for that purpose, when the object, for which they were deposited, has been satisfied.(b)¹

However, in a late case in the Rolls, trustees, who had acquiesced for four years in the possession of the title-deeds and estate by the equitable tenant for life, were restrained from proceeding with an action against him for the recovery of the deeds, on the tenant for life *bringing them into court*.(c)

It is the duty of the trustees to retain the deeds in their custody for the protection of the persons, to whom future equitable estates are limited. And if a trustee of a settlement suffer an equitable tenant for life to obtain possession of the title-deed, and thus become instrumental in defrauding a third person, who advances money to the tenant for life on the faith of the deeds; the trustee himself may be held liable to the injured party for the consequences of the fraud.(d) However, this liability will not be enforced, unless the trustee acted with a knowledge of the intended fraud, or behaved with such gross negligence, as of itself amounts to equitable fraud.(e)

But where the *legal*, as well as the equitable, interest is vested in a person as tenant for life under a settlement, he is entitled to the possession of the title deeds; and the remainder-man, whether claiming as trustee, or for his own benefit, has no right either by action at law, or suit in equity, to take them out of his hands.(f) And although the tenant for life, by means of his possession of the deeds, *is enabled* to dispose of or incumber the estate to the prejudice of the person entitled in remainder, that is not considered an objection of sufficient importance, to deprive him of his right to the possession of the deeds;(g) although it would be otherwise, if there were shown to be any reasonable grounds of suspicion, that he actually intended to make an improper use of the deeds.(h)

In like manner, where the trust property consists of personal

(b) *Duncombe v. Mayer*, 8 Ves. 320. *v. Lymington*, ib. 522, n.; *Churchill v.*

(c) *Denton v. Denton*, 8 Jurist, 388; *Small*, ib.; *Bowles v. Stewart*, 1 Sch. & Lef. 223; *Knott v. Wise*, id., cited 7 Beav. 388; vide post, Trustees of Freeholds. *Webb v. Webb*, 1 Dick. 298.

(d) *Evans v. Bicknell*, 6 Ves. 174; (g) *Strode v. Blackburne*, 3 Ves. 222; *Meux v. Bell*, 1 Hare, 82, 98. *Walwyn v. Lee*, 9 Ves. 24; post, 513.

(e) 6 Ves. 190; see *Knye v. Moore*, (h) See *Strode v. Blackburne*, 3 Ves. 1 S. & St. 65. 223; sed vide *Hicks v. Hicks*, 2 Dick.

(f) *Ford v. Peering*, 1 Ves. jun. 76; 650.
Duncombe v. Mayer, 8 Ves. 320; *Webb*

¹ *Foster v. Crabb*, 16 Jur. 835; 21 L. J. (C. P.) 109; 11 Eng. L. & Eq. 521, was an action of detinue for deeds by a *cestui que trust*, against a bailee of his trustee, but the question as to the respective rights of the parties did not arise, as the plaintiff admitted an equal title to the possession of the deeds in the trustee; and in that case, the court held, that the possession was ambulatory, and that either party obtaining the deeds, might retain them against the other.

estate, such as bonds, policies, or other securities for money, the trustee by whom the securities are to be realized, is entitled to the possession of the instruments, and may enforce their delivery as against the *cestui que trust*, who has possessed himself of them.⁽ⁱ⁾

Where the legal estate is vested in a person merely as a dry trustee for the person, who is entitled to the absolute beneficial interest, we have already seen that it is the duty of the trustee to dispose of and convey *the estate according to the direction of the *cestui que trust*. In such cases therefore it is obvious, [*273] that the trustee has no right to retain possession of the title-deeds in opposition to the equitable owner.

The right of a trustee to retain the possession and management of the trust estate as against the equitable tenant for life, has occasionally been the subject of controversy. The decision of this question will be governed mainly by the general scope and object of the trust, and the nature of the duties, which the trustee is required to discharge.

Where the entire interest in the estate is vested in the trustees, with directions for their continued management of the property, by keeping the buildings insured from fire, and by paying premiums and annuities, or other periodical payments, out of the annual income, the court will be very reluctant to take the direction and disposition of the estate out of their hands, and to deliver it over unprotected to the equitable tenant for life; even though the tenant for life offer to bring into court a sufficient sum to secure the payment of the annual charges.^(k)

And where the equitable tenant for life is a *female*, that will be an additional reason for the court to continue the trustees in the possession and control of the estate, with a view to her personal protection in case of her marriage.^(l) And if the trustees are themselves the parties beneficially entitled in remainder after the death of the tenant for life, that circumstance will also have weight with the court in refusing to invest the tenant for life with the uncontrolled management of the estate.^(m)

However, it will be otherwise, where it is plain from the expressions in the will, that the testator did not intend that the property should remain under the personal management of the trustees;⁽ⁿ⁾ or (in the absence of any such indication of the intention), if the personal possession or occupation of the property by the tenant for life

(i) Jones v. Jones, 3 Bro. C. C. 80; see Poole v. Pass, 1 Beav. 600.

(k) Tidd v. Lister, 5 Mad. 429; see Naylor v. Arnitt, 1 R. & M. 501. [Post p. 384.]

(l) Per Sir J. Leach, V. C., 5 Mad. 432. [Post p. 384, &c., and notes.]

(m) Tidd v. Lister, 5 Mad. 432.

(n) 5 Mad. 433.

be beneficial or requisite for its due enjoyment—as in the case of a family residence.(o)

And where the tenant for life takes a *legal* estate of freehold, subject to a term vested in trustees for raising a charge, he will be let into possession on the terms of securing the payment of the charge, if, on taking the accounts of the estate, it shall appear that the annual income is amply sufficient to satisfy the incumbrance imposed on it.(p) In a late case in the Rolls, trustees of an estate subject to annuities, were restrained from taking proceedings to compel the payment of the rents to them, although the tenant for life had only an *equitable estate*, upon the *cestui que trust* for life undertaking to keep down the annuities. In that case, however, there was no pretence of any arrears, or irregularity in payment of the annuities by the tenant for life, which had been done, and possession of the estate kept by him for four years with the acquiescence of the trustees.(q)

Where the annuities, which it is the object of the trust to secure, are in arrears, it will be the duty of the trustees to enter into possession of the estate, and to give notice to the tenants to pay the rents [*274] to them.(r) *And though the arrears may afterwards be paid, the trustees can only be compelled to give up their possession upon such terms as will enable them to resume it again, the moment the purpose of the trust requires it.(s)

If a sum of money be given by will to trustees, to be applied to charitable purposes, but those purposes are not clearly defined or ascertained, the court will not suffer the fund to be paid over into the hands of the trustees, although there may not be the slightest imputation against their characters, but it will direct a scheme for its application.(t)

A court of law in general recognises only the legal owner of property; and every action that is founded on the legal title must be brought by or in the name of the trustee, in whom that title is vested.¹

(o) 5 Mad. 432, 3.

(q) *Denton v. Denton*, 8 Jurist, 388;

(p) *Blake v. Bunbury*, 1 Ves. jun. 194,

7 Beav. 388.

514; see *Tidd v. Lister*, 5 Mad. 432;

(r) *Jenkins v. Milford*, 1 J. & W. 629.

Denton v. Denton, 8 Jurist, 388; 7 Beav.

(s) *Ibid.*

388.

(t) *Wellbeloved v. Jones*, 1 S. & St.

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¹ In general, actions with regard to the legal estate are to be brought in the name of the trustee. *Mordecai v. Parker*, 3 Dev. 425. Thus, he must sue in ejectment, (*Cox v. Walker*, 26 Maine, 504; *Matthews v. Ward*, 10 G. & J. 443; *Beach v. Beach*, 14 Verm. 28; *Wright v. Douglass*, 3 Barb. S. C. 559; *Moore v. Burnett*, 11 Ohio, 334); except where the trust is terminated by operation of law (*Nicoll v. Walworth*, 4 Denio, 385); or there is a presumption of a reconveyance or surrender (*Obert v. Bordine*, 1 Spencer, 394; see ante, p. 253.) See further, Revised Code of Virginia, 1849, p. 560; *Hopkins v. Ward*, 6 Munf. 38. And the grantee of a trustee may also bring ejectment, though the transfer to him

Therefore, in an ejectment for the recovery of land, a demise must be laid in the name of the trustee, in whom the legal estate is outstanding, or the plaintiff will fail in the action.^(u) And so in the case of a bond, or covenant, or other contract, the obligee, or covenantee, or other person with whom the engagement was originally made, is in general the only person who can sue and recover upon

(u) *Goodtitle v. Jones*, 7 T. R. 47.

was in breach of trust. *Canoy v. Troutman*, 7 Ired. 155; *Taylor v. King*, 6 Munf. 358; *Reese v. Allen*, 5 Gilm. 241. In Pennsylvania, however, ejectment is an equitable action, and may, therefore, be maintained either by the *cestui que trust*, when entitled to possession, *Kennedy v. Fury*, 1 Dall. 72; *Presbyt. Congr. v. Johnston*, 1 W. & S. 56; *School Dir. v. Dunkelsburger*, 6 Barr, 29, or by the trustee, *Hunt v. Crawford*, 3 Pa. R. 426. The trustee may bring trespass *qu. cl. fr.*, *Walker v. Fawcett*, 7 Ired. 44, as may the *cestui que trust*, if in actual possession, *Cox v. Walker*, 26 Maine, 504; but it has been held that merely nominal trustees, as those of an incorporated town, cannot sue for a trespass on the streets thereof. *Conner v. New Albany*, 1 Blackf. 88. A trustee must sue also in trespass for injuries to personal property. *McRaeny v. Johnson*, 2 Florid. Rep. 520. So of trover, *Hower v. Geesaman*, 17 S. & R. 251; *Guphill v. Isbell*, 1 Bail. 230; *Cobson v. Blenton*, 3 Hayw. 152; *Thompson v. Ford*, 7 Ired. 418; *Poage v. Bell*, 8 Leigh, 604; *Schley v. Lyons*, 6 Geo. 530; though in the possession of the *cestui que trust*, *Wynn v. Lee*, 5 Geo. 236; see *Jones v. Cole*, 2 Bail. 33; of detinue, *Chambers v. Maudlin*, 4 Alab. 477; *Baker v. Washington*, 5 Stew. & Port. 142; *Parsons v. Boyd*, 20 Alab. 112; *Stoner v. Yealy*, 11 Alab. 327; *Jones v. Strong*, 6 Ired. 369; *Murphy v. Moore*, 4 Ired. Eq. 118; *Newman v. Montgomery*, 5 How. Miss. 742; and of replevin. *Daniel v. Daniel*, 6 B. Monr. 230. The action in all these cases would lie equally against the *cestui que trust* (*Beach v. Beach*, 14 Verm. 28), who is not permitted at law to deny the title of the trustee, *White v. Albertson*, 3 Dev. 241; as against a stranger. Though it is a general rule, the action of assumpsit being equitable in its nature, that on a promise made to one for the benefit of another, the latter must sue; yet this is only where the sole and exclusive interest is in him; in other cases the trustee must bring the action. *Treat v. Stanton*, 14 Conn. 445. As only the original parties to a contract can sue, substituted trustees must use the names of their predecessors. *Davant v. Guerard*, 1 Spear, 242; *Ingersoll v. Cooper*, 5 Blackf. 426; see *Binney v. Plumly*, 5 Verm. 500. A tender must be made to the trustee. *Chahoon v. Hollaback*, 16 S. & R. 425. But notice to a trustee before his appointment will not affect his *cestui que trust*. *Lessee of Henry v. Morgan*, 2 Binn. 497. A *cestui que trust* of personalty cannot interpose a claim, under the Alabama statute, to try the right of property. *King v. Hill*, 20 Alab. 133. Trustees must sue jointly at law. *Brinckerhoff v. Wemple*, 1 Wend. 470; see post, 309, and notes. On an appeal from a decision in favor of the *cestui que trust*, it is the duty of the trustee to sustain the decision in the appellate court *Wood v. Burnham*, 6 Paige, 513.

In New York, notwithstanding the alteration introduced in that State by the new Code of Procedure, it is nevertheless expressly provided, that an executor or administrator, a trustee of an express trust, or person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. Code of 1851, § 113. But in general, all actions must be now commenced in the name of the party really interested. *Id.* § 111. The Civil Code of Ohio of 1853, § 25, 27, contains similar provisions.

the contract at law.(x) Moreover, in an action by a trustee, the defendant cannot set-off an equal or greater debt due to him from the *cestui que trust*, although at one time a contrary doctrine seems to have prevailed.(y) (1) Where the *cestui que trust* brings an action at law in the name of his trustee, the trustee may apply to a court of equity to compel him to give security for costs.(z)

The legal act of presentation to a benefice must be exercised by the trustee, in whom the legal interest in an advowson is vested. But unless by the express terms of the trust the trustee is empowered to nominate, as well as present, he will be bound to present the nominee of the beneficial owner,(a) even though the latter be an infant only six months old.(b)

And so the trustee of a manor has the legal right of appointing the steward; and if the *cestui que trust*, by reason of infancy, or other legal incapacity, be incompetent to nominate, and the trustee has exercised his own discretion in making the appointment, the court will not set aside this appointment in favor of a steward appointed by the testamentary guardian of the infant *cestui que trust*, unless there has been some improper conduct on the part of the trustee, or unless some advantage is to be derived from the change. However, [*275] it seems that in such a case the trustee ought to *attend to the wishes of the guardian, or even of the infant *cestui que trust*, in making the appointment.(c)

(x) *Wake v. Tinkler*, 16 East, 36.

Insurance Co. v. Smith, 11 Penn. St. R. 120.]

(y) *Tucker v. Tucker*, 4 B. & Ad. 745; overruling *Bottomley v. Brooke*, and *Rudge v. Birch*, cited 1 T. R. 621, 2. [*Campbell v. Hamilton*, 3 Wash. C. C. R. 93; *Beale v. Coon*, 2 Watts, 183; *Porter v. Morris*, 2 Harr. 509; *Woolf v. Bate*, 9 B. Monr. 211; see *Wells v. Chapman*, 4 Sandf. Ch. 312.]

(a) *Barrett v. Glubb*, 2 Bl. 1052; *Arthington v. Coverley*, 2 Eq. Abr. 518; *Boteler v. Allington*, 2 Atk. 458; *Earl of Albemarle v. Rogers*, 2 Ves. Jun. 477; 3 Cruis. Dig. Tit. 21, ch. 1, s. 6; *Att.-Gen. v. Forster*, 10 Ves. 335, 8; *Att.-Gen. v. Newcombe*, 14 Ves. 1, 7.

(z) *Annesley v. Simeon*, 4 Mad. 390. [See *Roden v. Murphy*, 10 Alab. 804;

Arthington v. Coverley, 2 Eq. Ab. 518.

(c) *Mott v. Buxton*, 7 Ves. 201.

(1) If a trustee, being the nominal plaintiff, fraudulently release an action at law without the consent of the party beneficially interested, the court will, on motion, set aside a plea of the release, and will order the release to be cancelled. *Leagh v. Leagh*, 1 B. & P. 447; *Baberman v. Radenius*, 7 T. R. 670, 6; *Payne v. Rogers*, Dougl. 407; *Hickey v. Burt*, 7 Taunt. 48; *Anon.*, 1 Salk. 260; *Manning v. Cox*, 7 Moore, 617; *Barker v. Richardson*, 1 Y. & J. 362, Chitt. Contr. 605. [*Kirkpatrick v. McDonald*, 11 Penn. St. R. 387; *Green v. Beatty*, Cox, 142; *Roden v. Murphy*, 10 Alab. 804. So a trustee, in case of a mortgage, cannot release the property before the debt is paid. *Woolf v. Bate*, 9 B. Monr. 210. Where trustee refuses to become party to a suit at law, equity will interfere. *Robinson v. Maudlin*, 11 Alab. 978. See also *Chisleden v. Newton*, 1 Alab. 371; 11 Johns. R. 47; *Welch v. Mandeville*, 1 Wheat. 233; *McCullum v. Cox*, 1 Dall. 139; *Parker v. Kelly*, 10 Sm. & M. 184; *Blin v. Pierce*, 20 Vermont, 25.]

A person claiming as heir-at-law of a bare trustee, who had been found by inquisition to have died without heirs, has not sufficient interest to enable him to traverse the inquisition.(d)

In case of the bankruptcy of any person indebted to the trust estate, the trustee must prove the debt, for he is in general the party to receive the dividends. However, the *cestui que trust*, if not under disability, should join in the proof.(e) And so in the case of an assignment of a bond or other *chose in action*, although the court of bankruptcy recognises the equitable title of the assignee, and admits him to prove for the amount, it requires that the original obligee or creditor, in whom the legal title is vested, should join with him in the proof.(f) However, this subject will be further considered in a future chapter.(g)

The right to sign a bankrupt's certificate follows the right to prove;(h) and therefore a trustee may sign the certificate of a bankrupt debtor to the estate: although *one* of several trustees cannot do so, unless authorized by his colleagues.(i)

It was said by Lord Northington, in the case of *Burgess v. Wheate*, that the right of voting for coroners, sheriffs, and members of parliament was annexed by the common law to the possession of the land; and where there was a transmutation of the possession to a trustee, those rights could not be separated, retained, or suspended by the creator of the trust; but the legislature was obliged to interpose for that purpose.(k)¹

(d) *Re Saddler*, 1 Mad. 581.

(g) *Vide post*, Bankruptcy of Trustees, p. 530.

(e) *Ex parte Green*, 2 D. & Ch. 116; *Ex parte Dubis*, 1 Cox, 310; Archb. Bkrpt. Law, 155, 6.

(h) *Re Lawrence*, 1 M. & A. 453.

(i) *Ex parte Rigby*, 2 Rose, 224; and S. C. 19 Ves. 463.

(f) *Ex parte Dickenson*, 2 D. & Ch. 520; Archbold, Bkrpt. Law, 303, 308, 156.

(k) In *Burgess v. Wheate*, 1 Ed. 251. [See *Lee v. Hutchinson*, 1 Eng. L. & Eq. 329.]

¹ See the Contested Election Case in the appendix to 5 Ired. Equity Reports. The 1st article of the amendments to the constitution of North Carolina, provided, that "all freemen (except free negroes, &c.) who have been inhabitants of any one district within the state, twelve months immediately preceding the day of election, and possessed of a freehold within the same district of fifty acres of land, for six months next before and at the day of election, shall be entitled to vote for a senator." In the case above mentioned, one entitled to at least fifty acres of land in freehold, conveyed it by deed of bargain and sale to a trustee, to secure debts to other persons, with a power to the trustee to sell the estate and out of the proceeds to pay the debt. The Senate of the State submitted to the Supreme Court, questions as to the respective rights of the parties to vote at an election. The court was of opinion, that under the circumstances neither grantor trustee, nor *cestui que trusts*, had the right of voting. They held, however, that when the trustee, or mortgagee, had been in possession, and taken the profits for the requisite period, he would thereupon be entitled to exercise the franchise. In the matter of *Barber*, 6 Wend. 509, it was held that a trustee of stock in an Insurance Company, was entitled to vote at an election for directors.

The first statute made with this view appears to be that of 8 Hen. VI., which after fixing a freehold of the value of 40s. at the least as the qualification of a voter for a member of parliament, concludes by providing that *he should be able to expend 40s. per annum.*

But the statute 7 & 8 Will. III. c. 25, s. 7, expressly provides, that no trustee or mortgagee shall be entitled to vote in an election for a member of parliament by reason of the trust estate or mortgage, unless he be in actual possession or receipt of the rents and profits; but that the mortgagor or *cestui que trust* in possession shall vote for the same estate.

It is observable, that this enactment, by expressly doing away with the claim of trustees to vote when out of possession, seems by implication to give them the right of voting, when in possession of the estate or of the income arising from it.⁽¹⁾

However, the subsequent act of 10 Ann. c. 23, effectually obviated any doubt on this point. For the 2d section of that statute enacts, that no person shall vote in respect or in right of any lands, &c., for which he shall not have received, or be entitled to have received, the rents and profits *to his own use.* And the 18 Geo. II. c. 18, s. 5, also required as the qualification for a voter the possession of the property *to his own use.* *And the words "*to your own* [^{*276} *use,*" were inserted in the form of the oath to be taken by the freeholders.

These enactments appear to have entirely excluded the claim of trustees to vote in respect of the trust estate in any case. But the late Reform Act (2 Will. IV. c. 45, s. 23) re-enacts the provisions of the 7th section of 7 & 8 Will. III. c. 25, declaring that trustees or mortgagees shall not be allowed to have any vote for the trust estate, or mortgage, unless they be in actual possession or receipt of the rents and profits; without adding the words "*to their own use,*" which were introduced into the acts of 10 Ann. and 18 Geo. II.; and this, if it had not subsequently been explained and qualified, might probably have restored the implication, that trustees *in actual possession* were to be entitled to vote. However, the 26th section of the same act provides, that *notwithstanding anything thereinbefore contained,* no person shall be entitled to vote unless duly registered, as hereinafter provided; and that no person shall be registered in respect of his estate or interest in any lands, &c., unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof, "*for his own use*" for the period specified in the act.

Therefore the provisions of the 26th section appear completely to negative the right of a trustee to exercise the elective franchise,

(1) Roger's Law of Elections, 126.

although he may be in actual possession of the trust estate, and notwithstanding any implication arising from the 23d section. And this opinion seems to be supported not only by the sound principles of construction, as applicable to the act, but also by considerations of the general object and nature of the elective franchise. It is to be remarked, however, that the construction contended for has not been universally adopted, and the point in question has repeatedly been agitated with conflicting results before the several revising barristers.

The rule is of course different, where the trustee has a beneficial interest in the trust estate to the amount in value fixed by the act as the *minimum* of qualification according to the nature of the property: for in that case his right of voting would be unquestionable.

In like manner the privilege of voting on the election of a coroner, which at common law was attached to the possession of the legal freehold,^(m) has been transferred by the statute 58 Geo. III. c. 95, s. 2, to the beneficial owner.

And wherever a certain property qualification has been fixed by the legislature as necessary to the holding of an office, or the enjoyment of certain privileges; as in the case of members of parliament;⁽ⁿ⁾ or justices of the peace;^(o) or other similar offices; or (previously to the alteration of the game laws by the recent statute),^(p) with respect to the right of shooting game;^(q) in all these cases though a beneficial enjoyment of the property, on which the qualification is rested, may not in terms be expressly required, yet there can be no doubt, but that the equitable *construction of the statute would exclude the claim of the trustee, and support that of [*277] the party beneficially entitled.

A mere trustee, in whom the equity of redemption of a mortgaged estate had been vested for a particular purpose, which has been satisfied (as for the payment of debts, which had long since been discharged), has not a sufficient interest in the estate to entitle him to redeem the mortgage.^(r)¹

A mere dry trustee, who is made a party defendant to a suit in

(m) *Burgess v. Wheate*, 1 Ed. 251.

(n) 1 & 2 Vict. c. 48, s. 2, which expressly requires that the property giving the qualification, shall belong to the party "for his own use and benefit."

(o) 5 Geo. II. c. 18; 18 Geo. II. c.

20.

(p) 1 & 2 Will. IV. c. 32, s. 6.

(q) 22 & 23 Car. II. c. 25; 5 Ann. c. 14; 9 Ann. c. 25; 13 Geo. III. c. 80; 58 Geo. III. c. 75.

(r) *James v. Biou*, 2 S. & St. 600.

¹The general rule, however, is otherwise; *Upham v. Brooke*, 2 Story, 629; *Dexter v. Arnold*, 1 Sumn. 111; *Grant v. Duane*, 9 Johns. R. 591. See *Kellogg v. Conner*, 10 Paige, 311.

respect of the legal estate vested in him, is in equity a competent witness for the *cestui que trust*.(s) And a trustee differs in that respect from an executor or administrator, whose evidence cannot be received in a suit respecting the estate.(t). Indeed *at law* the testimony of a mere trustee is inadmissible.(u)¹

But if there be any charge against the trustee, which he has an interest in rebutting, or any pecuniary liability (however small), which depends upon the result of the suit, the evidence of the trustee cannot be received even in equity, and for the same reason that of his wife will be equally inadmissible.(x)

As a general rule a trustee, whether he be sole trustee or jointly with others, cannot be the receiver of the trust estate with a salary; and a special case must be made to warrant such an appointment in opposition to the general rule.(y)

A trustee of a ship has an insurable interest in it, in respect of the legal property vested in him; although it seems that the title of the *cestui que trust* will also be recognised at law, for the purpose of supporting an insurance effected by him.(z)

(s) *Croft v. Pike*, 3 P. Wms. 182; 126. See *Smith v. Duke of Chandos*, *Mann v. Ward*, 2 Atk. 229; *Fotherby v. Pate*, 3 Atk. 604. But it seems that a trustee plaintiff cannot be a witness, — *v. Fitzgerald*, 9 Mod. 330; *Phillips v. Duke of Bucks*, 1 Vern. 230. Barn. 416. [*Wilson v. Wilson*, 1 Desaus. 230.]

(t) *Goss v. Tracy*, 1 P. Wms. 290; 8 Ves. 72; *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 Ves. 584; but see *Tait v. Jenkins*, 1 N. C. C. 492; vide post, *Disabilities of Trustees*, p. 535.

(u) *Goss v. Tracy*, 1 P. Wms. 290; *Croft v. Pike*, 3 P. Wms. 182; *Fotherby v. Pate*, 3 Atk. 604. (y) *Ex parte Yallop*, 15 Ves. 67. [1 *Phillips Ins.* 107. See *Swift v. Mutual Ins. Co.*, 18 Verm. 305, and note.]

(v) *Mann v. Ward*, 2 Atk. 229. (z) *Ex parte Yallop*, 15 Ves. 67. [1 *Phillips Ins.* 107. See *Swift v. Mutual Ins. Co.*, 18 Verm. 305, and note.]

¹In equity, a trustee may in general be a witness; *Newton v. Demarritt*, 1 Green, Ch. 321; *Harvey v. Alexander*, 1 Rand. 219; *Taylor v. Moore*, 2 Rand. 563; *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Hawkins v. Hawkins*, 2 Car. Law Rep. 627. See *Hodges v. Mullikin*, 1 Bland, 503. This rule has been adopted at law in Pennsylvania. *Drum v. Simpson*, 6 Binn. 481; *King v. Cloud*, 7 Barr, 467; *Keim v. Taylor*, 11 Penn. St. R. 163. See in other states in suits at law, 4 *Phillipps' Ev.* by Cowen & Hill, 1529; *Johnson v. Cunningham*, 1 Alab. 249; *Brumby v. Langdon*, 10 Alab. 747.

*CHAPTER IV.

[*278]

OF THE DISPOSITION OF THEIR ESTATE BY TRUSTEES.

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| I.—WHERE THE DISPOSITION IS
MADE BY DEED, OR ACT
INTER VIVOS [278]. | II.—WHERE IT IS MADE BY WILL
[283].
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I.—OF THE DISPOSITION BY TRUSTEES OF THEIR ESTATE BY DEED, OR ACT INTER VIVOS.

WHERE the legal interest in real or personal estate is vested in trustees, they are entitled at law to the exercise of all the powers of disposition incident to the legal ownership.¹ In equity their legal powers are regarded as under the control and subservient to the interest of the *cestui que trust*, according to whose direction only it is in general their duty to convey or dispose of the trust estate. The present question is altogether distinct from a conveyance or disposition by a trustee made under a power conferred upon him by the instrument creating the trust. The consideration of this last question will be reserved more conveniently for a future chapter.(a)

Where the persons entitled to the whole beneficial interest are *in esse* and *sui juris*, it is one of the first duties of a trustee to execute such conveyances of the legal estate, as the *cestui que trusts* shall direct.(b) Therefore, if a mere dry trustee without reason refuse to convey, when required by the person who is clearly entitled to the equitable interest, and a bill is filed to compel a conveyance, the decree will be made against the trustee, with costs.(c) And where the refusal proceeds from any improper motive—as, for the purpose of extorting a sum of money as the price of compliance—that will be an additional inducement for the court to visit the trustee with the costs of the suit, as a penalty for his misconduct.(d)

However, although the title of the *cestui que trust* to require a conveyance from the trustee be quite clear in the opinion of the

(a) Post, Powers of Sale, p. 471. Kingdom, 1 Coll. 184; Penfold v. Bouch,

(b) 1 Cruis. Dig. Tit. 12 ch. 4, s. 6; [4 Hare, 271.] Vide post, Costs. Boteler v. Allington, 1 Bro. C. C. 73. (d) Watts v. Turner, 1 R. & M. 634;

(c) Willis v. Hiscox, 4 M. & Cr. 197; vide post, Costs, p. 551. Jones v. Lewis, 1 Cox, 199; Lyse v.

¹ The trustees may convey the mere legal estate, without the consent of the *cestui que trust*, or in breach of trust. Canoy v. Troutman, 7 Ired. 155; Short v. Unangst, 3 W. & S. 55.

court, yet if the trustee in refusing, act *bona fide*, and under the advice of his counsel, he will not be charged with the costs of the suit; but neither on the other hand will his costs be given him, but no order will be made respecting the costs.(e)

In a late case before Lord Langdale, M. R., where a trustee of a [*279] *term, acting under the advice of counsel, refused to assign the term without the concurrence of certain parties; the trustee was allowed his costs as between solicitor and client, which were decreed to be paid to him by the plaintiff, although the court disallowed the objection, and decreed an assignment of the term according to the prayer of the bill.(f)

If the title of the *cestui que trust* be at all doubtful, and the trustee under the advice of counsel refuses to sign, although at the hearing the court decides in favor of the title and decrees an assignment, yet it will give the trustee his costs of the suit, to be taxed as usual as between solicitor and client.(g) However, where the plaintiff's title, though not capable of absolute proof, is clear beyond all reasonable doubt, the decree will be made against the recusant trustee, with costs.(h)

The *cestui que trust* must have an immediate and absolute equitable interest in the trust estate; otherwise he will not be entitled to require a conveyance of the legal estate from the trustee.¹ Thus, if an estate is vested in trustees, in the first place to pay several annuities, the party beneficially entitled subject to those annuities, cannot *during their continuance* compel the trustees to convey to him, unless the annuitants give their consent.(i)

Where the beneficial interest in an estate is limited to a party for life with remainders over, it is doubtful whether the tenant for life could in any case compel the trustee to convey the legal estate to himself or his assignee. If there be any contingent remainders to be supported, or any duty or trust remain to be performed for the benefit of the remainder-men, and the continuance of the legal estate

(e) Knight v. Martin, 1 R. & M. 70; son v. Ellison, 3 Russ. 593, 6; Whit- Angier v. Stannard, 3 M. & K. 566; marsh v. Robertson, 1 N. C. C. 715; vide. post, Costs, p. 551. and see post, Chapter "Costs," p. 551.

(f) Poole v. Pass, 1 Beav. 600. See (h) Lyse v. Kingdom, 1 Coll. 184. Campbell v. Horne, 1 N. C. C. 664. (i) Carteret v. Carteret, 2 P. Wms.

(g) Poole v. Pass, 1 Beav. 600; see 134. Holford v. Phipps, 3 Beav. 434; Good-

¹ As to *femes covertes*, see Thompson v. McDonald, 2 Dev. & Batt. Eq. 477; Martin v. Poague, 4 B. Monr. 524. In Battle v. Petway, 5 Ired. R. 576, where by will property was conveyed to A. in trust for the use of B., and that he should pay over to him annually the net income accruing therefrom; but if B. should die without lawful issue, then to be held for others: held, that B. could not compel A. to convey to him the legal estate.

in the trustees be requisite for these purposes, it would clearly be a breach of trust in them to divest themselves of it at the request of the tenant for life: *(k)* and an equitable tenant for life of settled property, can rarely take such an unqualified beneficial interest, as will not be obnoxious to some objection of this nature. If the trust property consist of money or stock in the funds, the security and protection of the estates in remainder, obviously requires, the trustees not to part with the possession to the tenant for life.

However, where the *cestui que trust* has an *estate tail*, he may call on the trustee to convey the legal estate to him; and no one can afterwards prevent him from barring the entail. But the trustee ought not to convey to him the fee simple, where he is entitled only in tail. *(l)*

Where the parties in whom the absolute beneficial interest in the property was vested have disposed of the whole of their equitable estate to a purchaser, the purchaser is entitled to require a conveyance of the legal estate from the trustees, without the concurrence of the vendors (the previous *cestui que trusts*). *(m)* Although it is otherwise where a *part* only of the equitable estate has been disposed of by the *cestui que trusts*. *(n)*

*Where the equitable estate has been resettled by the *cestui que trusts*, the trustees of the new settlement are entitled to [*280] have a conveyance from the old trustees. *(o)* And if the purposes of the new settlement require that the dominion over the entire legal fee should be vested in the new trustees, as where the trust is for sale, *(p)* or to pay annuities, and make an allotment or division of the estate among the testator's children, *(q)* it has been decided, that the trustee of the resettlement is entitled to require a conveyance of the legal estate from the old trustee, without the concurrence of the parties beneficially interested. *(r)*

But if the old trustee be required to do any act beyond the execution of a simple conveyance; or if the nature of the trusts reposed in the new trustee do not require that he should be clothed with the legal estate, it seems, that the old trustee would be justified in declining to divest himself of the legal estate, unless the persons beneficially interested be joined as parties to the deed, in order to testify

(k) See *Tidd v. Lister*, 5 Mad. 429. [*Battle v. Petway*, 5 Ired. 576; *Thompson v. McDonald*, 2 Dev. & Batt. Eq. 478.]

(l) *Carteret v. Carteret*, 2 P. Wms. 134; *Boteler v. Allington*, 1 Bro. C. C. 73; 1 Cruis. Dig. Tit. 12, ch. 4, s. 9; see *Pearson v. Lane*, 17 Ves. 105, 6.

(m) *Goodson v. Ellison*, 3 Russ. 583; see *Holford v. Phipps*, 3 Beav. 434.

(n) 3 Russ. 593, 4.

(o) *Penfold v. Bouch*, [4 Hare, 271.]

(p) *Angier v. Stannard*, 3 M. & K. 566.

(q) *Poole v. Pass*, 1 Beav. 600.

(r) *Angier v. Stannard*, 3 M. & K. 566; *Poole v. Pass*, 1 Beav. 600.

their concurrence in the transaction; and for this purpose it is of course requisite, that they should be *sui juris*.(s)

The title of the purchaser or assignee of the equitable estate must be established beyond doubt, or the trustees will be justified in refusing to transfer the legal estate without the concurrence of the original *cestui que trusts*, or the sanction of the court. Therefore, in a case in which the legal fee had been vested in trustees in the year 1767, and there had been since a frequent and intricate devolution of the title to the equitable estate, Lord Eldon observed that it would be a matter of consideration, whether the trustees, on being required to convey the legal estate to a purchaser of the equitable interest, would not have a right to have the title examined by the court, instead of being required to acquiesce in an opinion which was not clothed with the sanction of judicial authority. And his Lordship subsequently decided that the trustees in that case had a right to have the conveyance settled in the Master's office.(t)

It was also laid down by the same eminent Judge in the same case, that a trustee cannot be compelled to convey the legal estate in *part* of the trust property to a person, who has purchased that portion from the *cestui que trust*. His Lordship there said, that "it was quite new to him to be informed, that you can call on a trustee from time to time to divest himself of different parcels of the trust estate, so as to involve himself as a party to conveyances to twenty different persons. Has not a trustee a right to say, If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper?"(u)

So, it is settled, that a trustee can be called upon to convey only by the words and descriptions by which the conveyance was made to him. In this respect he is like a mortgagee.(x)

As long as any of the original trusts remain to be performed, it is [*281] *clear that the trustee cannot be required to divest himself of the legal estate; for by so doing, he would unquestionably be guilty of a breach of trust.(y) Therefore, where the parties entitled to the equitable estate call upon trustees to part with the legal estate on the ground that the trusts have terminated, they are bound clearly and satisfactorily to prove that fact to the trustees; and if that be not done, the trustees will be justified in refusing to convey, except under the direction of the court.(z) In case of the refusal by a trustee to convey when duly required, the parties may apply to the Court of Chancery, by petition under Sir E. Sugden's Act (1 Will.

(s) 3 M. & K. 571; 1 Beav. 604.

(x) Per Lord Eldon, 3 Russ. 594.

(t) Goodson v. Ellison, 3 Russ. 593,

(y) Carteret v. Carteret, 2 P. Wms.

6; sed vide Lyse v. Kingdom, 1 Coll. 184.

(z) Holford v. Phipps; 3 Beav. 434; S. C. 4 Beav. 475.

(u) 3 Russ. 594.

IV. c. 60), for the appointment of a person to convey in place of the trustee.(a) But where the application is made by a purchaser of the equitable estate, the trustee who refuses will not necessarily be fixed with the costs of the petition.(b)

Where the conveyance by the trustees is made under the direction of the court, it will be referred to the Master to settle the form of the instrument; and the certificate of the Master's having settled a conveyance under such a reference may be excepted to by any party who is dissatisfied with it.(c)

If trustees receive notice of any disposition or incumbrance of the equitable interest by the *cestui que trust*, they cannot afterwards safely convey or transfer the legal estate to the *cestui que trust* himself, or any subsequent purchaser from him; for in that case they would be held personally responsible to the purchaser or incumbrancer, of whose title they had been made cognizant.(d)

A person, who conveys merely as trustee, can be required to enter into no covenants for title, beyond the usual covenant that he has done no act to incumber.(e)(1)¹ However, in a case where trustees of

(a) Warburton v. Vaughan, 4 Y. & C. C. 391; Dearle v. Hall, 3 Russ. 1, sec. 247; Prendergast v. Eyre, 1 Ll. & G. 11; 12; Forster v. Blackburne, 1 M. & K. Robinson v. Wood, 5 Beav. 246. 297; Hodgson v. Hodgson, 2 Keen,

(b) Robinson v. Wood, 5 Beav. 246. 704; 1 Sugd. V. & P. 12, 520, 9th ed.;

(c) Wakeman v. Duchess of Rutland, Ex parte Knott, 11 Ves. 613. 3 Ves. 504; 2 Dan. Ch. Pr. 900. (e) 4 Cruis. Dig. Tit. 32, ch. 26, s.

(d) Baldwin v. Billingsley, 2 Vern. 87. 539; Cothay v. Sydenham, 2 Bro. C.

(1) It is now settled, that trustees need be under no scruples as to the propriety of conveying by the word "*grant*." This term was at one time frequently objected to, as implying a warranty of the title; and it is omitted in many of the forms used by conveyancers. However, this apprehension is altogether unfounded, and there is no doubt but that this word would have no such effect, and even if it had, any express covenant on the part of the grantor would restrain its general effect. On the other hand, Mr. Butler in an elaborate note in his edition of Coke upon Lyttleton, has endeavored to show, that in some cases a purchaser ought not to dispense with the use of the term "*grant*" in a conveyance from a trustee. Co. Litt. 384 a, n. 1; 4 Cruis. Dig. tit. 32, ch. 25, s. 19. The recent act, 7 & 8 Vict. c. 76, s. 6, does away with any peculiar effect of the word "*grant*" in a conveyance, by enacting, that that word shall not have the effect of creating any warranty or right of re-entry, or of creating any covenant by implication. [See Rawle on Covenants for Title, 403, n.]

¹ Ennis v. Leach, 1 Ired. Eq. 416; Hoare v. Harris, 11 Illinois, 24; Grantland v. Wright, 5 Munford, 295; see Sumner v. Williams, 8 Mass. 162. But where the trustee has declared at the sale, that a good title could be made, he must procure such title, before he can enforce payment of the purchase-money. Ennis v. Leach, ut sup. And if the trustee enters into covenants of greater scope than the law requires, he is nevertheless personally bound, Sumner v. Williams, ut supr.; Duval v. Craig, 2 Wheat. 56. Thus executors with a power of sale are personally liable on a covenant that "they, ex-

a charity estate had granted a lease for ninety-nine years, which was set aside as improper, and the trustees had entered into personal covenants with the lessee for quiet enjoyment; the court decreed the instrument to be cancelled *in toto*, and would not suffer the personal covenants of the trustees to remain in force for the benefit of the lessee. (f)

In a late case, the trustees of real estate joined with their *cestui* [*282] *que trust* *in a contract of sale, and *personally* agreed to exonerate the estate sold from any incumbrances. There turned out to be considerable incumbrances, and it did not appear, whether the purchase-money would be sufficient to discharge them. The court refused to enforce a specific performance of the agreement against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages. (g)

Although trustees have the same power of disposing of the trust estate at law, as if they were the beneficial owners, yet, as has been already stated, a conveyance by a trustee *without consideration*, will not prejudice the title of the *cestui que trust*; but the volunteer will in equity be treated as a trustee for his benefit. (h) And so if the person taking from the trustee be a purchaser for valuable consideration, yet if he purchased *with notice* of the trust, his conscience will be affected with the same equity as the trustee, from whom he purchased. (i)

(f) Atty.-Gen. v. Morgan, 2 Russ. 306.

(g) Wedgewood v. Adams, 6 Beav. 600.

(h) 1 Cruis. Dig. Tit. 12, ch. 4, s. 16; ante, p. 172.

(i) Mead v. Lord Orrery, 3 Atk. 238; Earl Brook v. Bulkely, 2 Ves. 498;

Taylor v. Stibbert, 2 Ves. jun. 437; Adair v. Shaw, 1 Sch. & Lef. 262;

Croften v. Ormsby, 2 Sch. & Lef. 583; ante, p. 164.

ecutors, &c., do for ever warrant and defend, &c." Godley v. Taylor, 3 Devereux, 178. In Worley v. Frampton, 5 Hare, 560, a copyholder had agreed to demise a tenement within the manor for sixty-three years, on a building lease, and as the custom did not allow a lease to be made for more than twenty-one years, the copyholder agreed to execute a lease for twenty-one years with a covenant for himself, his heirs, and assigns, to renew the lease for a further term of twenty-one years, at the expiration of the first, and for a further term of twenty-one years at the expiration of the second term. The copyholders died before execution of the lease, having devised the premises to a trustee. It was held, by Sir J. Wigram, V. Ch., in a bill for specific performance on the part of the lessee, that the trustee having no beneficial interest in the estate, was not bound in the lease for twenty-one years, to enter into any covenant for the renewal of the lease at the expiration of that term, and that he could only be required to covenant against his own acts. Whether, if it had been the trustee who had applied for specific performance, he would not then have been obliged to have entered into the covenant, was not decided. See Page v. Brown, 3 Beav. 36; and see the cases on this subject, collected and discussed in Mr. Rawle's valuable treatise on Covenants for Title, page 419.

But if the trustee convey the legal estate to a purchaser for valuable consideration *without notice* of the trust, the title of the purchaser will be good both at law and in equity; for he has equal equity with the *cestui que trust*; and the legal estate, which was vested in him by the conveyance from the trustee, of course will prevail at law.^(k) This, however, is a subject which will be reserved more conveniently for future consideration.^(l)

Where the disposition of the trust estate by the trustee to a third party still remains in contract, the court will not enforce a specific performance of the engagement, if it amount to a breach of trust, or be made by mistake or for inadequate consideration; nor will any difference be made in this respect in favor of a *bona fide* purchaser.^(m)

It has already been seen, that an unauthorized disposition of the trust estate to another person will not exonerate the trustee from the responsibilities of the trust;⁽ⁿ⁾ but if the *cestui que trust* commence any proceedings against the trustee, who has made such a disposition, he must also make the person in whom the legal estate has thus become vested, a party to those proceedings; for the decree in the first place will be against the party.^(o)

By the usual railroad and canal acts, and other acts of that nature, in case of the disability of the persons beneficially entitled, their trustees are empowered to contract for, and sell, and convey, the land, as effectually as the *cestui que trusts* could do. But in case of their being called upon to exercise this power, the trustees are of course bound to re-invest the money received in the repurchase of land to be held upon the same trust. As such statutory authorities are governed in every case by the provisions of the particular enactment by which they are created, it is impossible to consider their effect with reference to any general principle of law.

*II.—OF THE DISPOSITION OF THE ESTATE OF TRUSTEES BY WILL. [*283]

As trustees have the power of disposing of the legal estate by deed or act *inter vivos*, so they may also dispose of it by will, subject to the rules and restrictions imposed by the law upon testamentary dispositions of real or personal estate.

(k) Millard's case, 2 Freem. 43; Richardson, 4 Beav. 174; Adams v. Finch v. Earl of Winchelsea, 1 P. Wms. Broke, 1 N. C. C. 617; Thompson v. 278, 9; 1 Cruis. Dig. Tit. 12, ch. 4, s. Blackstone, 6 Beav. 470; et vide post, p. 509, and p. 477.

(l) Post, Pt. III. Div. I. Ch. III, p. 510.

(n) Ante, p. 175; [Drane v. Gunter,

(m) Bridger v. Reid, 1 J. & W. 74; 19 Alab. 731.]

Ord v. Noel, 5 Mad: 438; Wood v.

(o) Burt v. Dennett, 2 Bro. C. C. 225.

It is now settled, though after some fluctuation of opinion, that a general devise of real estate will pass estates vested in the testator as trustee or mortgagee, unless a contrary intention can be collected from the expressions of the will, or from the purposes or limitations to which the devised lands are subjected. (p)(1)¹

(p) Lord Braybroke v. Inskip, 8 Ves. Thacker, 12 Sim. 178; Doe d. Read v. 417, 432; 2 Jarm. Pow. Dev. 146 to 157; Reade, 8 T. R. 118; Hawkins v. Obeen, 6 Cruis. Dig. Tit. 38, ch. 10, s. 140, 2; 2 Ves. 559; Ex parte Shaw, 8 Sim. Co. Litt. 205, a. n. 1 (6th); Lindsell v. 159.

(1) From the observations of the Vice-Chancellor of England in the case of Cooke v. Crawford, 13 Sim. 91, which has been very recently reported, the general statement, as to the powers of trustees to dispose of the trust estate by will, must be received with some qualification. Where a *mere dry legal estate* is vested in the trustee, there can be no question as to his power to devise that estate. Indeed it seems to be the duty of the trustee in some cases to make that devise, and it might be considered an improper neglect in him to suffer the estate to descend to an infant heir, and thus to occasion embarrassment and expense to the *cestui que trust* in dealing with the property. See Midland Counties Railway Company v. Westcombe, 11 Sim. 57. But where there is a subsisting active trust, accompanied by discretionary powers and duties of management, it seems, that a trustee will have no power to delegate the trust by will to a devisee; and although the devise, if sufficiently express, would unquestionably pass the legal estate, yet the devisee would be incapable of exercising the powers conferred on the trustee. In the case referred to, which has been already stated in a previous page, his Honor expressed a strong opinion against the propriety of a trustee's devising his estate, upon general principles, and added, that he saw no substantial distinction between a delegation of the trust by act *inter vivos* and by a devise. It has been already observed, in commenting upon this case, that his Honor's observations were not required for the purposes of the decision, and the question may therefore be still open to argument; but until the power of a trustee to devise the trust has been actually affirmed by a judicial determination, no trustee could be advised to make such a disposition of the estate, nor could the parties act under it with any security. Wherever the devise of a trust is improper, within the principle above stated, a general devise would certainly not be held to include the trust estate, for a breach of trust is never presumed.

[The case of Cooke v. Crawford, where there was a limitation to the surviving trustee and his heirs, omitting the word assigns, and it was held not to authorize a devise of the trust estate, has been recently very much discussed in England. See 9 Jur. p. ii. 129, 181. In Titley v. Wolstenholme, 7 Beav. 425, Lord Langdale considered the subject very carefully, and, though the question did not directly arise in the case, as the word "assigns" was added, he took occasion to ex-

¹Jackson v. Delancy, 13 John. R. 537; Heath v. Knapp, 4 Barr, 228; Hughes v. Caldwell, 11 Leigh, 342; Ballard v. Cater, 5 Pick. 112; Taylor v. Benham, 5 How. U. S. 270. But where the purposes of the devise are inconsistent with the trust, as where it is to sell and distribute the proceeds, it is otherwise, in the case of a naked trustee. Merritt v. Farmers' Fire Ins. & Loan Co., 2 Edw. Ch. 547. A general power of disposal, however, given to the devisee, is not sufficient to prevent trust estate passing; Heath v. Knapp, ut supra. In Pennsylvania, a mortgage will pass by a bequest of "personal estate." Asay v. Hoover, 5 Barr, 35.

Thus, in an early case it was laid down, that if a man had but a trust of lands in *D.*, it would pass by a devise of all his lands in *D.*(*q*) And in another case Sir J. Jekyll, M. R., was of opinion, that the estate of a surviving trustee for preserving contingent remainders, passed by a devise of "all the rest of his real estate," to his wife and

(*q*) Sir Thomas Lyttleton's case, 2 Ventr. 351.

press a marked disapprobation' of the doctrine of the foregoing cases, and indicated very clearly the inconveniences which would ensue on its adoption. He was also distinctly of opinion that there was no breach of trust in not permitting the trust estate to descend. In *Mortimer v. Ireland*, 6 Hare, 196, a testator gave certain legacies, and appointed two persons his "executors and trustees," without more. The survivor of these bequeathed the trust property to A., on the trusts declared by the original testator, expressing at the same time his wish, that A. would execute the trust with fidelity. There was no power of appointment of new trustees in the original will. On a bill filed by the *cestui que trusts* for that purpose, it was held by the Vice-Chancellor, and his decree was affirmed on appeal, that though A. was legally in possession of the trust property, yet he could not claim to hold it as the trustee of the parties beneficially interested, against their will; and new trustees were accordingly appointed. So where a testator devised estates to trustees, their heirs and assigns, on certain trusts, and the surviving trustee devised the trust estates in the same trusts on which he held the same, it was held, that the *cestui que trusts* of the original will, were entitled to have new trustees appointed. *Ockleston v. Heap*, 1 De G. & Sm. 640. In *Beasley v. Wilkinson*, 13 Jur. 649, the question presented itself broadly. That was a devise, by a sole surviving trustee, of all estates which might be vested in him at his decease, as trustee, and which he could devise without breach of trust, to A. W., her heirs and assigns, upon the trusts affecting the same respectively, and it was held, that the legal estate vested in the devisee. In *Wilson v. Bennett*, 20 L. J. (Ch.) 279; 5 Eng. L. & Eq. 45; and in *Macdonald v. Walker*, 14 Beav. 558; 11 Eng. L. & Eq. 324, the same point arose, as to the effect of a devise by the survivors of trustees, to whom and "the survivor, his heirs, executors, or administrators," a power of sale was given; and it was held, in each case, that the title derived on a sale by the devisee, was too doubtful to force on a purchaser. In the latter case, however, the Master of the Rolls seems very distinctly to disagree from the ruling in *Cooke v. Crawford*. This last case is also reviewed and strongly disapproved in 2 Jarm. on Wills, 710. See also 1 Greenl. Cruise, 376, note. On the whole, it may be doubted, whether the case would be now followed as an authority in England. In a very recent case in England, however, re *Burt's estate*, 1 Drewry, 319, before V. Ch. Knight Bruce, there was a bequest to A. and B., their executors and administrators, upon trust. B., the surviving trustee, by his will, bequeathed his trust estates to C. and D., their heirs, executors, administrators, and assigns, on the trusts; and he appointed C. D. and E., executors of his will. It was held, that C. and D. took only the legal estate; and that neither C. and D. themselves, nor C., D., and E., were capable of executing the trusts.

In New York and Michigan, on the death of a trustee, the trust does not vest in his representatives, but is to be exercised by the court. In Virginia, on the contrary, the personal representative of a sole or surviving trustee, is to execute the trust, unless the instrument otherwise directs, or another is appointed by the court. See note, ante, page 190.]

her heirs.(r) The subsequent case of *Ex parte Sergison*,(s) arose on the will of a mortgagee in fee, and both Lord Alvanley and Lord Rosslyn were of opinion that the legal estate passed to the devisee by a general residuary gift of the testator's estate, "both real and personal and of what nature or kind soever, or wheresoever, not thereinbefore specifically devised." However, from the circumstances of the case this opinion was not there acted upon.(s)

So far the cases have been in favor of the trust estate passing by a general devise, but in *Strode v. Russell*,(t) the Lord Chancellor, together with the Master of the Rolls, and Trevor, L. C. J., and Tracy, J., gave it as their unanimous opinion, that mortgages in fee, though forfeited when *the will was made, did not pass by a [*284] general devise of "all lands, tenements, and hereditaments."(t) And in *Casborne v. Scarfe*,(u) the same doctrine was laid down by Lord Hardwicke.(u)

In these two cases the question was respecting estates vested in the testator as *mortgagee*, and not as a mere *trustee*. But in *Pickering v. Vowles*,(x) it was said by Lord Thurlow, that "if a man has estates of his own, and also has pure trusts, and gives the residue by his will, only his own estates will pass by the residuary clause."(x)

This opinion of Lord Thurlow not being required for the decision of the case was clearly extra-judicial; but in *Attorney-General v. Buller*,(y) it was expressly decided by Lord Rosslyn, C., that a general residuary gift of real and personal estate did not pass trust estates vested in the testator, although the general words in the devise were particularly ample, extending to every species of right and interest belonging to the testator. And his Lordship, in the case under consideration, appears to have assented to the general rule, as stated at the bar, "that general words would not pass trust estates, unless there appears to be an intention that they should pass." This rule, it will be observed, is directly the converse of that which has been stated as at present governing the construction on this subject.

The authority of this last case appears also to be supported by the subsequent decision of Lord Eldon, in *Ex parte Brettell*,(z) where a general and very ample residuary gift, of the testator's "estate and effects whatsoever and wheresoever, and of what nature or kind soever," to his natural son, *G. H.*, his heirs, executors, &c., for his and their own proper use and behoof, was held by that learned judge not to pass an estate vested in the testator as trustee for a mortgagee in fee.

(r) *Marlow v. Smith*, 2 P. Wms. 198.

(s) *Ex parte Sergison*, 4 Ves. 147.

(t) *Strode v. Russell*, 2 Vern. 625.

(u) *Casborne v. Scarfe*, 1 Atk. 605.

(x) *Pickering v. Vowles*, 1 Bro. C. C. 198.

(y) 5 Ves. 339.

(z) 6 Ves. 577.

In this conflicting state of the authorities, the case of Lord Braybroke *v. Inskip*(a) arose, in which the doctrine, as stated at the beginning of this section, was finally established by Lord Eldon, after a careful review of all the cases on the subject, and the principles on which they severally proceeded. In that case, the heir of a surviving trustee devised all his real estates whatsoever and wheresoever unto his wife, 'G. A., her heirs and assigns for ever. An objection was taken to the title to the property on the ground, that the legal estate did not pass by the devise to the wife, but descended to the co-heirs at law of the trustee, two of whom were infants and the other a *feme covert*. The question came first before Sir William Grant, M. R., who held that the legal estate did pass by the will to the devisee; and this decision was afterwards supported by Lord Eldon, who overruled the objection to the title, and decreed a specific performance of the contract by the defendant.

His Lordship in the course of his judgment remarked of the case of Attorney-General *v. Buller*, that he did not know in experience any case in which the proposition was laid down so strong; and he stated on a subsequent occasion, that Lord Rosslyn himself had altered his opinion with respect to that case.(b) His Lordship also observed, with reference to his own previous decision in *Ex parte Brettell*, that, having been brought *on upon a petition, it had not perhaps been so attentively considered, as the impor- [*285] tance of the point required; although that decision was not intended to infringe upon the general rule as stated above, inasmuch as it proceeded upon the circumstance of there being sufficient on the face of the will to show, that the testator's beneficial estate only was intended to pass.(c)

Where there is a general devise of all the the testator's real estate, it is clear that the circumstance of his being beneficially entitled to other lands, on which the devise *might* operate, will not of itself prevent his trust estates from passing.(d)

But the operation of a general devise in passing trust estates may be controlled by the intention of the testator. If there be no indication of a contrary intention the words will be suffered to have their legal operation, and the trust estates will pass. But if, either from the expressions used by the testator, or from the way in which the property is disposed of, it appears to have been his intention to dispose only of the estates to which he was beneficially entitled, the devise will not be suffered to have any more extensive operation.(e)

(a) 8 Ves. 417.

(e) Lord Braybroke *v. Inskip*, 8 Ves.

(b) Lord Braybroke *v. Inskip*, 8 Ves. 436; Doe d. Reade *v. Reade*, 8 T. R. 118; Wall *v. Bright*, 1 J. & W. 498; 2

(c) 8 Ves. 437.

Jarm. Pow. Dev. 146, et seq.

(d) Sir Thomas Lyttleton's case, 2 Vent. 351; 2 Jarm. Pow. Dev. 147.

Thus where the expressions of a gift, coupled with the relative situation of the parties, show that the testator intended to give only what the donee could enjoy beneficially—as in the case of a general residuary gift to a natural son, his heirs, executors, &c., “*to and for his and their own proper use and behoof*”—it has been decided, that a mere trust estate will not pass.^(f)

It is to be remarked, however, that Lord Eldon in *Lord Braybrooke v. Inskip* stated, that he did not mean in *Ex parte Brettell* to put anything upon the expression, that it was given “to the use and behoof” of the party.^(g) And in a very recent case it was held by Sir L. Shadwell, V. C., that a general gift by a testator, of all his property whatsoever and wheresoever, to his wife, *for her absolute use for ever*, passed an estate vested in the testator as a trustee.^(h)

On the same principle, where a general devise of real estates is for purposes applicable only to the testator’s absolute property, and inconsistent with the beneficial title of another person, it will be held not to operate upon mere trust estates.¹

This doctrine was established in an early case, where a general devise by a testator of all his lands in M. and D., *charged with a rent-charge for life*, was held not to pass lands vested in him as mortgagee.⁽ⁱ⁾

And a general charge for the payment of debts has been repeatedly held to have the same effect, in restricting the operation of a residuary devise to the beneficial estate of the testator.^(k)

So a devise of real estate, in trust to sell or release the same, has been held to be inconsistent with the intention to dispose of any property, *which was not vested in the testator for his own benefit.^[*286] But on this point a material distinction has been established between a mere dry trustee, and a trustee *by construction of equity*. Thus where a testator had contracted to sell an estate, and died before the conveyance was executed, having devised all his real and personal estate to trustees, *in trust to sell*, Sir Thomas Plumer, M. R., decided, that the devise passed the estate, which had been contracted to be sold: on the ground that the beneficial interest was not so entirely out of the testator, as to preclude the pos-

(f) *Ex parte Brettell*, 6 Ves. 577.

(g) 8 Ves. 434, 5.

(h) *Lindsell v. Thacker*, 12 Sim. 178.

(i) *Winn v. Lyttleton*, 1 Vern. 4;
Duke of Leeds v. Munday, 3 Ves. 348.
[*Rackham v. Siddall*, 16 Sim. 297; 12
Jur. 640.]

(k) *Duke of Leeds v. Munday*, 3

Ves. 348; *Doe d. Reade v. Reade*, 8
T. R. 118; *Silvester v. Jarman*, 10 Price,
78.

(l) *Ex parte Morgan*, 10 Ves. 101;
Ex parte Marshall, 9 Sim. 555; *Wall*
v. Bright, 1 J. & W. 493. [*Merritt v.*
Loan Co. 2 Edw. Ch. 547.]

¹ But a general power of disposal given to the devisee will not alter the rule. *Heath v. Knapp*, 4 Barr, 228.

sibility of its becoming the subject of a sale by his trustees in any event.(m)

On the same principle, where the devised estates are limited by the testator in strict settlement, or otherwise tied up by limitations, which would be nugatory or improper, if applied to mere trust property, the devise will not operate upon the testator's trust estates.(n) The contrary decision of Lord Hardwicke in *Ex parte Bowes*(o) has clearly been overruled by the subsequent cases.(p)

It has been decided, that a general devise to several persons as tenants in common in fee, is not inconsistent with an intention to dispose of the mortgage estates of the testator.(q) It might probably be a question, whether a similar disposition would pass trust estates; the *argumentum ab inconvenienti* is certainly strongly against suffering the number of trustees to be thus needlessly multiplied, even if a trustee possessed the power so to increase them.(r)

It seems, that a general devise conferring a less estate than a fee, would not, on principle, be held to operate on a trust estate; and Mr. Jarman has suggested that it is thus possible to support the dictum of Lord Hardwicke in *Casborne v. Scarfe*;(s) for in that case the devise would only have carried a life estate.(t)

It was held in a recent case by Lord Langdale, M. R., that a devise by a testator, of all the lands and hereditaments vested in him as trustee or mortgagee *in fee*, passed the trust estates vested in him for an estate *pur autre vie* as a trustee for preserving contingent remainders.(u)

Previously to the recent Will Act, 1 Vict. c. 26, a general devise of real estate would pass copyhold property vested in the testator as trustee:(x) but according to the principle established by *Rose v. Bartlett*,(y) a similar devise would not have operated upon leaseholds for years, unless there were no other estate for the devise to take effect upon; or there were otherwise a clear intention on the part of the testator, that they should pass.(z) But the 26th sect. of that act provides for the point *in question with re- [*287]

(m) *Wall v. Bright*, 1 J. & W. 494.

(n) *Atty.-Gen. v. Vigor*, 8 Ves. 373; *Thompson v. Grant*, 4 Mad. 438; *Gal-liers v. Moss*, 9 B. & Cr. 267; re *Horsfall*, 1 M'Clel. & Y. 292; but see *Mather v. Thomas*, 10 Bing. 44.

(o) Cited 1 Atk. 605, Sand. n.

(p) 2 Jarm. Pow. Dev. 153.

(q) *Ex parte Whiteacre*, Rolls. July, 1807; 1 Sand. Us. 285; 2 Jarm. Pow. Dev. 152.

(r) Vide *supra*, p. 181.

(s) 1 Atk. 605.

(t) 2 Jarm. Power. Dev. 153, n.

(u) *Greenwood v. Wakeford*, 1 Beav. 576.

(x) 2 Jarm. Pow. Dev. 122, 4; see *Weigall v. Brome*, 6 Sim. 99.

(y) *Cro. Car.* 293.

(z) 2 Jarm. Pow. Dev. 127, et seq. and sec. 154. The later cases on this point, are *Hobson v. Blackburne*, 1 M. & K. 511; *Goodman v. Edwards*, 2 M. & K. 759; *Weigall v. Brome*, 6 Sim. 99; *Arkell v. Fletcher*, 10 Sim. 299.

gard to wills made since the 1st of January, 1838, by enacting, that a devise of the testator's land, or any other general devise which would describe a customary copyhold or leasehold estate, shall be construed to include such estates, as well as the freehold estates of the testator, unless a contrary intention shall appear by the will.

Where there is a general or residuary devise of bequest of leaseholds for years, or other personal estate held in trust, it is improbable that any question would often be raised as to the title of the devisee or legatee to the mere legal estate. This would vest primarily in the executor or administrator *cum testamento annexo*, by virtue of his appointment; and it is not likely that the legatee would claim his assent to the bequest, unless there were reason to contend that it passed some beneficial interest.(a)

If the claim were made, there seems no reason to doubt, but that the effect of a residuary or general bequest of personal estate would be held to extend to trust property of that description, subject to the same rules, *mutatis mutandis*, for restricting its operation, as have been established respecting similar dispositions of real estate.

The devisee of a trust estate, together with the legal interest, will in general take all the legal powers of disposition, as fully and effectually as the testator himself. But powers vested personally in the original trustee, will not pass to his devisee, unless they be expressly limited to the trustee *and his assigns* by the instrument creating the trust. Therefore, where a discretionary power of disposition was given by will to two trustees, and the survivor of them, and the *heirs, executors, and administrators* of the survivor, it was held by Sir William Grant, M. R., and that opinion was approved of by Lord Eldon,(b) that the *devisees* of the surviving trustee were not authorized to exercise the power given by the first will.(c) And persons claiming by assignment from the original trustee or his heirs in a similar case, will be equally incapable of exercising the power.(d)

The devisee of a trust estate may doubtless dissent from and disclaim the devise, in the same manner as if it were a beneficial gift to him, and in that case no estate passes to him by the will.(e)

(a) 2 Jarm. Pow. Dev. 154.

(b) *Walter v. Maunde*, 19 Ves. 424.

(c) *Cole v. Wade*, 16 Ves. 27; see *Bradford v. Belfield*, 2 Sim. 264; 1 Sugd. Pow. 148, 6th ed.; *Cooke v. Crawford*, 11 Law Journ. N. S., Chanc. 406; 13 Sim. 91. [*Hughes v. Caldwell*,

11 Leigh, 342; but see ante, p. 283, in note.]

(d) *Bradford v. Belfield*, 2 Sim. 264; *Cooke v. Crawford*, ubi supra. [See remarks in 2 Sugd. Powers, 466.7th ed.]

(e) 1 Jarm. Pow. Dev. 429; ante, Pt. I. Div. IV. Chap. II. Sect. 1.

III.—OF THE DISPOSITION OF THE ESTATE OF TRUSTEES WHO ARE UNDER ANY LEGAL DISABILITY.

At common law, trustees who labor under any legal disability, can dispose of the trust estate only in the same manner and to the same extent as other persons in the same situation. Thus, a married woman being a trustee of real estate, could convey only by fine or recovery, or (since the act (3 & 4 Will. IV. c. 74), for the abolition of fines and recoveries) by a deed duly acknowledged by her according to the provisions of that act.^(f)¹

So an infant trustee, or one *non compos mentis*, was unable to make *any valid disposition of the trust estate *at all*: nor could a conveyance be obtained from such trustees, even by the assistance of the Court of Chancery, until this inconvenience was remedied by statute. [*288]

The first act passed with this object was that of 7 Ann. c. 19, which enabled *infant* trustees, or mortgagees of *lands* to convey by the direction of the Court of Chancery, to be made on petition.² The act of 4 Geo. II. c. 10, was then passed, empowering *lunatic* trustees or mortgagees of *lands*, or their committees, to convey under the direction of the Lord Chancellor, also to be obtained on petition. The act 36 Geo. III. c. 90, provided a similar remedy for the incapacity of trustees of *stock*. And these several statutes were finally repeated, and their provisions re-enacted and extended by the act 6 Geo. IV. c. 74.

It was held, that none of these enactments prior to the 6 Geo. IV. c. 74, applied to infant or lunatic trustees, who had any beneficial interest or claim,^(b) or any duties to perform.^(c) They extended only to mere dry trustees.^(d)

It was also held, that the act 4 Geo. II. c. 10, did not apply to lunatic trustees, who had not been so found by inquisition.^(e) Al-

(f) See *Ex parte Maire*, 3 Atk. 479; (d) — *v. Handcock*, 17 Ves. 384. *Radcliffe v. Eccles*, 1 Keen, 130.

(b) *Hawkins v. Obeen*, 2 Ves. 559; (e) *Ex parte Lewis*, 1 Ves. 298; *Ex parte Gillam*, 2 Ves. jun. 587. But the act 1 Geo. IV. c. 114, extended that of

(c) *Ex parte Tutin*, 3 V. & B. 149; 4 Geo. II. to lunatics, who were not so found by inquisition. *Ex parte Chasteney*, Jac. 56; *Ex parte Anderson*, 5 Ves. 243.

¹ So her husband must join in the deed, as in other cases. *Palmer v. Oakley*, 2 Dougl. 354. See, however, *Insurance Co. v. Bay*, 4 Comst. 9. In Pennsylvania, the court will compel a *feme covert* trustee by descent, conveying under decree, to acknowledge that she executed the deed voluntarily, in order to give validity to the conveyance. *Dundas v. Biddle*, 2 Barr, 160. With regard to the statutory provisions on the subject in the United States, see ante, 190, note.

² This act is in force in South Carolina, 2 Coop. Stat. 546; and was formerly so in New York. *Livingston v. Livingston*, 2 J. C. R. 541.

though such persons were held to be within that of 36 Geo. III. c. 90.(f)

The act 6 Geo. IV. c. 74, extended the jurisdiction of the court to trustees having an interest or duty to perform; but neither that nor any of the preceding statutes applied to trustees by constructive trust,(g) unless indeed the existence of the trust had been determined by a decree.(h)

The jurisdiction of the court in cases of the disability of trustees, is now governed by the act 1 Will. IV. c. 60, usually known as Sir Edward Sugden's Act. This act, the provisions of which will presently be considered in detail, enables the court to direct a conveyance of trust property to be made by infant trustees, or by the committees of lunatic trustees, or (if the lunatic has not been so found by inquisition), by any person to be appointed by the Lord Chancellor for that purpose.

Again, there are many cases in which it is extremely difficult, if not absolutely impossible, to obtain a conveyance of the legal interest by any of the ordinary modes of proceeding: although there may be no actual personal incapacity in the trustee. For instance, where the trustee is resident in a foreign country; or where from frequent deaths or lapse of time, or failure in representation, or some other similar reason, it cannot be accurately ascertained who is the person actually possessed of the legal estate at the particular moment.

These cases, which were partially remedied by previous statutes,(i) are now also provided for by 1 Will. IV. c. 60, as explained and extended by the 2d section of 4 & 5 Will. IV. c. 23. The former act empowers the court to appoint a person to convey the trust estate [*289] in place of the actual trustee, in the same manner as in the case of an infant or lunatic trustee.—1st, Where the existing trustee is out of the jurisdiction.—2d, Where it is not known who was the survivor of several trustees.—3d, Where it is uncertain whether the trustee last known is alive or dead.—4th, Where it is not known who is his heir (in the case of real estate)—and 5th, Where the existing trustee refuses to convey or transfer when duly required.—Lastly, The subsequent act 4 & 5 Will. IV. c. 23, extends the provisions of 1 Will. IV. c. 60, to the case of a trustee of real estate dying without an heir.

We will now proceed to consider *seriatim* the several provisions of the act of 1 Will. IV. c. 60, and the decisions upon the construction of those provisions.

(f) *Simms v. Naylor*, 4 Ves. 360; *Vernon*, 2 P. Wms. 549; *Dew v. Clarke*, West v. Ayles, T. & R. 330. 4 Russ. 511; *Re Moody*, Tam. 4.

(g) *Goodwin v. Lister*, 3 P. Wms. 387; *Ex parte Currie*, 1 J. & W. 642; 559.

King v. Turner, 2 Sim. 549; *Ex parte* (i) 36 Geo. III. c. 90; 6 Geo. IV. c. 74.

It is to be premised that the act applies only to legal interests, and therefore an assignment of a *chose in action* is not within its provisions.^(k)

The 3d, 4th, and 5th sections of the act provide for the lunacy of trustees, or mortgagees of land or stock, and empower the Lord Chancellor to direct the conveyance of the land, or the transfer of the stock, by the committee of the lunatic, or, if he has not been found a lunatic by inquisition, by any person whom the Lord Chancellor may think proper to appoint for that purpose.¹

By the interpretation clause contained in the 2d section, the provisions relating to a lunatic are declared to extend to any idiot or person of unsound mind or incapable of managing his affairs. And by the express terms of the act, it applies to a trustee who is of unsound mind, although not actually found a lunatic on inquisition.^(l) But mere infirmity or weakness of intellect will not be sufficient to bring a trustee within the act.^(m)

It was held on one occasion by the present Vice-Chancellor of England, that the Vice-Chancellor had jurisdiction to direct the preliminary reference to the Master to inquire, whether a lunatic-trustee was a trustee within the act, although his jurisdiction ceased at that point.⁽ⁿ⁾ However, it was afterwards decided by the Lords Commissioners, that the V. C. had no power to make even that preliminary order, but that *every* order in the matter of a lunatic must proceed from the Lord Chancellor, or other person to whom the jurisdiction over lunatics is committed by the crown.^(o) The Master of the Rolls therefore is equally excluded. For this reason the Lord Chancellor cannot adopt the facts relating to the lunacy of a trustee which have been found in a suit in another court, but he will require them to be ascertained by the usual reference.^(p)

The court cannot make any order on a petition under the act, where the fact of the lunacy is contested.^(q)

The 6th and 7th sections of the act provide for the infancy of trustees of *land*.⁽¹⁾² The 6th section enables infant trustees to con-

(k) *Price v. Dewhurst*, 8 Sim. 617.

(o) *Re Shorrocks*, 1 M. & Cr. 31.

(l) *See re Welch*, 3 M. & Cr. 292.

(p) *Re Prideux*, 2 M. & Cr. 640.

(m) *Re Wakeford*, 1 Jones & Lat. 2.

(q) *Re Walker*, Cr. & Ph. 147.

(n) *Anon.* 5 Sim. 322.

(1) By the interpretation clause contained in the 2d section, the provisions relating to land are declared to extend to any manor, messuage, tenement, heredita-

¹ On a petition under these sections, the court never interferes in the administration of the trusts, but merely substitutes a trustee in place of the lunatic. In *re Ward*, 2 Mac. & G. 73.

² See on these sections, In *re Barry*, 2 Jones & Lat. 1; In *re Halliday*, 1 Drury 3; *Callum v Upton*, 14 Jur. 187; 19 L. J. Ch. 276.

[*290] vey the land by *the direction of the Court of Chancery.¹ And the 7th section enacts, that where the lands are within the jurisdiction of the Courts of Lancaster, Chester, Durham, and Wales, the conveyance is to be made under the direction of those courts.(r)

It will be observed that the act provides for the infancy of trustees of *real estate* only. It was unnecessary to extend this provision to *personal* estate, for in the case of the personal representative of a trustee being an infant, a remedy might be obtained under the existing law by taking out letters of administration *durante minore ætate*.

It has been decided that the infant heir of a mortgagee is a trustee within the meaning of the act.(s)

And the infant heir of a devisee of an estate charged with legacies after a decree in a suit for raising the legacies by a sale, is also a trustee for the legatees within the act.(t)

The court has no jurisdiction to direct the sale of the real estate of an infant on the ground of its being for his benefit; and a decree directing such a sale, and declaring that the infant should be a trustee for the purchaser within the act, 1 Will. IV. c. 60, was held to be erroneous; and the purchaser was discharged on petition with his costs.(u)

But where the decree for sale has been obtained by the *ancestor* of the infant, in his lifetime, the heir will be a trustee within the act.(x)

The infant heir of a trustee of a dry legal estate, from whom a conveyance is required, need not be served with the order of reference to the master, or the other orders in the matter of the petition; and if he oppose the order for a conveyance without sufficient grounds he will be deprived of his costs.(y)

The 8th, 9th, and 10th sections of the act provide for the cases of

(r) The Court of Great Sessions in Wales, and of the County Palatine of Chester, have since been abolished. maney, 10 Sim. 298. [See the form of the order, in *In re Halliday*, 1 Drury, 3.]

(s) *Re Gathorne*, 8 Sim. 342; see (t) *Walters v. Jackson*, 12 Sim. 278.

Prendergast v. Eyre, Ca. Temp. Sugd. (u) *Calvert v. Godfrey*, 6 Beav. 97.

11. *Ex parte Griffin*, V. C. 13th April, Sugd. 11. (x) *Prendergast v. Eyre*, Ca. Temp.

1837; *re Kent*, 9 Sim. 501; *S. C. Cook's* (y) *Re Bradbourne*, 12 Law Journ. N. Ch. Orders, 2d ed. 133; *Ex parte Om-* S., Chanc. 353.

ment, or real property, of whatever tenure, and to property of every description transferable otherwise than in books kept by any company or society, or any share thereof or interest therein.

¹ A conveyance by an infant trustee passes only such estate as the infant if of full age might pass; *Oldfield v. Cobbett*, 8 Beavan, 294.

trustees being out of jurisdiction, or not being known, or their refusal to convey or transfer.

By the 8th section it is enacted, that where any person seised of any land upon any trust shall be *out of the jurisdiction of or not amenable to the process of the Court of Chancery*, or it shall be uncertain (where there were several trustees) *which of them was the survivor*, or it shall be uncertain, *whether the trustee last known to be seised be living or dead*, or if known to be dead, *it shall not be known who is his heir*; or if any such trustee, or the heir of any trustee, *shall neglect or refuse to convey* for twenty-eight days after a proper deed shall be tendered for his execution by any person entitled to require it, in every such case it shall be lawful for the Court of Chancery to direct any person, whom the court may think proper to appoint for that purpose, to convey the land.

The 9th section contains similar provisions respecting trustees of *leaseholds*, except that the provision contained in the 8th section for the cases of the survivor of several trustees, or the heir of the last trustee, not being *known, is omitted in the 9th section. The reason of this omission being, that it is open to the parties to continue the legal representation in competent persons, by taking out administration to the old trustees.^(z) [*291]

The 10th section also contains similar provisions respecting trustees of *stock*,⁽¹⁾ with the same omission as the 9th section, and with the exception, that the refusal of the trustee to transfer must be for thirty-one days after a request in writing from the party entitled. There is also an additional provision for the case of the trustee's refusing to receive and pay over the dividends.

It will be observed, that the case of a trustee of real estate *dying without an heir* is not provided for by the 8th section; and the omission was intentional, in order not to deprive the lord of any right by escheat. However, the subsequent act (4 & 5 Will. IV. c. 23) for the alteration of the law of escheat, has supplied that omission, and has extended the provisions of 1 Will. IV. c. 60 to the case of a trustee or mortgagee *dying without an heir*.

The provisions of the 8th section of the act of 1st Will. IV. are not *expressly* extended to *mortgagees*, as is the case in the previous sections, which provide for lunacy and infancy. Hence, it was held at first, that the heir of a mortgagee, who was not known,^(a) or was

(z) See *re Anderson*, Ll. & G. 27. (a) *Re Goddard*, 1 M. & K. 25; *Re Stanley*, 5 Sim. 320.

(1) The interpretation clause declares, that the provisions respecting *stock* shall extend to any fund, annuity, or security, transferable in any books kept by any company or society established or to be established, or to any money payable for the discharge or redemption thereof, or any share or interest therein.

out of the jurisdiction,(b) or the devisee of a mortgagee,(c) was *not* a trustee within the meaning of the act. Although, where a mortgagee had obtained a *decree for sale*, his heir, being out of the jurisdiction, was held by Sir Edward Sugden to be a trustee within the act.(d)

However, the 2d section of 4 & 5 Will. IV. c. 23, which extends the provisions of 1 Will. IV. c. 60 to the case of a trustee or mortgagee dying without an heir, refers to the latter act, as if it applied equally to trustees *and mortgagees*. Consequently, it was held by Lord Langdale, M. R., in *Ex parte Whitton*,(e) that mortgagees and the heirs of mortgagees were within the act of 1 Will. IV. *as explained by the 2d section of 4 & 5 Will. IV. c. 23*. And this decision was followed by Sir L. Shadwell, V. C., in several subsequent cases.(f)

In this state of the authorities the act 1 & 2 Vict. c. 69 was passed, which gives the court jurisdiction to direct a conveyance in the place of the heir or devisee of a mortgagee, under the same circumstances which are provided for by the 8th section of 1 Will. IV. c. 60, and the 2d section of 4 & 5 Will. IV. c. 23, in cases where the mortgagee shall have died *without having been in possession or in receipt of the rents of the mortgaged estate, and the mortgage money shall be paid to his executor or administrator*. And it then enacts, that neither of the acts, 1 Will. IV. c. 60, or 4 & 5 Will. IV. c. 23, [*292] shall extend to mortgagees **in any other case than those provided for by that act*. Hence the jurisdiction of the court, under the 8th section of 1 Will. IV. c. 60, will in future be confined to the heir or devisee of a mortgagee, who has died without having been in possession, and where the money has been paid off.

However, it has been decided, that the act of 1 & 2 Vict. was not intended to repeal the previous acts, and, therefore, that the jurisdiction of the court still remains with regard to *infant and lunatic mortgagees*, who are *expressly* included in the third and sixth sections of 1 Will. IV. c. 60, although the words of the final clause in the act of Victoria, if strictly followed out, would unquestionably have deprived the court of the jurisdiction in those cases.(g)

A trustee, who was captain of a merchant ship on its voyage to India, has been held not to be out of the jurisdiction within the meaning of the act.(h)

Where two or more persons are *jointly* seised of an estate as trustees, and *one of them*, absconds, or cannot be found, the case does

(b) *Re Dearden*, 3 M. & K. 508.

(c) *Ex parte Payne*, 6 Sim. 645.

(d) *Prendergast v. Eyre*, Ca. Temp. Sugd. 11.

(e) 1 Keen. 278; *sed vide Green v. Holden*, 1 Beav. 207.

(f) *Re Stanley*, 7 Sim. 170; *Re Wil-*

son, 8 Sim. 393; *Re Williams*, 9 Sim.

426; *Re Thompson*, 12 Sim. 392.

(g) *Re Gathorne*, 8 Sim. 392.

(h) *Hutchinson v. Stephens*, 5 Sim. 498.

not come within the 8th section of the act, for the trustee who cannot be found, is not the trustee "*last known to be seised.*" This decision was recently made with respect to the husband of a *feme* trustee of real estate, who had absconded.⁽ⁱ⁾ But the same principle applies with equal force to one of several co-trustees.

The court will receive proof by *affidavit* at the hearing, that the trustee after every exertion cannot be found, where the inability to discover him is the foundation of the application.^(k)

In order to found an application to the court to direct a conveyance on the ground of the refusal of the trustee to convey, the 8th and 9th sections require a conveyance or assignment to have been tendered to the trustee by the persons entitled to require it. The tender must therefore be made by the *cestui que trusts*, being *sui juris*, or (where the conveyance is to new trustees) by the new trustees, who have been duly appointed, either under a power, or by the decree of the court.^(l)

An order of the court to a trustee to transfer stock, cannot be treated as the request of the persons entitled, so as to bring the trustee within the 10th section.^(m)

The 11th section of the act prescribes the mode of obtaining the order for a conveyance, and by whom the application for that purpose may be made.

It directs that the order may be made *in any cause depending in the court, or upon petition*, in the lunacy or matter.

Although it may be optional for the parties to proceed either by suit or petition, yet if a *bill* have been once filed to obtain the conveyance or transfer from a trustee, and the answer have been put in, the court will not then entertain a *petition* presented under the act with the same object, but the cause must proceed regularly to a hearing.⁽ⁿ⁾

*In some cases,—as in cases of constructive trusts coming within the 16th and 17th sections of the act, which will be [*293] presently considered,—the court has no jurisdiction to direct a conveyance under the act, until the right of the parties to require the conveyance shall have been established by a decree. In such cases therefore the parties must necessarily proceed by *suit*; and an application by *petition* in the first instance will be improper. And it is the same with regard to doubtful cases, coming within the 12th section.

Where a decree is made in a suit *declaring the defendant a trustee*

(i) *Moore v. Vinter*, 12 Sim. 161.

(k) *Moore v. Vinter*, ubi supra; *De Crespigny v. Kitson*, 12 Sim. 163, cited.

(l) See *Rider v. Kidder*, 13 Ves. 123; *Mansfield v. Magnay*, 2 Moll. 153; Ro-

binson *v. Wood*, 5 Beav. 246; *Ex parte Foley*, 8 Sim. 395.

(m) *Madge v. Riley*, 3 Y. & Coll. 425.

(n) *Burr v. Mason*, 2 S. & St. 11.

within the act, and the conveyance or transfer is to be made by the *defendant himself*, as where he is an *infant*, he will *at once* be directed to make the conveyance or transfer by *the same decree*, which declares him to be a trustee, and it is now settled, that a subsequent petition to obtain the order for a conveyance is unnecessary,^(o) although the practice in that respect was formerly different.^(p)

And so where the person to make the conveyance or transfer in place of the trustee *is pointed out by the 32d section* of the act, the court will in like manner by its decree *at once* direct the conveyance or transfer to be made by that person in place of the party, whom by the same decree it declares to be a trustee. Thus where one of two co-executors and trustees was proved to be out of the jurisdiction, his co-executor was at once ordered to transfer the trust stock without any reference to the Master.^(q) And so the secretary or officer of the bank will be ordered to make the transfer at once under similar circumstances.^(r) And the same reasons would of course authorize a similar direction to the committee of a lunatic trustee.

But where the person to make the conveyance or transfer in the place of the trustee *is not* pointed out by the act, as a general rule the order for a conveyance will not be immediate, but there must be a reference to the Master to appoint a person to execute a conveyance in the place of the trustee.^(s)

An order for a conveyance has been made on *motion* after a decree. But such a motion must be on notice; or made with the consent of all parties.^(t)

Again if the defendant in a suit be not *actually declared a trustee* within the act by the decree, but the fact of his being such a trustee is only a result, which arises from the decree itself (as where there is a decree for the sale of the estate in which he has the legal interest), a petition must be presented in the usual manner under the act to obtain an order for a conveyance, and the proceedings upon the petition will be regularly carried out according to the usual practice, which will presently be considered.^(u)

By the 11th section the court is also enabled to act upon *petition*

(o) *Walton v. Merry*, 6 Sim. 328; *Miller v. Knight*, 1 Keen, 129; *Broom v. Broom*, 3 M. & K. 433; *Neve v. Bine*, 1 Keen, 129, n.; *Hanson v. Lake*, 2 N. C. C. 328. (s) See *Fellowes v. Till*, 5 Sim. 319; *Beale v. Ridge*, 4 Y. & C. 248, cited.

(p) *Fellowes v. Till*, 5 Sim. 319; *Prytharch v. Havard*, 6 Sim. 9. (t) *Callaghan v. Egan*, 1 Dr. & Walsh, 187.

(q) *Parker v. Burney*, 1 Beav. 492. (u) *Parker v. Burney*, 1 Beav. 492; *Robinson v. Wood*, 5 Beav. 246; *Cockell v. Pugh*, 6 Beav. 293; *King v. Leach*, 2 Hare, 57; *Walters v. Jackson*, 12 Sim. 278.

(r) See *Cockell v. Pugh*, 6 Beav. 293, sec. 294; re *Law*, 4 Beav. 509, 512.

in *the lunacy or matter. And that section directs, that the petitioner shall be the person or some or one of the persons [*294] beneficially entitled to the land, stock, or dividends, to be conveyed, transferred, or received; except where a conveyance to a new trustee is required, when the petition may be presented by the new trustee, or any of the trustees, being duly appointed under a power, or by the Court of Chancery.(1)

Where there is no suit, the court can act upon *petition* only, and not on *motion*; for a petition is required by the statute, and the court has no jurisdiction except in the mode prescribed.(x)

It has been seen, that the act requires the petition to be in the lunacy, or the matter. It is therefore essential, that a petition under the act should be so entitled, in order to give the court jurisdiction. It is also now the settled practice, to require the petition to be likewise entitled in the matter of the act of parliament, under which the application is made.(y) Although this is not essential to the validity of the petition.(z)

In cases, where the appointment of a new trustee is not required, the petitioner must be the person or one of the persons beneficially entitled to the land, stock, or dividends, to be conveyed, transferred, or received.

It has been decided, that a person having a partial interest in the trust property,—as for instance an annuitant, to whom an equitable interest in a sum of stock had been assigned, as a farther security for the annuity—may present a petition under the act.(a)

Where there has been a decree in a suit for the sale of an estate, we shall see presently, that the effect of that decree will be to convert the defendant, in whom the legal estate is vested, into a trustee within the meaning of the act, and that an order for the conveyance of the property may be obtained upon petition, upon the refusal of the defendant to execute the conveyance, or his being out of the jurisdiction, &c.(b)

However, it is doubtful from the authorities, whether the *purchaser* under the decree, or the persons *beneficially interested in the purchase-money*, are the proper parties to present this petition. In *Robinson v. Wood*,(c) the petition was presented by the *purchaser*,

(x) *Eveline v. Foster*, 8 Ves. 96; (b) *Prendergast v. Eyre*, Ca. Temp. Baynes *v. Baynes*, 9 Ves. 462; Vide Sugd. 11; *Robinson v. Wood*, 5 Beav. anon. 1 Y. & Coll. 75. 246; *King v. Leach*, 2 Hare, 57; see

(y) *Re Law*, 4 Beav. 509.

(z) *Re Fowler*, 2 Russ. 449; and see *Beale v. Ridge*, 4 Y. & C. 248, cited; et vide post.

4 Beav. 510, 511.

(a) *Re King*, 10 Sim. 605, 607.

(c) 5 Beav. 246; et vide *Calvert v. Godfrey*, 6 Beav. 97, 102.

(1) A mere proposed trustee cannot present the petition for a conveyance to himself under this section. *Re Odell*, *Hayes' Ir. Excheq. Rep.* 257.

and the order was made by the Master of the Rolls (Lord Langdale), without raising any question as to the propriety of the proceeding. But in a subsequent case before V. C. Wigram, which occurred in the same year, and but shortly after *Robinson v. Wood*, the petition was presented by *the plaintiffs* in a cause, who were equitable mortgagees of the estate, which had been decreed to be sold. His Honor said, that it was impossible the defendant could be treated as a trustee *for the purchaser* within the act. The act provided, that it should [*295] not extend to the case of a vendor except *in the particular circumstances provided for, (d) and those circumstances did not occur in that case. However, his Honor added, that he thought the effect of the decree was, to make the defendant a trustee *not for the purchaser, but for the plaintiffs in the cause*, and that the defendant being out of the jurisdiction, the plaintiffs were entitled, under the act, to an order for the appointment of a person in the place of their trustee to assign the premises to the purchaser. (e)

Lord Langdale's decision in *Robinson v. Wood*, was not brought to the notice of the court in this last case, but as the point in question was expressly decided after consideration in *King v. Leach*, it may probably be considered entitled to more weight than the case at the Rolls, in which the attention of the Master of the Rolls does not appear to have been directed to this particular point. However, a further judicial decision is undoubtedly requisite to settle the practice.

A petition for a conveyance under the act must state all the facts necessary to show the petitioner's title to the relief, and to bring the case within the summary jurisdiction of the court.

And the statement must be verified by affidavit. (f) And where a petition for the transfer of stock is presented on the refusal of the executors of the surviving trustee to take out probate, the affidavit should state, that the executors refuse to take the steps necessary for enabling them to transfer; and an affidavit, that they refused to take out probate is not sufficient. (g) Where a trustee's absence from the country is the ground of the application, the affidavit should state the country where he is resident. (h)

As a general rule, the court will not make any order for conveyance or transfer on petition in the first instance: but the first order will be, for a reference to the Master to inquire, whether the person from, or in place of, whom a conveyance is sought is a trustee within the act. (i) There must then be a second petition upon the Master's report on this reference.

(d) Sect. 18, vide post.

(e) *King v. Leach*, 2 Hare, 57.

(f) Ex parte Winter, 5 Russ. 284; 32.

Moore v. Vinter, 12 Sim. 161; *De Crespigny v. Kitson*, id. 163, cited.

(g) Ex parte Winter, ubi supra.

(h) Ex parte Hughes, 1 Jones & Lat.

(i) 3 Newl. Prac. 242, 3d ed.; 1 Turn. Prac. 405; Seton on Decrees, 252.

However, this reference is only made for the satisfaction of the court, nor is it essential in every case. But if the court be perfectly satisfied of the facts, the order may be made without any reference, or the reference will be confined to those facts only, as to which the court cannot feel satisfied without a reference.^(k)

Therefore where the party has been declared a trustee within the act by a decree in a cause; or the fact of his being such a trustee appears from the decree (as where there is a decree for sale); or it is evident from the proceedings in the cause; the reference is not required for the satisfaction of the court, which will pay attention to the previous proceedings; and the order for the conveyance or transfer will, consequently, be made at once, without any previous reference.^(l)

And in very clear cases, even on a simple petition without any previous *suit, the court has dispensed with the usual preliminary reference; and where a conveyance is sought from [*296] an infant, it will itself examine the proposed conveyance for the purpose of making an immediate order for him to execute it.^(m) In a late case, where the surviving trustee of a settlement refused to execute a conveyance to new trustees; the V. C. on petition appointed a person named in the petition to execute the deed in place of the trustee without a reference.⁽ⁿ⁾ And a conveyance to a new trustee has been ordered on petition without a reference, where the petitioner was the only person interested in the property.^(o)

Where the property is very small, it seems that the order, referring it to the Master to inquire whether the party is a trustee within the act, may go on to direct a conveyance at once if the Master should so find; so as to do away with the necessity of coming back to the court for the final order upon the Master making his report.^(p) It was said by the Master of the Rolls in the case referred to, that in cases of charity the court will never dispense with a reference.

The order of reference to the Master, or the other orders in the matter of a petition for a conveyance under the act, need not be served on the infant heir of a trustee of a dry legal estate; and if the infant oppose the petition without sufficient grounds, he will be deprived of his costs.^(q)

^(k) Per Lord Langdale, M. R., in *Chanc. 168; 8 Jur. 347; re Platt, Ibid. Cockell v. Pugh*, 6 Beav. 294. cited.

^(l) *Parker v. Burney*, 1 Beav. 492; ⁽ⁿ⁾ *Ex parte Foley*, 8 Sim. 395.
Robinson v. Wood, 5 Beav. 246; *King* ^(o) *Ex parte Shick*, 5 Sim. 281; et
v. Leach, 2 Hare, 57; and see *Fellowes* vide re Trapp, ubi supra.

v. Till, 5 Sim. 319; *Prytharch v. Harvard*, 6 Sim. 9; *Walters v. Jackson*, 12 Sim. 278. ^(p) *Att.-Gen. v. Arran*, 1 J. & W. 229; *Neal v. Dell*, Vice-Chancellor Bruce, 9 Jurist, 99.

^(m) *Re Trapp*, 13 Law. Journ. N. S. ^(q) *Re Bradbourne*, 12 Law Journ. N. S., Chanc. 353.

When the Master has made his report upon the reference, a second petition must be presented, praying the confirmation of the report, and that the person approved of by the Master may be ordered to execute the conveyance or assignment.

The Master's report on a reference under the act cannot be *excepted to*, but if the parties are dissatisfied with it, they must bring it before the court by petition, when it will either be confirmed, or referred back to the Master to be reviewed.^(r)

It is not sufficient for the Master's report to state simply that the party is a trustee within the act, but the documents and facts which establish the trust should be stated on the face of the report.^(s)

The act declares, that every conveyance executed under an order made within the act shall be as effectual as if executed by the trustee. Hence it will not have any greater effect, and all the same formalities must be observed, that would have been requisite to give it legal validity, in case it were executed by the trustee himself. Therefore if the estate vested in the trustee be an estate tail, or if the trustee be a married woman, the conveyance must be enrolled, or acknowledged, according to the provisions of the Fines and Recoveries Act.^(t)

Where a person has been ordered to execute a conveyance in the place of a recusant trustee, it is not necessary that he should be made a party to the deed, or that there should be a recital in the deed of the order on *the petition*; but the conveyance may [^{*297}] be prepared, as if it were to be executed by the trustee himself, and the person appointed by the court may then execute it, and it should be expressed in the attestation clause that he had executed it in place of the trustee, in pursuance of the order made on the petition.^(u)

In the case in which this decision was made, the conveyance had actually been prepared and tendered to the recusant trustee for execution by him, and its subsequent execution by the person substituted by the court in the manner suggested by the V. C. obviated the expense of preparing a new deed. Where there is no such reason for adopting the course sanctioned by the decision in *Ex parte Foley*, it would doubtless be more regular and advisable to make the person who is to convey, a party to the deed, and to recite the petition and order in explanation of the transaction.

By the 12th section of the act, where from the length of time since the creation of the trust the title of the person requiring the con-

(r) *Ex parte Burton*, 1 Dick. 395; *Ex parte Johnson*, ib. 559; and see *Price v. Shaw*, 2 Dick. 732; *Ex parte Radcliffe v. Eccles*, 1 Keen, 130; *Penny v. Pretor*, 9 Sim. 135.

(s) *Re Purdon*, 1 Dr. & War. 500.

(u) *Ex parte Foley*, 3 Sim. 395.

(t) See *Ex parte Maire*, 3 Atk. 749;

veyance may appear to require investigation, or where the court under any other circumstances may not choose to make an order upon petition, it may direct a bill to be filed to establish the right.

It was held on one occasion by Sir J. Leach, M. R., that the statute was intended to apply only where the *cestui que trusts* were named in the instrument creating the trust, or where they claimed directly by assignment or representation through the persons so named. And where a petition for a conveyance under the act was presented by persons, whose title as *cestui que trusts* depended on whether the testator's debts and legacies had been paid, and whether a third person had died without issue, his Honor refused to make any order on the petition, observing, "that it could not have been the intention of the legislature to give authority to determine facts of that important nature upon an *ex parte* proceeding; and that he could not act upon the Master's report in such a case."^(x) And this decision was approved of on a rehearing by Lord Brougham, Chancellor.^(y)

However, this decision did not meet with the approbation of Lord Lyndhurst,^(z) and in a subsequent case, where a petition for a conveyance had been presented by persons who were entitled to equitable interests in remainder after the determination of an estate tail, his Lordship considered that the case before him came within the discretionary power given to the court by the 12th section, and he directed the usual reference to the Master.^(a)

It is clear, however, that the act does not enable the court to entertain, or decide upon, any doubtful or adverse questions of title upon a petition for a conveyance under the act; and where any such questions arise, or the title of the parties requiring the conveyance is not reasonably certain and clear, the court can act only in a suit regularly instituted.^(b)

However, an executor who has assumed the character of a trustee of stock and other securities, which had formed part of the assets, by setting *them apart for the purposes of the trust, is clearly a trustee within the meaning of the act; and where [*298] such a person is under disability, or out of the jurisdiction, &c., an order for a transfer may be obtained on petition.^(c)

And so, executors, *who refuse to prove*, are trustees within the act,^(d) if they have not renounced.^(e) And a person who is named

(x) *Ex parte Merry*, 1 M. & K. 677.

(y) 1 M. & K. 679.

(z) 2 M. & K. 626.

(a) *Re De Clifford Estates*, 2 M. & K. 624; and see *Ex parte Dover*, 5 Sim. 500.

(b) See *re Nicholls*, Ca. Temp. Sugd. 17; *re Walker*, Cr. & Ph. 147.

(c) *Ex parte Dover*, 5 Sim. 500.

(d) *Ex parte Winter*, 5 Russ. 284; *Ex parte Hagger*, 1 Beav. 98; *re Needham*, 1 Jones & Lat. 34.

(e) 5 Russ. 286.

executor in a will, but who declines to state whether he will prove or not, is also a trustee within the act; (*f*) so as to enable the court to make an order for an assignment or transfer in such cases on *petition*.

The 13th section of the act declares, that any committee, infant, or other person, directed to convey or transfer under the act, may be compelled to make the conveyance or transfer in the same manner as trustees who are not under disability, &c.

If an infant trustee refuse to comply with an order to convey, he may be committed on a motion by the petitioner for that purpose. And if the order were obtained in a suit to which the infant was a party, an attachment may be obtained against him. (*g*)

The 14th section contains a provision for the payment of mortgage-money belonging to infants into court.

The 15th section extends the operation of the act to trustees having a beneficial interest, (*h*) or having any duty as trustee to perform; adding a discretionary power for the court in any case to direct a bill to be filed, and not to make the order for a conveyance or transfer unless by the decree in such a suit, or after a decree.

The 16th, 17th, and 18th sections of the act apply to cases of constructive trust.

The 16th section provides, that the heir of a vendor who dies after the contract, but before making a conveyance, when a decree is made in a suit for specific performance of the contract, shall be a trustee within the act for the purchaser. And also that a nominal purchaser, in whose name a conveyance is taken, without any declaration of trust for the real purchaser, or the heir of such a nominal purchaser, shall be a similar trustee for the real purchaser, after a decree shall be obtained declaring him a trustee.

The 17th section extends the operation of the act to the devisee for life of an estate, which had been contracted to be sold by the testator, where a specific performance of the contract shall have been decreed.

The 18th section extends the previous provisions to every other case of constructive or resulting trust. But it is added, that where the alleged trustee has or claims a beneficial interest, adverse to the party seeking a conveyance or transfer, no order for a conveyance or transfer shall be made, until the person be declared a trustee by the court in a suit regularly instituted. And it is declared that the act shall not extend to cases upon partition, or election, or to a vendor, except where thereinbefore expressly provided.

It will be seen that the cases of constructive trust, which are expressly *provided for by the 16th and 17th sections, are those
[*299] arising upon an incomplete contract for the sale of an estate,

(*f*) Cockell v. Pugh, 6 Beav. 293.

(*h*) See Ex parte Ryley, 3 Hare, 614.

(*g*) Re Beech, 4 Mad. 128.

and upon a purchase by one person in the name of another. Such cases are therefore unquestionably within the operation of the act. But although the 18th section extends the act to all other cases of constructive trust, this provision is so qualified and restricted by the subsequent clause, that it is of very little practical effect for the purpose of giving the court any summary jurisdiction to act upon *petition*. For it can very rarely happen that a mere constructive trustee, against whom a conveyance is sought, does not claim some beneficial interest in the estate. And in that case, the court is expressly disabled from making any order without a *suit*.⁽ⁱ⁾

Hence a petition under the act for a conveyance from a trustee by virtue of any resulting or constructive trust, which is not expressly provided for by the 16th or 17th sections, would be very doubtful in its result, and the adoption of such a course could rarely, if ever, be advised.

As constructive trusts are expressly provided for by these sections, the 8th and other preceding sections cannot be considered to include trusts of that description.^(k)

It has been held, that an agreement for the *exchange* of lands is not within the 16th section of the act, although a sum of money forms part of the consideration by way of equality of exchange. Therefore, where one of the parties to such an agreement for an exchange died before the execution of the conveyance, leaving an infant heir, the court refused to make an order under the act for the infant to convey.^(l)

However, where a decree has been properly made for the sale of an estate in mortgage, or subject to a charge, and the sale has been made accordingly, but the mortgagor or his heir, or the owner of the estate subject to the charge, is out of the jurisdiction, or under any disability, or he refuses to convey, it has been held, that the person who has been so decreed to convey, is a trustee within the act, and a conveyance will be directed on petition.^(m) Whether he will be a trustee for the purchaser under the decree, or for the persons beneficially interested in the purchase-money, is, as has been already stated, a matter of doubt. And the conflicting decisions of Lord Langdale, M. R., in *Robinson v. Wood*,⁽ⁿ⁾ and of Sir James Wigram, V. C., in *King v. Leach*,^(o) have been also already considered.

(i) See the observations of Sir Christopher Pepys, M. R., in *re Dearden*, 3 M. & K. 508, 512; and see *Turner v. Edgell*, 1 Keen, 502, 505.

(k) *Ibid*.

(l) *Turner v. Edgell*, 1 Keen, 502.

(m) *Prendergast v. Eyre*, Ca. Temp. Sugd. 11; *Robinson v. Wood*, 5 Beav.

246; *King v. Leach*, 2 Hare, 57; see *Beale v. Ridge*, 4 Y. & Coll. 248, cited; *Warburton v. Vaughan*, 4 Y. & Coll. 247.

(n) 5 Beav. 246; and see *Calvert v. Godfrey*, 6 Beav. 97, 102.

(o) 2 Hare, 57.

If the decree for sale be improper or irregular, the person thereby directed to convey will not be a trustee within the act. *(p)*

The 19th section of the act extends its provisions to the husband of any *feme covert* trustee, or mortgagee, where his concurrence is necessary in any conveyance or transfer, &c., by his wife, and whether the husband be under any disability or not.

In a recent case, where the husband of a woman, who was the sole [*300] *trustee for sale of real estate, had absconded, and had not been heard of up to the hearing of the cause, the Vice-Chancellor of England decreed a sale, and that the husband should be declared a trustee within the act 1 Will. IV. c. 60; but his Honor declined to appoint a person to convey in place of the husband, on the ground that he was not the person "last known to be seised," within the 8th section, inasmuch as there was a *joint* seisin in the husband and the wife. *(q)*

By the 21st section, the provisions of the act are extended to petitions in cases of charity and friendly societies.

The 22d section, which confers on the court the power of appointing new trustees on petition in certain cases, has been considered at large in a previous chapter. *(r)*

The 23d section, which extends the power of appointing new trustees to cases of charities, has also been already considered. *(s)*

The 24th section facilitates the proceedings of the court in suits where a trustee cannot be found; the effect of this enactment will be considered in a future chapter. *(t)*

The 25th section empowers the court to direct the costs and expenses of petitions, and conveyances, and transfers under the act, to be raised and paid out of the land, or stock, or rents, or dividends.

Under the earlier acts the court had jurisdiction to give an *infant* trustee his necessary costs of the petition and conveyance. *(u)* And according to the present practice, an *infant* trustee or heir of a mortgagee, who is ordered to convey under the act, either on suit or petition, is unquestionably entitled to his costs and expenses occasioned by the proceedings. *(x)*

However, the costs must have been reasonably incurred, and nothing will be allowed which is not necessary. For instance, a brief to counsel to consent for the infant, will be disallowed; for no attention can be paid by the court to such a consent. *(y)*

(p) Calvert v. Godfrey, 6 Beav. 97.

(q) Moore v. Vinten, 12 Sim. 161.

(r) Ante, Pt. I. Div. III. Ch. II.

(s) Ibid.

(t) Post, 545. [Suits against Trustees.]

(u) Ex parte Cant, 10 Ves. 554.

(x) Ex parte Ommaney, 10 Sim. 298;

Prytharch v. Havard, 6 Sim. 9; Midland Counties Railway Company v. Westcomb, 11 Sim. 57; Hanson v. Lake, 2 N. C. C. 328; see re Marrow, Cr. & Ph.

142, 145.

(y) Ex parte Cant, 10 Ves. 554.

The rule is the same with regard to lunatic trustees: (z) and according to the present practice, there can be little doubt but that the same rule also applies to lunatic *mortgagees*. (a) Although a distinction has been held to exist between lunatic trustees and mortgagees, the latter having been held not to be entitled to their costs of a petition to obtain a conveyance. (b)

So in other applications for a conveyance under the act, which are not occasioned by the fault of the trustee, as where the trustee is out of the jurisdiction, or cannot be found, &c., there can be no question but that the costs must be borne by the party for whose benefit the order is made. (c)

However, if the application be rendered necessary by the unreasonable refusal on the part of the trustee to execute a conveyance, he will not be *allowed his costs. (d) Although even in that case he will not be made to *pay costs*, even where there had been [*301] a decree in the suit, directing him to convey to the petitioner. (e)

And so if a trustee, though being an infant, oppose an application for a conveyance under the act without sufficient reason, as, for instance, because he had not been served with the order of reference or other orders in the petition—he will be liable to be deprived of his costs. (f)

In cases within the 16th section, where a vendor has died, after the contract, but before the execution of the conveyance, leaving an infant heir, and a decree has been made in a suit for specific performance of the contract, whereby the heir is ordered to convey, the costs of the suit have been ordered to be paid out of the purchase-money. (g) And the reason assigned by Sir L. Shadwell, V. C. E., in making this order was, that the suit was occasioned by the laches of the vendor in suffering the legal estate in the land sold to descend to his heir-at-law, instead of devising it to a trustee to convey to the purchaser. (h) (1) However, this reasoning will not apply where only a very short interval has elapsed between the contract of sale and

(z) *Ex parte Tutin*, 3 V. & B. 149;
Ex parte Pearce, T. & R. 325, 7; over-
 ruling *Ex parte Bridges*, Coop. 290.

(a) *Re Marrow*, Cr. & Ph. 142.

(b) *Ex parte Richards*, 2 J. & W. 264;
 and 2 Collinson on Lunacy, 761.

(c) *King v. Leach*, 2 Hare, 57, 59.

(d) *Robinson v. Wood*, 5 Beav. 246;
 vide supra, p. 278, et post, p. 551.

(e) *Robinson v. Wood*, ubi supra.

(f) *Re Bradbourne*, 12 Law Journ.
 N. S. Chanc. 353.

(g) *Prytharch v. Havard*, 6 Sim. 9;
Midland Counties Railway Company
v. Westcomb, 11 Sim. 57.

(h) 11 Sim. 58.

(1) It is only the costs of the proceedings *requisite to enable the infant heir to convey*, that will be borne by the vendor's estate in these cases, the expenses of the *conveyance itself* will fall upon the purchaser according to the general rule. 11 Sim. 57. [See as to this, *Lewis v. Baird*, 3 McLean, 67; *Tiernan v. Roland*, 15 Penn. St. R. 440.]

the death of the vendor. In that case, therefore, if there have been no other default on the part of the vendor, the purchaser will have to bear his own costs, and the costs of the infant will be paid out of the personal estate of the intestate vendor.(i) For that purpose, the administrator of the intestate must appear and consent to be bound by the decree.(k)

Where an estate has been sold under a decree of the court, and an application under the act becomes necessary in order to obtain a conveyance of the legal estate, we have seen that it is an unsettled point, whether the petition should be presented by the *purchaser*, or the persons *having an interest in the application of the purchase-money*.(l) The liability to the costs of the petition is equally unsettled. In *Robinson v. Wood*, where the purchaser presented the petition, the Master of the Rolls refused to order the trustee to *pay costs*, and therefore the petitioner must have borne his own costs at all events.(m) In *King v. Leach*, the equitable mortgagees of the estate, who were the petitioners, were ordered to pay the purchaser his taxed costs.(n) In that case it appears that the purchase-money was insufficient to pay the petitioner's mortgage debt and the costs of the suit in full.

Where an improper or irregular order has been upon an application under 1 Will. IV. c. 60, the court has jurisdiction to order payment of his costs to the party resisting the order.(o) And it has [*302] been decided, *that the court may dismiss a petition, which it has no jurisdiction to entertain, with costs.(p)

By the 26th section of the act, the powers given to the *Lord Chancellor of Great Britain sitting in lunacy* are extended to all lands and stock in the British dominions, except Scotland and Ireland. And by the 29th section, the powers given to the *Court of Chancery* in England are extended to all land and stock in the British dominions, except Scotland. The effect of the 27th, 28th, 30th and 31st sections, is to extend the powers of the act to the Court of Exchequer, and to the Lords Commissioners or Lord Keeper of the Great Seal, in England, and as to land and stock in Ireland, to the Lord Chancellor, Keeper, and Commissioners, and Courts of Chancery and Exchequer in that country.

The previous acts had been held to extend to lands situated out of the jurisdiction of the court, but within the British dominions, as in the East and West Indies, and Ireland.(q) This construction is ex-

(i) *Hanson v. Lake*, 2 N. C. C. 328.

(k) *Ibid*.

(l) *Vide supra*.

(m) 5 Beav. 246.

(n) 2 Hare, 57, 59.

(o) *Re King*, 10 Sim. 605; see *Calvert v. Godfrey*, 6 Beav. 97.

(p) *Re Isaac*, 4 M. & Cr. 11.

(q) *Evelyn v. Forster*, 8 Ves. 96; *Ex parte Prosser*, 2 Bro. C. C. 325; *Ex parte Anderson*, 5 Ves. 240; *Ex parte Bosanquet*, id. 242, cited; *Ex parte Fanelito*, id.; *Ex parte Osborn*, id.

pressly adopted by the present act, except that Scotland is excluded from its operation.

However, the act does not extend to lands in foreign countries which are not part of the British dominions.^(r)

The 32d section points out the persons who in certain cases are to be named in the order, as the persons to make the conveyance or transfer in place of the trustee. These are—the committee of the estate of a lunatic trustee; or a co-trustee or co-executor (where there is one); or some officer of the company or society, in whose books the transfer was to be made; and (where the transfer is to be in the books of the Bank of England) the secretary, or deputy secretary, or accountant-general, of the bank, or his deputy.

In other cases, where the appointment of a person to convey is part of the relief required, it will be part of the reference to the Master to appoint a proper person for that purpose. And it seems that the order may be for the Master *himself* to be at liberty to execute the conveyance.^(s)

The 33d section provides for the indemnity of the bank and other companies and their officers in acting under the act.

CHAPTER V.

[*303]

OF THE LEGAL DEVOLUTION OF THE ESTATE OF TRUSTEES.

WHERE more trustees than one are appointed, the trust property is almost invariably limited to them as joint-tenants; and even if the terms of the gift rendered this at all doubtful, the court for the sake of convenience would doubtless endeavor, if possible, to affix this construction to it.

Therefore upon the death of one of the original trustees the whole estate, whether real or personal, devolves upon the survivors, and so on continually to the last survivor.¹

Upon the death of a sole or last surviving trustee, who has not made any disposition of the trust estate, it devolves according to its legal quality upon his heir-at-law or personal representative.^(a)¹

(r) Price v. Dewhurst, 8 Sim. 617.

(s) See King v. Leach, 2 Hare, 59.

(a) It has been already seen, that the title of the crown, or other superior lord,

to take by escheat on the death of a trustee without heirs, is now excluded, ante p. 50, and Ch. III. p. 269 of this Division.

¹ Sheetz v. Unangst, 3 W. & S. 45; Stewart v. Petters, 10 Missouri, 755; Moses v. Murgatroyd, 1 John. Ch. R. 119; De Peyster v. Ferrers, 11 Paige, 13. Even though survivorship be abolished by statute; Parsons v. Boyd, 20 Alab.

As a general rule the surviving trustees or trustee, or the heir or personal representatives of the sole or last surviving trustee, are as fully competent to act in the administration and management of the trust estate, as the trustees originally appointed. But, where discretionary powers are given *personally* to the original trustees, the same rule applies as in the case of devisees; and the surviving trustee, or heir, or administrator, as the case may be, will not be competent to execute such powers, unless authorized to do so by the trust instrument.(b)

A surviving trustee, who has never accepted or acted in the trust, may execute a disclaimer, and thus dissent from the estate, which the law casts upon him; and in that case, if the disclaiming party be the last surviving trustee, the legal estate, according to its quality, will devolve upon the heir or the personal representative of the deceased trustee.(c)¹

If the original trustee *have accepted the trust* in his lifetime, it is conceived that it is no longer competent for his heir or personal representative to make a valid disclaimer after his death; although the heir or representative might unquestionably apply to the court to have other trustees appointed in his place, without rendering himself liable to the costs of that proceeding.(d) But where the trust has *not* been accepted by the original trustee, there seems to be no reason, why a disclaimer may not properly be made by his heir or representative; although the point does not appear to have been ever expressly decided.(e)

[*304] *Upon the marriage of a female trustee the legal interest in the trust property will become vested in the husband, either wholly or partially, according to the nature of the estate. If it consist of chattels personal in possession, they will devolve upon

(b) *Mansell v. Mansell*, Wilm. 36; 406; 13 Sim. 91, and post, 489. [Pow-
Peyton v. Beang, 2 P. Wms. 626; *Town-*
send v. Wilson, 1 B. & Ald. 608; *Dyer*,
 177, Pl. 32; see *Sharp v. Sharp*, 2 B. &
 Ald. 405; *Cole v. Wade*, 16 Ves. 27;
Hall v. Dewes, Jac. 189; *Bradford v.*
Belfield, 2 Sim. 264; 1 Sugd. Power,
 148, 152, 6th ed.; and see *Cooke v.*
Crawford, 11 Law Journ. N. S., *Chanc.*

(c) *Stacey v. Elph*, 1 M. & K. 199;
 ante, Pt. I. Div. IV. Ch. I. Sect. I.

(d) Ante, Pt. I. Div. IV. Ch. II.
 Sect. I.

(e) *Goodson v. Ellisson*, 3 Russ. 583,
 7; ante, Pt. I. Div. IV. Ch. II. Sect. I.
 [p. 219, 222, and notes.]

112; *Sheetz v. Unangst*, ut supra. In New York, Michigan, and Wisconsin, trusts do not pass to the heirs of the trustee, but vest in and are exercised by the court. See ante, 190. In Pennsylvania, the trust estate descends to the heir at common law, and not to the statutory heirs. *Jenks' lessee v. Backhouse*, 1 Binn. 91. With regard to executors, the old rule is abolished in several of the States, the trust devolving there on the administrator *cum testamento annexo*. See post, 472, note.

¹The heir of a trustee becomes liable only prospectively, and is accountable merely for his own management of the estate. *Baird's Appeal*, 3 W. & S. 459.

him absolutely by the fact of marriage, unless it be otherwise expressly provided; and if it consist of chattels real, the husband's legal interest in them will be subject to the title of the wife by survivorship. Where the trust property is real estate of inheritance, the husband will take either an estate by curtesy, if he have had inheritable issue, or otherwise a bare estate during the life of his wife jointly with her.¹ It has been already stated, that the husband of a *feme* trustee is a trustee within Sir E. Sugden's act, 1 Will. IV. c. 60.(f)

As the husband will be liable personally for any breach of trust committed by his wife,(g) it must follow as a necessary consequence that she cannot act in the administration of the trust without his concurrence or consent.²

The same principle, which prevents a surviving trustee or the devisee or heir of a sole trustee from exercising discretionary powers, which are given only to the original trustee *personally*, will also apply *à fortiori* to restrain the husband of a *feme* trustee from exercising any such power, where he is not expressly authorized to do so.

Where the *feme* trustee has once accepted the trust, it would also seem that the husband cannot by means of a disclaimer avoid the estate cast upon him by the law: and this doctrine depends on the same reasoning which prevents the heir of a trustee from making a valid disclaimer, if his ancestor had accepted the trust in his lifetime.

If the *feme* have *not* accepted the trust, there can be no reason why she and her husband may not execute a valid deed of disclaimer of real estate duly acknowledged by her. Where the trust is of personal estate a disclaimer by the husband would of course operate upon the whole legal interest.

There has been already occasion to observe, that the property, vested in a trader as trustee, does not devolve to his assignees upon his bankruptcy, and the bankrupt will therefore retain his character of trustee, until another be appointed on application in his place.(h)

We have also seen, that upon the refusal or renunciation of one of several trustees, his estate, and whole interest, with the powers annexed to it, will devolve upon those who accept the office.(i)

(f) *Moore v. Vinten*, 10 Law Journ. 459. See *Redwood v. Reddick*, 4 N. S., Chanc. 345; 12 Sim. 161; S. C. Munf. 222.]
p. 300, preceding chapter.

(g) See *Palmer v. Wakefield*, 3 Beav. Bankruptcy. [*Bunce v. Vandergrift*, 8 227. [Even before marriage, so far as
assets; *Moon v. Henderson*, 4 Desaus. Paige, 37.]

(i) Ante, Pt. I. Div. IV. Ch. II. Sect. 3, p. 225.

¹ In *Chew v. Comm. of Southwark*, 5 Rawle, 160, it was held, that a mere naked seisin of the freehold by the wife, as trustee, would not support a tenancy by the curtesy, though she had also a beneficial interest in the reversion.

² *Carrol v. Connett*, 2 J. J. Marsh. 195; *Elliott v. Lewis*, 3 Edw. Ch. 40.

*P A R T I I I.

OF THE DISCHARGE OF THE OFFICE OF
TRUSTEE.

DIVISION I.

OF THE POWERS AND DUTIES OF TRUSTEES.

CHAPTER I.

OF THE POWERS AND DUTIES OF CO-TRUSTEES, AS
BETWEEN EACH OTHER.

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| <p>I. OF THE NECESSITY FOR THE CONCURRENCE OF ALL THE TRUSTEES [305].</p> | <p>II. OF THE LIABILITY OF ONE TRUSTEE FOR THE ACTS OF THE OTHERS [309].</p> |
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I.—WHERE THE CONCURRENCE OF ALL THE TRUSTEES IS REQUISITE
IN ACTS FOR THE ADMINISTRATION OF THE TRUST.

TRUSTEES have all equal power, interest, and authority, with respect to the trust estate.—As a general rule, therefore, they cannot act separately, but they must all join in any sale, lease, or other disposition, of the trust property, and also in receipts for money, payable to them in respect of their office.(a)¹ And in this respect they

(a) *Crewe v. Dicken*, 4 Ves. 97; *Chambers v. Minchin*, 7 Ves. 198; *Ex Fellows v. Mitchell*, 1 P. Wms. 83; *S. parte Rigby*, 19 Ves. 463; 2 Fonbl. Eq. C. 2 Vern. 516; *Churchill v. Lady Hobson*, id. 241; *Leigh v. Barry*, 3 Atk. 584; *Belchier v. Parsons*, Ambl. 219; *B. 2, ch. 7, sec. 5*; 1 Cruis. Dig. Tit. 12, ch. 4. sec. 39.

¹ *Vandever's Appeal*, 8 W. & S. 405; *Latrobe v. Tiernan*, 2 Mary. Ch. Dec. 480; *Ridgely v. Johnson*, 11 Barb. S. C. 527; *Sinclair v. Jackson*, 8 Cow. 544; *Franklin v. Osgood*, 14 John. 560; *Hill v. Josselyn*, 13 Sm. & M. 597; *Cox v. Walker*, 26 Maine 504. It was said, in *Vandever's Appeal*, however, that there might be a case of necessity, in which the concurrence of a co-trustee would be

differ materially from executors, who have a joint and entire authority, and any one of whom may effectually bind, or dispose of, the assets by his own individual act.(b)

The principle of law, as applied to the case of trustees, as well as other persons, holding as joint-tenants, is, that every act done by one of them *for the benefit* of the whole, shall bind the others, but not those acts, which might tend to *their prejudice*.(c) On this principle one trustee alone could not have signed the certificate of a bankrupt in respect of debt due to him and his co-trustee,(d) according to the Bankrupt *Law previously to the recent act.(e) [*306] And so where there are three joint trustees of an estate, a notice to quit, given to a tenant by two of them only, is bad, even though the name of the third be joined in the notice, and he afterwards adopt it, and join in the demise in ejectment.(f) The reason is, that these acts need not necessarily have been for the benefit of the others.

If, however, one of several trustees be duly authorized by the others to act as their agent, the legal maxim of "*qui facit per alium facit per se*" applies; and any act of the agent alone, which does not exceed his authority, will be binding on the others.(g)

But where the act is *for the benefit* of the estate, the act of one will be binding on all.—And on this ground the entry or re-entry of one of several joint trustees of an estate,—or the grant of livery of seisin,—or a surrender by a lessee,—to one of them, will enure for the benefit of all.(h)

And so the possession or seisin of one or more of several joint trustees operates as the possession of the others. And the Statutes of Limitation will not begin to run against the *cestui que trusts* as

(b) Touchst. 484; Bac. Abr. (Exors.) C. 1; Wentw. Off. Ex. 206, 14th ed.; 2 Wms. Exors. 620. [See post, 309, note.]

(c) Rudd v. Tucker, Cro. Eliz. 803.

(d) Ex parte Rigby, 19 Ves. 463. [See Vandever's Appeal, 8 W. & S. 405.]

(e) 5 & 6 Vict. c. 122, see s. 39.

(f) Right d. Fisher v. Cuthell, 5 East, 491.

(g) Ex parte Rigby, 19 Ves. 343; and see Goodtitle d. King v. Woodward, 3 B. & Ald. 689; Handbury v. Kirkland, 3 Sim. 265; 1 East, 568; 1 B. & Ald. 85. [See Sinclair v. Jackson, 8 Cow. 543.]

(h) 1 Inst. 49, b.; id. 192, a.; 6 Mod. 44; 2 Cruis. Dig. Tit. 18, ch. 1, s. 60, 1.

presumed. In Ridgely v. Johnson, 11 Barb. S. C. 527, it was held that where there is one deed in the name of three trustees, but executed by only two, the burden of proof is on the purchaser to show that the third was dead at the time of execution. But a payment by a mortgagor to one of two trustees, assignees of the original mortgagee is good. Bower v. Seeger, 8 W. & S. 222. Where a lease is granted by one only of several trustees it will not, as in the ordinary case of joint tenants, be operative to convey his own moiety. Sinclair v. Jackson, 8 Cowen, 544.

long as one of the trustees is in possession.⁽ⁱ⁾ The alteration of the law on this point by the statute 3 & 4 Will. IV. c. 27, affects those joint-tenants only, who have the beneficial as well as the legal ownership.—The 12th section of that act provides, that where one or more of several joint-tenants shall have been in possession of the entirety, or more than his proper share of an estate, for his own benefit, or for the benefit of any person *other than the persons entitled to the other shares*, such possession shall not be the possession of the other joint-tenants. This enactment, therefore, cannot apply to the possession of one of several co-trustees, who, if they hold as joint-tenants, must all hold for the joint benefit of the same *cestui que trusts*.

An acknowledgment of a debt by one of several joint trustees will not take it out of the Statute of Limitations, as regards the others;^(k) but part payment made by one will revive the remedy against them all.^(l)

It has been decided, that notice of a charge or incumbrance on the trust estate, given to one of several co-trustees, is sufficient to perfect the equitable title of the incumbrancer.^(m) And it is immaterial, that the incumbrancer is himself the trustee, who thus receives the notice for his own benefit.⁽ⁿ⁾ However, the effect of such a notice only continues as long as the party to whom it is given continues to hold the office of trustee; and after his death, or retirement, a subsequent incumbrancer *may gain a preference, by [*307] giving notice to the then existing trustees; if in the mean time they have received no notice of the first charge.^(o)

No case has arisen in which a notice to one of several trustees has been held to bind the others, so as to render those who have not received notice personally liable to the incumbrancer for any subsequent disposition of the trust estate by them; and it appears difficult to contend successfully, that a notice so limited should have such an operation. It is, therefore, for many reasons, advisable that notice of an equitable incumbrance, &c., should in every case be given to *all* the trustees.

A trustee who has disclaimed or renounced—or upon the same

(i) Att-Gen. v. Flint, Vice-Chancellor Wigram, [4 Hare, 147.]

(k) See 9 Geo. IV. c. 14, s. 1; Chitty, Contr. 640, 50.

(l) Whitecomb v. Whiting, Dougl. 652; Burleigh v. Stott, 8 B. & Cr. 36; Pease v. Hurst, 10 B. & Cr. 122; Perham v. Raynall, 2 Bingh. 306.

(m) Smith v. Smith, 2 Cr. & Mees. 232; Meux v. Bell, 1 Hare, 73; and

see re Raikes, 4 D. & Ch. 412; Ex parte Vauxhall Bridge Company, 1 Gl. & J. 106; Duncan v. Chamberlaine, 11 Sim. 123. [But see Martin v. Sedgwick, 9 Beav. 333; Holt v. Dewell, 4 Hare, 446.]

(n) Smith v. Smith, 2 Cr. & Mees. 232; see re Raikes, 4 D. & Ch. 412; Duncan v. Chamberlaine, 11 Sim. 123.

(o) Timson v. Ramsbottom, 2 Keen, 35; Meux v. Bell, 1 Hare, 97.

principle, one who has been duly discharged under the power contained in the trust instrument, or by a decree of the court—need not join in any sale or other disposition of the estate, or in receipts for the trust moneys.^(p) And it is immaterial that those acts are directed to be performed by the particular trustees by name; for a gift to several individuals *nominatim* upon trusts is a gift to those only who accept the trust; and they consequently take full power to perform all *ministerial* acts consequent upon the office.^(q)

But a trustee, who has once acted or accepted the trust, and has not been properly discharged from it, must join with the other trustees in the receipts to purchasers or other persons, requiring a discharge for the payment of trust money; and it is immaterial that he has parted with the possession of the legal estate.^(r) And it is on this principle, that a person, who executed a release of the estate, devised to him as a trustee, instead of making a simple disclaimer, has been held to be a necessary party to a receipt to a purchaser.^(s)

Where, however, a mere discretionary power, or one simply collateral, has been given to several persons *expressly by name, and to them only*; all the individuals named must join in exercising it; and any act by those only, who have accepted the trust, will not be a valid execution of the power.^(t) But it is otherwise where the power is not strictly personal, but is annexed to the *office* of trustee.^(u)

In ordinary cases of private trust there does not appear to be any established rule, according to which the decision or opinion of the majority in number of the trustees would be binding on the dissentient minority. The principle that all co-trustees have equal power and authority would seem to be directly at variance with the existence of any such rule.

All the trustees are of course bound to concur in every ministerial act requisite for the discharge of the trust; and those who should refuse to do so without sufficient reason, would be compelled to act by the court, whose decree would also visit the offending trustees with the costs occasioned by their conduct.^(x) But where the act is a matter of pure personal *discretion, we shall see presently, that the court cannot in general interfere to control a trustee [*308]

(p) *Flanders v. Clark*, 1 Ves. 9; *Smith v. Wheeler*, 1 Ventr. 128; *Hawkins v. Kemp*, 3 East, 410; *Adams v. Taunton*, 5 Mad. 435; *Worthington v. Evans*, 1 S. & St. 165. [See ante, 226, post, 473. In *Worthington v. Evans*, the trustee had never acted.]

(q) *Adams v. Taunton*, 5 Mad. 435, 8.

(r) 2 Sugd. V. & P. 50, 9th ed.; the case of *Hardwick v. Mynd*, 1 Anstr. 109, is of a contrary tendency, sed

quære? and see *Lord Braybrooke v. Inskip*, 8 Ves. 417.

(s) *Crewe v. Dicken*, 4 Ves. 97; *Small v. Marwood*, 9 B. & Cr. 307.

(t) See 1 Sugd. Pow. 138; et post, Chap. [Powers, p. 471, 485.]

(u) *Worthington v. Evans*, 1 S. & St. 165; *Clarke v. Parker*, 19 Ves. 19.

(x) Vide post, p. 545, [Suits against Trustees] and [Costs,] p. 551.

in the *bona fide* exercise of his discretion; and there seems to be no remedy against one or more of several co-trustees, who without any corrupt motive refuse to concur with their co-trustees in any discretionary act. (y) The proof of fraudulent or improper conduct would of course give the court jurisdiction. (z)

However, in cases of charitable and public trusts, where the number of trustees is usually greater, the decisions of the majority will be binding on the rest; for otherwise, it would be in the power of one dissenting trustee to embarrass and possibly disappoint the working and object of the trust. (a)

It is almost needless to add, that if the trust instrument contain *express directions* for the administration of the trust according to the decision of the majority of the trustees, the dissentient minority will be compelled to give effect to the decision of the majority. For instance, where an advowson is vested in trustees, in trust to prevent the person whom the majority approve of, those trustees, who voted for an unsuccessful candidate, must join in the presentation of the one chosen by the majority. (b)

One of several trustees cannot prove a debt, due from a bankrupt to the trust estate, without an order of the court; although one of several executors may so prove without any order. (c)

One of two or more executors, or trustees, may apply for the taxation of a bill of costs, which had been paid by the other. (d)

At law, any one of several joint-tenants has the power to receive and give discharges for the whole of the rents and income arising from the property.¹ Therefore, one of several co-trustees of stock in the public funds may receive the dividends on the whole sum; (e) for the bank looks only to the legal title. (f) And the rule is the same as to the dividends on shares and other similar payments. And so the rents of a trust estate may be paid to, and received by, one or more of several trustees. (g) Although it would be different, if the tenants had received notice not to pay their rents except upon the receipt of all the trustees.

(y) *Clark v. Parker*, 19 Ves. 1; overruling *Harvey v. Haston*, 1 Atk. 375; vide post, 485, [Discretionary Powers]; the court will sometimes act in such a case, see *Tomlin v. Hatfield*, 12 Sim. 167.

(z) *Ibid.*

(a) *Att.-Gen. v. Scott*, 1 Ves. 413; *Wilson v. Dennison*, Amb. 82; *Wilkinson v. Malin*, 2 Tyr. 544; *Att.-Gen. v. Shearman*, 2 Beav. 104; *Att.-Gen. v. Cuming*, 2 N. C. C. 139.

(b) *Att.-Gen. v. Cuming*, 2 N. C. C. 139.

(c) *Ex parte Smith*, 1 Deac. 385, and *M. & A.* 586; *Ex parte Phillips*, 2 Deac. 334.

(d) *Hazard v. Lane*, 3 Mer. 285; see *Lockhart v. Hardy*, 4 Beav. 224.

(e) *Williams v. Nixon*, 2 Beav. 472.

(f) See *Williams v. Nixon*, 2 Beav. 472. [But see note ante, p. 174.]

(g) *Townley v. Sherborne, Bridg.* 35.

¹ See *Husband v. Davis*, 4 Engl. L. & Eq. 342; 10 C. B. 645.

Where an account at a banker's is opened in the name of two or more trustees, it is in their power to require that the cheques should be signed by all or any one or more of their number. However, we shall presently see that a trustee would be held personally liable for any loss, if he diminished the security of the trust fund by placing it in the exclusive power of any one or more of his colleagues.^(h) In strictness, therefore, it is the duty of trustees to require, that the cheque should bear the joint signature of all the trustees. Where there are several trustees, however, this *might be regarded as a matter of extreme and over caution, which would more- [*309] over be productive of much inconvenience in the working of the trust. And most trustees would probably be satisfied with requiring the signature of two or three of their number only.

II.—OF THE LIABILITY OF A TRUSTEE FOR THE ACTS OF HIS CO-TRUSTEES.

Where more than one trustee is appointed, and all have accepted the trust, it is the duty of each one to protect the trust property from the acts of his colleagues. And if through the neglect of this duty, any one or more of 'the trustees have been enabled to misappropriate, or otherwise occasion any loss to, the trust estate, the others, as a general rule, will be personally answerable to the *cestui que trusts* for the amount of the loss; although they had not been actively engaged in, or benefited by, the breach of trust.¹

(h) See next sect. and *Walker v. Symonds*, 3 Sw. 1, 58; *Clough v. Bond*, 3 M. & Cr. 490.

¹ The liability of co-trustees and executors for each other's acts, does not appear to have been always as rigorously enforced in the United States, as the later English authorities stated in the text would justify. Judge Story, in his *Commentaries on Equity Jurisprudence* (§ 1280), uses the following language: "The general rule is, that they are responsible only for their own acts, and not for the acts of each other, unless they have made some agreement, by which they have expressly agreed to be bound for each other, or they have by their voluntary co-operation or connivance, enabled one or more to accomplish some known object in violation of the trust." The rule in these words was adopted and acted on in *Taylor v. Roberts*, 3 Alab. 86; *State v. Gutford*, 18 Ohio, 509; *Latrobe v. Tiernan*, 2 Maryl. Ch. 480. And to the same effect, see *Taylor v. Bonham*, 5 How. U. S. 233; *Worth v. McAden*, 1 Dev. & Batt. Eq. 199; *Boyd v. Boyd*, 3 Grattan, 114; *Glenn v. McKim*, 3 Gill. 366; *Stell's Appeal*, 10 Barr, 149; *Banks v. Wilkes*, 3 Sandf. Ch. 99. As, in the case of trustees and guardians, a joinder in receipts and discharges, in the course of the execution of the trust, is a necessary act, such joinder, though *prima facie* evidence of the receipt of the money by all, is open to explanation; and those only into whose actual possession or control the money has come, will be held responsible for its subsequent misapplication. *Jones' Appeal*, 8 W. & S. 147; *Wallis v. Thornton*, 2 Brock, 434; *Monell v. Monell*, 5 Johns. Ch. 283; *Sterrett's Appeal*, 2 Penn. Rep. 419; *Deade-*

For instance, if a trustee stand by and suffer his co-trustee to retain the exclusive possession of the trust funds, and they are lost

rich *v.* Cantrell, 10 Yerg. 264; Kip *v.* Denniston, 4 Johns. Rep. 23. In *Monell v. Monell*, 5 J. C. R. 263, it was ruled, however, that this presumption from joinder in receipts could not be rebutted by the defendant's answer alone (*accord*, *McCubbin v. Cromwell*, 7 G. & J. 157), and its effect was treated as more conclusive than other cases and the subsequent decision of *Manahan v. Gibbons*, 19 Johns. 427, seem to warrant. (See American Note to *Townley v. Sherburne*, 2 Lead. Ca. Eq. pt. ii. p. 307, 1st ed.) With regard to executors whose concurrence in acts relating to the estate is not necessary, a different rule exists; and it has been said to amount to an agreement on the part of each to be answerable for the credit of the others. *Johnson v. Johnson*, 2 Hill's Eq. 290; *Jones' Appeal*, 8 W. & S. 147; *Monell v. Monell*, 5 J. C. R. 288; see *Manahan v. Gibbons*, 19 Johns. 427. But in *Stell's Appeal*, 10 Barr, 152, it was considered that this distinction between executors and other trustees has been broken down, and that no intent to be jointly chargeable is deducible from the mere fact of joining in a receipt. *Ochiltree v. Wright*, 1 Dev. & Batt. Eq. 336; *McNair's App.*, 4 Rawle, 155; *accord*. Wherever it is necessary and convenient for the purposes of the trust, that a part or all of the business thereof should be committed to the charge of one or more of the co-trustees, the others, not cognizant of or concurring in any way, in a misapplication of the funds, will not be held liable. *Jones' App.*, 8 W. & S. 147; *State v. Guilford*, 18 Ohio, 593; *Deaderich v. Cantrell*, 10 Yerg. 264; but see *contra*, *McCubbin v. Cromwell*, 7 G. & J. 168. But if the acting trustee is known to be a person unfitted for the management of the trust, or is suffering under pecuniary embarrassment, the co-trustees will be responsible, if they permit money to be received by him, or to remain in his hands. *Evans' Estate*, 2 Ashm. 470; *Ringgold v. Ringgold*, 1 H. & G. 11; *State v. Guilford*, 15 Ohio, 593; 11 S. & R. 71. Mere slight suspicions, however, are not sufficient to require the non-acting trustees to interfere. *Jones' App.*, 8 W. & S. 147. A trustee who has actually received money or securities, and pays or assigns them to his colleague without necessity, becomes thereby responsible. *Mumford v. Murray*, 6 J. C. R. 1; *Monell v. Monell*, 5 J. C. R. 283; *Clark v. Clark*, 8 Paige, 153; *Glenn v. McKim*, 3 Gill, 366; *Evans' Estate*, 2 Ashm. 470; *Graham v. Davidson*, 2 Dev. & Batt. Eq. 155; *Ringgold v. Ringgold*, 1 Harr. & Gill, 11; *Graham v. Austin*, 2 Gratt. 273. So even in the case of executors who are, as has been observed, *prima facie* responsible only for their own acts. *Mesick v. Mesick*, 7 Barb. S. C. 120; *Edmonds v. Cranshaw*, 14 Pet. 166; *Worth v. McAden*, 1 Dev. & Batt. Eq. 199; *Johnson v. Johnson*, 2 Hill's Eq. 277; *Sterrett's App.*, 2 Penn. R. 419. With regard to the effect of a joinder in sales, &c., of the trust property, the authorities are not perfectly agreed. From *Spencer v. Spencer*, 11 Paige, 299; *McCubbin v. Cromwell*, 7 Gill & Johns. 157; *Ringgold v. Ringgold*, 1 Harr. & Gill, 11; *Deaderich v. Cantrell*, 10 Yerg. 263; *Wallis v. Thornton*, 2 Brockenb. 434; *Hauser v. Lehman*, 2 Ired. Eq. 594, it appears that all are responsible for the collection and investment of the proceeds, though but one actually receives; but in *Kip v. Denniston*, 4 Johns. R. 23, it was held that the receipt in a deed by two trustees for the purchase-money, would not make the one who did not receive liable; and see *Jones' App.*, 8 W. & S. 347; Am. Notes to *Townley v. Sherburne*, 2 Lead. Ca. Eq. 306. So in *Boyd v. Boyd*, 3 Gratt. 114, it was held that where several executors and trustees joined in a sale necessary to the purposes of the trust, but the proceeds of the sale were received by one who was a man of fair character and apparently ample fortune, but who subsequently turned out insolvent, the others would only be liable in case of fraud, which must be distinctly and conclusively proved. Where a proper investment has been once made, however, the responsibility of

or wasted by the co-trustee, the non-acting trustee will be decreed personally to make good the loss; for it was his duty to have interfered and protected the fund from the misapplication; and by his acquiescence he was directly accessory to the loss.⁽ⁱ⁾ However, this knowledge and acquiescence must be proved against the trustee.^(k)

In *Booth v. Booth*,^(l) a testator bequeathed his personal estate to his partner and to B. in trust, to invest for the benefit of his wife and children. B., together with his co-trustee, the surviving partner, proved the will, and thus accepted the trust, but he did not actively interfere; the other and sole acting trustee, *with B.'s knowledge and acquiescence*, retained the testator's money in the trade for several years, instead of investing it, as directed by the will. Upon the failure of the business, the trust fund was lost, and it was held by Lord Langdale, M. R., that *both* the trustees were equally responsible for the loss.^(l)

In *Lincoln v. Wright*,^(m) the testator gave the residue of his estate to trustees, to be invested for the benefit of his daughter and her children. Two of the executors and trustees suffered the ascertained residue to remain in the hands of their co-trustee, and they were decreed to make good the loss, which was occasioned by his bankruptcy.^(m)

It is still more evident, that if a trustee *connive at* a breach of trust committed by his co-trustee, or *use any artifice to conceal it* from

(i) *Williams v. Nixon*, 2 Beav. 475. 370; *Fulton v. Gilmour*, Rolls, 15th February, 1845, MS. [On another point,

(k) *Williams v. Nixon*, ib.

(l) *Booth v. Booth*, 1 Beav. 125.

(m) *Lincoln v. Wright*, 4 Beav. 427; Ashm. 470; *Pim v. Downing*, 11 S. & and see *James v. Frearson*, 1 N. C. C. R. 71.]

the non-acting trustees ceases. *Glenn v. McKim*, 3 Gill, 366. Where a trustee has renounced, it is *a fortiori* necessary to show that the fund has ever been in his hands. *Clagett v. Hall*, 9 Gill & Johns. 80. In *Deaderich v. Cantrell*, 10 Yerg. 264; followed in *Thomas v. Scruggs*, Id. 400, a distinction is taken between discretionary and directory trusts, as to the nature of the joint liability above considered. In the former, which comprehend cases where no direction is given as to the manner in which the trust fund is to be invested, it was said to be necessary, to charge a co-trustee, to show some act by which it was obtained by him, or some act of commission, amounting to gross neglect, in permitting the fund to be wasted by his colleague. In the latter class, however, which are those where by the terms of the trust the fund is to be invested in a particular manner, till the period arrives at which it is to be appropriated, if the fund be not invested, or be invested in a different manner from that pointed out, it is an abuse of trust, for which all the trustees are responsible. In all these cases, however, there is no liability of one joint trustee for the mere misfeasance or nonfeasance of another, unless it be shown that that other, from insolvency, is unable to answer for himself. *Stell's Appeal*, 10 Barr, 153. See this subject fully discussed in the notes to *Townley v. Sherburne*, 2 Lead. Ca. Eq., pt. ii. page 306; *Story's Eq. § 1280*, &c.

the *cestui que trust*, he will himself be involved in the same liability. Thus, where one of two trustees had sold out a sum of trust stock, and the other knew of it *and concealed it* from the *cestui que trust*, they were both held equally liable upon the loss of the fund.⁽ⁿ⁾ And in another case, where one of two trustees retained a sum of trust money in his *possession, *but the other joined in a false representation to the cestui que trust, that it was invested in stock in their joint names*, both trustees were declared responsible.^(o)

And it is the duty of trustees to obtain every information from their co-trustee as to the situation and disposition of the trust property; and if they neglect this precaution, they will become answerable for any misfeasance on the part of the acting trustee.^(p)

Again, if a trustee join in doing any act, or in carrying into effect any arrangement, by which the trust property is taken out of the joint protection and control of all the trustees, and is placed within the sole power and at the mercy of one or more of their number, by whom it is lost, it is clear that the trustee so acting, will, as a general rule, be held responsible for all the consequences; for by his conduct he diminished the security of the property, and was thus directly accessory to the loss that ensued. The exceptions to this rule will be considered presently.

Thus, if two or more trustees join in the sale of the trust estate, or the conversion of the existing investments, and suffer the proceeds to be received and retained by one or more of their number exclusively;^(q) or if they pay, or make over, the trust funds or property in a similar manner;^(r) or execute a joint power of attorney;^(s) or join in signing a draft or order;^(t) enabling one or more of their co-trustees exclusively to receive and deal with the property; or suffer the trust fund to be invested in bills payable to one or more of their number;^(u) or to be paid into a bank to the account of two of them,

(n) Boardman v. Mosman, 1 Bro. C. C. 68.

(o) Bate v. Scales, 12 Ves. 402.

(p) Walker v. Symonds, 3 Sw. 58.

(q) Sadler v. Hobbs, 2 Bro. C. C. 114; Scurfield v. Hawes, 3 Bro. C. C. 90; Chambers v. Minchin, 7 Ves. 198; Shipbrook v. Hinchinbrook, 11 Ves. 252; Brice v. Stokes, id. 319; Underwood v. Stevens, 1 Mer. 713; Hanbury v. Kirkland, 3 Sim. 265; Bradwell v. Catchpole, 3 Sw. 78, n.; Clough v. Bond, 3 M. & Cr. 496; Williams v. Nixon, 2 Beav. 472; Broadhurst v. Balguy, 1 N.

C. C. 16; Curtis v. Mason, 12 Law Journ. N. S. Chanc. 442.

(r) Keble v. Thompson, 3 Bro. C. C. 111; French v. Hobson, 9 Ves. 103; Shipbrook v. Hinchinbrook, 11 Ves. 252; Joy v. Campbell, 1 Sch. & Lef. 341; Moses v. Levi, 3 Y. & Coll. 359, 367; Clough v. Bond, 3 M. & Cr. 497; Langford v. Gascoyne, 11 Ves. 333.

(s) Harrison v. Graham, 1 P. Wms. 241, n.; Hanbury v. Kirkland, 3 Sim. 265; Hewett v. Foster, 6 Beav. 259.

(t) Sadler v. Hobbs, 2 Bro. C. C. 114; Broadhurst v. Balguy, 1 N. C. C. 16.

(u) Walker v. Symonds, 3 Sw. 1, 58.

to the exclusion of a third ;(x) in all these cases, the trustees so acting will be personally responsible for any loss occasioned by the acts of those into whose power they have thus committed the trust property.

If, however, it be necessary or proper for the due discharge of the trust, that the trust property should be committed exclusively to the charge of one or more of the co-trustees, the others will not be held liable for the subsequent acts of those to whom it has been so committed. In *Clough v. Bond*,(y) it was observed by Lord Cottenham, "When the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted, necessity, *which includes the regular course of business in administering the property*, will in equity exonerate the personal representative. But if without such necessity he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator."

*Thus in an early case,(z) a legacy of 600*l.* was given to three trustees, in trust to build an almshouse. R., one of [*311] the trustees resided in London, the other two lived in Cornwall. R. alone received payment of the legacy, although, to satisfy the testator's executors, the other two trustees joined in the receipt. 400*l.* was paid at different times by R., by the direction of the other trustees for building, &c. ; but four years after the receipt of the money he became insolvent. On a bill being filed to charge the other two trustees with the loss of the 200*l.*, the Lord Chancellor held, that R. alone was chargeable, and in the course of his judgment he observed, that the payment to R. only was a *reasonable* thing, R. being the only trustee who lived in London, where the money was paid.(z)

And in *Townley v. Sherborne*,(a) it was laid down by the Lord Keeper, after much deliberation and with the advice of the assistant judges, that where lands or leases are conveyed to two or more trustees, and one of them receives all or the most part of the profits, his co-trustees shall not be charged for the receipts of the other. And in the same case it was said to be no breach of trust to permit one of the trustees to receive all or most part of the profits, *it falling out many times that some of the trustees live far from the lands*, and are put into the trust out of other respects, than to be troubled with the receipt of the profits.

So, in *Ex parte Griffin*,(b) A. one of the assignees of a bankrupt

(x) *Clough v. Bond*, 3 M. & Cr. 490.

(y) 3 M. & Cr. 497.

(z) *Att.-Gen. v. Randell*, 2 Eq. Cas.

Abr. 742 ; 7 Bac. Abr. 184, 6th ed.

(a) *Bridgman*, 35.

(b) 2 Gl. & J. 114.

signed the cheques upon the banker for a dividend, and delivered them to B. his co-assignee, for him to sign them, and deliver them to the creditors. B. signed the cheques, which were then stolen out of his desk and payment received from the bankers. It was held by Sir J. Leach, that the signature of the cheques by A. and his delivery of them to his co-assignee, *was required for the purposes of convenience*, and was done in the proper execution of his duty of a trustee, and consequently that he was not responsible for the subsequent loss. Although this was a case affecting *assignees* and not trustees strictly so called, the principle of the decision is precisely the same, and was treated as such by the learned judge.

Upon the same principle, where one of two executors had paid a sum of 1,200*l.* to his co-executor, who resided in the country, for the purpose of discharging the testator's debts, which were owing to persons in his immediate neighborhood; and the co-executor died insolvent, having only applied 787*l.* in payment of the debts; the whole sum of 1,200*l.* was allowed to the other executor in his accounts, as the payment was requisite in the ordinary management of executors.^(c)

So in a recent case before Lord Langdale, M. R., two executors and trustees were directed to pay certain annuities out of the dividends of the trust estate, which consisted principally of stock, and to invest and accumulate the surplus. Both executors proved the will, but one only acted in the trust, and for several years continued to receive and misapply the dividends, though this was unknown to his co-trustee. The acting trustee became bankrupt, being largely indebted to the trust estate for the dividends misapplied by him. And [*312] it was held the non-acting trustee **was not answerable for the breach of trust committed by his colleague.*^(d) The question appears to have been treated as one affecting executors, although the duties of paying the annuities and investing the surplus would seem to have clothed the parties with the character of trustees. From the report of the judgment, his Lordship seems to have rested his decision mainly on the fact of the want of knowledge or acquiescence on the part of the non-acting executor. But it is conceived, that the necessity, or at any rate the convenience of the arrangement, according to which the dividends were suffered to be received by the trustee, who acted and was on the spot, would be quite sufficient to support the decision, upon the principle now under discussion. In the same case the non-acting trustee had joined in the *sale of a sum of 450*l.* stock*, the proceeds of which were received by the acting trustee.

(c) *Bacon v. Bacon*, 5 Ves. 331; and see *Hovey v. Blakeman*, 4 Ves. 596.

(d) *Williams v. Nixon*, 2 Beav. 472.

tee alone, and the one who did not act was held clearly responsible for the misapplication of that fund.(e)

In a very late case before Lord Lyndhurst,(f) two co-executors and trustees had concurred in the sale of the testator's stock and also of his real estate, and had both signed the receipts for the purchase-money, but one of them only received the money, and afterwards became bankrupt, being largely indebted to the trust estate. His Lordship held, that the joint acts were necessary for the due administration of the estate, and that the trustee who had not received the money, was not answerable for the *devastavit* committed by his co-trustee.(f) The facts in this case, however, are not stated with sufficient precision in the only report of it hitherto published, to admit of the extraction of the particular grounds on which his Lordship's decision proceeded.

Upon the same ground of the necessity or convenience of the act, there can be no question but that a trustee will be justified in authorizing one or more of their number to receive or possess himself of the trust fund, for the purpose of making an immediate payment to the *cestui que trusts*, in discharge of the trust;(g) or preparatory to the completion of a purchase, or mortgage, or other new investment, which is in immediate contemplation.(h)

Where the trust funds are received by one trustee only, *and that receipt is justified by the circumstances*, the other trustees will not be held responsible for the loss of the fund, merely because they join in the receipt for the money: for in transactions with trustees it is usually essential for the security of the persons dealing with them, that all the trustees should join in signing the receipts.(i)(1)

And in this respect there is a material distinction between *trustees* and *executors*: for it is not in general necessary for all the *executors* to join in *the receipts, and if they do so, they will be chargeable for the money, although they did not receive [*313]

(e) *Williams v. Nixon*, 2 Beav. 472, 477.

(f) *Terrell v. Mathews*, 11 Law Journ. N. S., Chanc. 31.

(g) *Curtis v. Mason*, 12 Law Journ. N. S. Chanc. 442; see *Ex parte Griffin*, 2 Gl. & J. 114.

(h) *Broadhurst v. Balguy*, N. C. C. 16, 28; *Hanbury v. Kirkland*, 3 Sim. 265.

(i) *Aply v. Brewer*, Prec. Ch. 173; *Harden v. Parsons*, 1 Ed. 147; *Fellows v. Mitchell*, 1 P. Wms. 81; *Churchill v. Hodson*, id. 241; *Att.-Gen. v. Randell*, 7 Bac. Abr. 184; *Murrell v. Cox*, 2 Vern. 570; *Leigh v. Barry*, 3 Atk. 584; *Ex parte Belchier*, Ambl. 219; *Sadler v. Hobbs*, 2 Bro. C. C. 117; *Terrell v. Mathews*, 11 Law Journ. N. S., Chanc. 31.

(1) In most of the early cases referred to in the text, the liability of a non-acting trustee for the misfeasances of his co-trustee, appears to have been narrowed to a very small compass, but those decisions could not safely be depended upon as authorities at the present day.

it.(k)¹ And hence it may occasionally be important to determine, where an executor has assumed the character of a trustee.(l) The reason of this distinction is, that executors *are not bound* to join in the act. Therefore the distinction does not apply, where the concurrence of all the executors to an act is *indispensable*, as in the case of the sale or transfer of any part of the property.(m)

It is to be observed, however, that where all the trustees have joined in signing a receipt for a sum of trust money, there will arise a *prima facie* inference that the money was received by all; and it is for those who seek to discharge themselves, to rebut that inference, by proving that they joined only for the sake of conformity.(n)

If a trustee, who joins in the receipt, have received any part of the money, but it does not appear how much, he will be liable for the whole; for he is to blame for not keeping a distinct account, and the case has been likened to a person throwing his corn or money into another's heap, where the party who occasions the difficulty must bear the loss.(o)

A trustee, who had been induced to place the trust property in the hands of his colleague by his representations as to the necessity of that act, will not be exonerated from his liability for the acts of his co-trustee, if those representations turn out to have been unfounded, and there was in fact no necessity for the act. For it is a trustee's duty to inquire into and ascertain the truth. Thus a trustee, who paid the trust funds to his co-trustee on his erroneous representation that the money was wanted for the payment of debts;(p) or for the purpose of investment;(q) or of being paid over to the party beneficially interested;(r) has been held liable for the loss occasioned by the subsequent failure of the co-trustee without applying the money to those purposes.

And although the circumstances may be such as *at the time* to jus-

(k) *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Scurfield v. Hawes*, 3 Bro. C. C. 90; *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 324; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Doyle v. Blake*, 2 Sch. & Lef. 242; *Moses v. Levi*, 2 Y. & Coll. 359, 367; *Terrell v. Mathews*, 11 Law Jour. N. S., Chanc. 31.

(l) See *Chambers v. Minchin*, 7 Ves. 199.

(m) *Terrell v. Mathews*, ubi supra; *Hovey v. Blakeman*, 4 Ves. 608; *Chambers v. Minchin*, 7 Ves. 197.

(n) *Chambers v. Minchin*, 7 Ves. 186; *Brice v. Stokes*, 11 Ves. 324; sed vide *Scurfield v. Hawes*, 3 Bro. C. C. 90; *Harden v. Parsons*, 1 Ed. 147. [*Monell v. Monell*, 5 J. C. R. 294.]

(o) *Fellows v. Mitchell*, 1 P. Wms. 90.

(p) *Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Underwood v. Stevens*, 1 Mer. 713; *Hewett v. Forster*, 6 Beav. 259.

(q) *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 N. C. C. 16.

(r) *Curtis v. Mason*, 12 Law Jour. N. S., Chanc. 442.

tify a trustee in making over the trust funds to his colleague, yet he will be wholly wanting in his duty if he do not take due precautions to ascertain, that they *are* duly applied by the co-trustee to the required purpose: and he will undoubtedly be responsible for any loss, if he leave the property unprotected in the hands of his co-trustee for a longer time than the necessity of the case actually requires.(s)

So a trustee will be liable for the loss of a trust fund, which he may have suffered his co-trustee to receive for the purpose of investment, unless an immediate beneficial investment was in actual contemplation at the *time. For if no such investment was contemplated, the payment to the co-trustee was unnecessary, [*314] and therefore a breach of trust.(t)

If by any private arrangement between the trustees one of them is to have the exclusive management of one part of the trust property, and the other of the remaining part, each will notwithstanding be responsible for the whole.(u)

But where the author of the trust himself has invested one of his trustees with a particular authority to the exclusion of the others, as where a testator directed, that *one* of his trustees by name should sell an estate, the others will not be answerable for any act done by the party so entrusted in exercise of that power.(x)

And so if it be part of the arrangement between the parties on the creation of the trust, that each of the two trustees shall be answerable for only a moiety of the trust fund, the court will consider the division of the property, and of the consequent liability, to have been a term in the creation of the trust, and will hold each trustee to be liable only in respect of the share committed to him.(y)

If co-trustees expressly bind themselves to be answerable for the acts of each other, the court will not relieve them from the consequences of such an arrangement.(z)

It is the duty of one trustee to protect the trust estate from any misfeasance by his co-trustee, upon being made aware of the intended act, by obtaining an injunction against him,(a) and if the wrongful act has been already committed, to take measures by suit or otherwise, to compel the restitution of the property and its application in the manner required by the trust.(b)

(s) *Curtis v. Mason*, ubi supra; and see *Bone v. Cooke*, 1 M'Clel. 168; *Gregory v. Gregory*, 2 Y. & C. 313; *Scurfield v. Hawes*, 3 Bro. C. C. 91.

(t) *Brice v. Stokes*, 11 Ves. 319; *Broadhurst v. Balguy*, 1 N. C. C. 16.

(u) *Gill v. Att.-Gen.* Hard. 314; see *Fulton v. Gilmour*, Rolls, 15 February, 1845, MS.

(x) *Davis v. Spurling*, 1 R. & M. 64.

(y) *Birls v. Betty*, 6 Mad. 90.

(z) *Leigh v. Barry*, 3 Atk. 583.

(a) *In re Chertsey Market*, 6 Price, 279.

(b) *E. Powlet v. Herbert*, 1 Ves. Jun. 297; *Franco v. Franco*, 3 Ves. 75; see *Walker v. Symonds*, 3 Sw. 71.

The ordinary clause for the indemnity of trustees, which limits their liability to their own acts, does not apply to breaches of trust of the nature discussed in this section.(c) Indeed such a clause appears to be of little or no practical use; for if the conduct of the trustee be such as not to amount to a breach of trust, he will not be liable for the acts of his colleagues, though there be no such clause in the trust instrument;(d) and if there be a breach of trust on his part, the clause in question will not apply.(e)

The right of the *cestui que trust* to charge one trustee for the acts of his colleague may be waived by acquiescence; but this defence should be raised by the trustee's answer, and the fact of acquiescence must be established by sufficient evidence.(f)

And where the *cestui que trust* has entered into any compromise or arrangement with the trustee, by whom the trust fund has been lost, and the rights of the other trustees to be indemnified out of the assets of the *defaulting trustee are varied or affected by that [*315] arrangement, the *cestui que trust* will be held to have waived the remedy, to which he was previously entitled against the other trustees. For instance, where the *cestui que trust* executes, or authorizes the other trustees to execute, a deed of compromise, as one of the creditors of the defaulting trustee; and by that deed the other trustees are precluded from putting in force a bond, given by the defaulting trustee for the amount of the trust fund, the *cestui que trust* could not afterwards proceed against the other trustees for the breach of trust.(g)

But to produce this result, the *cestui que trust* must act with full knowledge of all the circumstances, and of his own rights as against the other trustees.(h)

It is almost unnecessary to add, that where a trustee is so far implicated in a breach of trust committed by his co-trustee, that he is compelled to make good to the *cestui que trust* the loss thus occasioned, although he has not benefited by, or been directly concerned in, the misappropriation of the property, he will be entitled to stand in the place of the *cestui que trust* as against his co-trustee, and to claim from him, or his estate, the amount which he has thus been compelled to pay.(i)

The cases in which one of several trustees, who are all liable for a

(c) *Mucklow v. Fuller*, Jac. 198; *Williams v. Nixon*, 2 Beav. 472.

(d) *Leigh v. Barry*, 3 Atk. 584; see *Dawson v. Clark*, 18 Ves. 254.

(e) *Underwood v. Stevens*, 1 Mer. 712; *Hanbury v. Kirkland*, 3 Sim. 265; *Williams v. Nixon*, 2 Beav. 472; *Mucklow v. Fuller*, Jac. 198.

(f) *Lincoln v. Wright*, 4 Beav. 427; *Brice v. Stokes*, 11 Ves. 319.

(g) *Walker v. Symonds*, 1 Sw. 1.

(h) *Walker v. Symonds*, 1 Sw. 1, 73.

(i) 1 Sw. 1, 77; *Lincoln v. Wright*, 4 Beav. 427.

breach of trust, may be sued alone by the *cestui que trust*, will be the subject of consideration in a future chapter.^(k)

Where co-trustees are implicated in a joint breach of trust, and the whole amount of the loss is recovered by the *cestui que trust* from one or more of their number, those trustees who have been compelled to pay may unquestionably enforce an apportionment or contribution from the others by means of a bill filed for that purpose.^(l)

*CHAPTER II.

[*316]

OF THE POWERS AND DUTIES OF TRUSTEES AS BETWEEN THEM AND THE CESTUI QUE TRUSTS.

I. OF TRUSTEES OF A DORMANT
ESTATE [316].

CLOTHED WITH ACTIVE DU-
TIES [328].

II. OF TRUSTEES OF AN ESTATE III. OF TRUSTEES OF POWERS [471].

I.—OF TRUSTEES OF A DORMANT ESTATE.

UNDER this head it is proposed to consider that class of trustees, who have no express active duties to discharge with relation to the trust estate. Such as,—1st, Trustees, in whom a mere dry legal estate is vested.—2d, Trustees to preserve contingent remainders.¹—And 3d, Trustees of terms of years, attendant on the inheritance.²

I.—OF TRUSTEES OF A MERE DRY LEGAL ESTATE.

Wherever the person who is equitably entitled to any property, takes absolutely the entire beneficial interest, the person in whom the legal estate is vested for his benefit, may be said to be a mere dry trustee. As, for instance, where the legal estate is vested in A. his heirs and assigns, in trust for B. his heirs and assigns. And an estate, not originally a mere dry trust, may become so in the event; as where a mortgagee in fee is paid off by the mortgagor, but no reconveyance is executed; or where an equitable estate in fee simple is limited in remainder to B., expectantly, upon the determination of some particular or partial beneficial estate, or interest, which is afterwards determined or satisfied. It was at one time not unusual for

(k) Post, p. 543.

198; *Knatchbul v. Fearnhead*, 3 M. &

(l) *Wilson v. Goodman*, [4 Hare, 54]; Cr. 124.
see *Ex parte Shakeshaft*, 3 Bro. C. C.

¹ Post, 317.

² Post, 324.

purchasers to take a conveyance of the legal fee to a dry trustee, as a mode of barring the dowers of their widows. For according to the law previously to the statute 3 & 4 Will. IV. c. 105, no dower attached upon a mere equitable estate of inheritance. The law in this respect has been altered by that act, which makes widows dowable out of trust estates. Therefore, no such advantage can in future be gained by taking a conveyance in that manner.

The powers of a mere dry trustee over the trust estate are very limited, and his duties simple and obvious. At law he is regarded as the real owner, and his name must be used in any action, or other proceeding, affecting the title to the property.(a) But in equity the *cestui que trust* is looked upon as the person really entitled, and the trustee will be restrained by injunction from using his legal powers otherwise than for the benefit of the *cestui que trust*.(b) It has been [*317] seen, that the duties of the *trustee are principally threefold, in conformity to those of the ancient feoffees to uses.—1st, To permit the *cestui que trust* to have the beneficial enjoyment of the estate, by receiving the income and other profits arising from it.—2d, To execute such conveyances and dispositions as the *cestui que trust* may direct.—3d, To defend the title of his *cestui que trust* in any court of law or equity, or at any rate to suffer his name to be made use of for that purpose.(c)

The right of the *cestui que trust* to require a conveyance or transfer of the legal interest from his trustee, and the duty of the latter to comply with such a requisition, have been already discussed at large in a previous chapter, as well as the extent and nature of the liability of the trustee for any expense occasioned by his refusal.(d)

The interest of *cestui que trusts* is to some extent recognised by courts of law in actions by a trustee as the nominal plaintiff; and if the trustee fraudulently release the action without the consent of the party beneficially interested, a plea of such a release will be set aside.(e)

But the defendant, in an action at law brought by a trustee, cannot in that action set off a debt due to him from the *cestui que trust*.(f)

A trustee, whose name is used by the *cestui que trust* as plaintiff in an action at law, may apply to a court of equity in a suit then pending to restrain the *cestui que trust* from proceeding with the action, until he had given him security for costs.(g)

(a) *Goodtitle v. Jones*, 7 T. R. 47; *Barker v. Richardson*, 1 Y. & J. 362; *Wake v. Tinkler*, 16 East, 36. [See *Chit. Contr.* 605. [Ante, 274, note (1).] ante, p. 274, note.]

(b) *Balls v. Strutt*, 1 Hare, 146.

(f) *Tucker v. Tucker*, 4 B. & Ad. 745. [Ante, p. 274, note y.]

(c) 1 *Cruis. Dig.* Tit. 12, ch. 4, sect. 6.

(g) *Annesley v. Simeon*, 4 Mad. 390.

(d) Ante, Pt. II. Ch. IV. Sect. 1.

[See *Ins. Co. v. Smith*, 11 Penn. St.

(e) *Manning v. Cox*, 7 Moore, 617; R. 12.]

In case of the disability of the *cestui que trust* by reason of infancy, or mental incapacity, a dry trustee does not acquire any further powers of management, or disposition over the trust estate; nor can he by any act of his, alter the nature of the trust property, by changing real estate into personal, or *vice versa*.^(h)

It is a general rule in equity, that no act of the trustee shall prejudice the *cestui que trust*.⁽ⁱ⁾ To this, however, there is one exception; for if a mere trustee be in actual possession of the estate, and convey it for valuable consideration to a purchaser, who has no notice of the trust, the title of the purchaser will prevail.^(k)

A mere dry trustee, such as one to preserve contingent remainders, is not incapacitated from dealing with the *cestui que trust* for the purchase of the trust estate.^(l)

II.—OF TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.¹

Where an estate was limited by deed or will to a person for life, with an immediate remainder to his children, or other persons, upon their coming into *esse*, or upon any other contingency, the contingent remainders previously to the recent act, 7 & 8 Vict. c. 76, might have been defeated, *before coming into existence, by the forfeiture or alienation of the tenant for life.^(m) [*318]

The inconvenience and injustice, which was thus occasioned, led to the invention of the estate of trustees to preserve contingent remainders. An estate was limited to trustees and their heirs during the life of the tenant for life, in trust to support the contingent remainders after limited from being defeated or destroyed. If, therefore, the estate of the tenant for life were determined otherwise than by his death, the estate of the trustees would then take effect in possession, so as to support and preserve the remainders depending in contingency.⁽ⁿ⁾²

^(h) *Furiam v. Sanders*, 7 Bac. Abr. [Uses and Trusts, E.]; *Witter v. Witter*, 3 P. Wms. 100.

⁽ⁱ⁾ 7 Bac. Abr. [Uses and Trusts, E.] 1 Cruis. Dig. Tit. 12, Ch. 4, Sect. 11.

^(k) *Millard's case*, 2 Freem. 43; see *Bovey v. Smith*, 1 Vern. 149; and see ante, p. 164; post, 510 [and notes].

^(l) *Parkes v. White*, 11 Ves. 226. [See ante, note (1), to page 158.]

^(m) *Archer's case*, 1 Rep. 66; *Chud-*

leigh's case, id. 120; *Fearne*, Cont. Rem. 290, 7th edit.; 2 Bl. Comm. 171, 2; 1 Mad. Ch. Pr. 618, 3d ed.; *Story* Eq. Jur. § 991.

⁽ⁿ⁾ *Garth v. Cotton*, 3 Atk. 753; S. C. 1 Dick. 183; *Smith d. Dormer v. Parkhurst*, 3 Atk. 135; S. C. Willes, 327; 2 Bl. Comm. 171, 2; 2 Cruis. Dig. Tit. 16, Ch. 7, Sect. 1; Co. Litt. 290, b. Butl. notes, IV. V. 4; 1 Mad. Ch. Pr. 619.

¹ See *Vanderheyden v. Crandall*, 2 Denio, 9.

² In some of the United States, as Georgia, South Carolina, Delaware, New York, Illinois, Kentucky, the necessity of trustees to support contingent remain-

The estate in remainder thus limited to trustees during the life of the tenant for life, is a vested and not a contingent remainder. This was once doubted, but it was so resolved by the Court of K. B. in the case of *Smith on the demise of Dormer v. Parkhurst*, and that decision was affirmed on appeal by the House of Lords with the unanimous concurrence of all the judges.^(o) The extent and duration of this estate, and in what cases it will be restricted or extended to meet the purposes of the trust, have been already considered in a previous chapter.^(p)

The primary duty of trustees of this description is to preserve the contingent remainders, created by the will or settlement, from being defeated or destroyed by the tenant for life. Therefore, where trustees are appointed to preserve contingent remainders limited to unborn sons, and before the birth of a son they join in a conveyance to destroy those remainders, that is a clear breach of trust, for which they will be held responsible to any son afterwards coming into existence to the extent of the full value of the estate;^(q) and a volunteer taking under such a conveyance, or a purchaser with notice, will be bound by the trust, and will be decreed to execute a reconveyance.^(r) And it is immaterial whether the trust was created by voluntary settlement, or by a settlement for valuable consideration, or by will.^(s)

But the court has refused to enforce this equity against the trustees in favor of persons claiming under an ultimate contingent limitation, in a settlement to the right heirs of the settlor, who were not within the consideration of the settlement. The case alluded to is that of *Tipping v. Piggott*.^(t) There by a marriage settlement lands were limited to trustees in trust for the husband for ninety-nine years, if he should so long live, remainder to trustees during his life to preserve contingent remainders, remainder to the first and other sons of

(o) 3 Atk. 135; S. C. Willes, 327; see 3 Atk. 537; *Fearne*, Cont. Rem. 217; Co. Litt. 265 a, n. 2, and 337, b, n. 2. (r) 1 P. Wms. 128; 2 P. Wms. 681; 3 Atk. 754, 5.

(p) Ante, Pt. II. Ch. II. Sect. 1.

(q) *Pye v. Gorge*, 1 P. Wms. 128; *Mansell v. Mansell*, 2 P. Wms. 678; 7 Bac. Abr. [Uses and Trusts, F.]; *Moody v. Walters*, 16 Ves. 302; *Biscoe v. Per-* (s) *Pye v. Gorge*, 1 P. Wms. 128; *Mansell v. Mansell*, 2 P. Wms. 681; *Symance v. Tatham*, 1 Atk. 614. (t) 1 Eq. Ca. Abr. 385.

ders in the case of posthumous children, is done away with by statute, 2 Greenleaf's Cruise, note to p. 315. In Indiana, Mississippi, and (except as to estates tail) in Maine, Massachusetts, and New York, no alienation by tenant for life in general will affect dependent estates. Id. 299, note. In Pennsylvania, however, a contingent remainder will be destroyed by a common recovery suffered by the tenant for life. *Dunwoodie v. Reed*, 3 S. & R. 435; *Toman v. Dunlop*, 18 Penn. St. R. 72. See, in New York, before the Revised Statutes, *Vanderheyden v. Crandall*, 2 Denio, 9.

the marriage in tail, *with an ultimate remainder to the right heirs of the husband*; there was no issue of the marriage, and *the husband and wife, and the trustees to preserve, joined in re- [*319] settling the estate by fine and conveyance to other uses. The husband and wife died without issue, and a bill was filed *by the heir-at-law of the husband* to enforce his claim under the limitation in the first settlement, and to set aside the subsequent conveyance, as having been made in breach of trust. But Lord Harcourt held, that although the second settlement would most certainly have been a breach of trust as against *the first and other sons*, who took as purchasers under the first settlement, yet the remainder over to the *right heirs of the husband* was merely voluntary, and not to be aided in equity, and he accordingly dismissed the bill.(u)

Under a limitation to A. for ninety-nine years, if he should so long live, with remainder to trustees to preserve (giving them the first estate of *freehold*), with a contingent remainder to the *first and other sons* of A. in tail; the first legal estate of freehold would be vested in the trustees, and their concurrence would consequently be requisite to give validity to any fine or recovery for barring the subsequent remainders. It is at present by no means settled how far it would be a breach of trust on the part of the trustees to join with the tenant for life, and tenant in tail in remainder upon his reaching twenty-one, in barring the subsequent remainders over in order to effect a re-settlement of the estate.(x) We shall presently see that the court will not in general decree the trustees to join in such a transaction, if they refuse to do so.(y)

If the new settlement of the estate be beneficial to the family generally, and it do not confer any unreasonable benefit on the tenant for life, for instance, where it gives an immediate beneficial interest to the son, who would otherwise take nothing until his father, the tenant for life's death; and where portions are directed to be raised for the daughters, who were omitted in the original settlement; such circumstances will materially assist the court in coming to the decision, that no breach of trust has been committed by the trustees in giving effect to the fresh arrangement.(z) Indeed, these considerations have on more than one occasion induced the court to decree the trustees to join in executing a re-settlement.(a)

(u) *Tipping v. Piggott*, 1 Eq. Ca. Abr. Woodhouse v. Hoskins, 3 Atk. 22; 385; S. C. 2 Cruis. Dig. Tit. 16, Ch. 6, Barnard v. Large, 1 Bro. C. C. 534; Sect. 9; and see *Moody v. Walters*, 16 Amb. 773.

(x) *Else v. Osborn*, 1 P. Wms. 387; 311; *Biscoe v. Perkins*, 1 V. & B. 485, *Moody v. Walters*, 16 Ves. 283; *Biscoe* 492.

(y) *Townsend v. Lawton*, 2 P. Wms. (a) *Platt v. Spring*, 2 Vern. 303; *Frewin v. Charlton*, 1 Eq. Ca. Abr. 386; 379; *Symance v. Tatham*, 1 Atk. 613; *Winnington v. Foley*, 1 P. Wms. 536.

In the case of *Else v. Osborne*,^(b) it was laid down without any qualification, by Lord Cowper, that "if the eldest son joins in a feoffment, where the remainder in tail is limited to the eldest son, it prevents any breach of trust in the trustees." In that case the remainder was limited to the *heirs of the body* of the tenant for life, and not to his first and other sons. The tenant for life, who did not take a freehold interest, and the trustees to preserve, and the eldest son, being of age, joined in a feoffment and fine to B. in fee, by way of mortgage to secure a sum of money. The case was [*320] decided on another point, but as we have already *seen, it was distinctly stated by Lord Cowper, that this would not have been a breach of trust in the trustees, if the limitation in tail had been to the *eldest son*. In this case there was not the slightest ground for supporting the transaction as a *beneficial family arrangement*; indeed it appears from a statement in the note to the report, that the equity of redemption in fee was reserved solely to the father, the tenant for life, to the exclusion of the son.^(c)

This decision does not seem to have been approved of by Lord Eldon, when it came to be considered by him in the course of his judgment in *Moody v. Walters*.^(d) Although, in the subsequent case of *Biscoe v. Perkins*,^(e) the observations of that eminent judge seem to be decidedly in favor of the doctrine, that a conveyance made by trustees jointly with the tenant for life and first tenant in tail, will not be treated as a breach of trust, though *they would not be decreed to execute* such a conveyance.^(e)

In the present state of the authorities, and until the question be set at rest by judicial determination, it must be laid down in the words of Lord Eldon, "as the safest rule for trustees, but certainly most inconvenient for the general interests of mankind, that it is better for trustees never to destroy the remainders, even if the tenant in tail of age concurs, without the direction of the court."^(f)

Where the limitation in remainder is not to the *first and other sons* of the tenant for life in tail, but to the *heirs of his body*, it was decided by Lord Cowper, that it was a breach of trust on the part of the trustees to join with the tenant for life in a feoffment to a stranger, although the eldest son, who was of age, and the apparent heir in tail, also joined; for *nemo est hæres viventis*, and *non constat*, that the eldest son would ever take as *heir* of the father, and unless he did so his concurrence in the transaction was immaterial: in fact, the eldest son had there died without issue in the lifetime of the

(b) 1 P. Wms. 387; and see *Woodhouse v. Hoskins*, 3 Atk. 24.

(c) *Else v. Osborn*, 1 P. Wms. 387.

(d) 16 Ves. 305.

(e) *Biscoe v. Perkins*, 1 V. & B. 491,

2; and see Lord Hardwicke's observations in *Woodhouse v. Hoskins*, 3 Atk. 24.

(f) 1 V. & B. 491.

father, and the bill was filed by the second son to set aside the feoffment as a breach of trust; but Lord Cowper, though he admitted that there had been a breach of trust, refused to entertain the suit, on the ground that the son had no title to sue in his father's lifetime, and dismissed the bill.(g)

Until the eldest son, or other first tenant in tail in remainder, attain the age of twenty-one, he is of course incompetent to give any effectual concurrence; and the destruction of the contingent remainders by the trustees before that time, will in any case be as much a breach of trust, as if no tenant in tail had then come into *esse*.(h) And the case would be the same, where the tenant in tail in remainder is laboring under any other legal incapacity to convey.

If the tenant for life under a will with remainder to another person in tail be also made trustee to preserve the contingent remainders over, his joining with the tenant in tail to bar the contingent remainders will not be a breach of trust.(i)(1)

*Although in the cases and under the circumstances already considered, a conveyance, *actually executed* by the [321] trustees, destroying the contingent remainders, will not be a breach of trust, it by no means follows that the trustees would be *compelled* by the decree of the court to execute such a conveyance in a similar case, and under the same circumstances.

However, in a proper case, the court will, and frequently has compelled the trustees to join in destroying the contingent remainders, although an indemnity is usually directed to be given in such cases.

Thus, where the parties who require the trustees to join in defeating the contingent remainders, claim by a title paramount to that of the persons entitled under the settlement, the court has decreed the trustees to perfect the superior title by joining in the conveyance. Thus in *Bassett v. Clapham*,(k) A., by a voluntary conveyance, settled lands to the use of himself for life, remainder to trustees to preserve, remainder to his first and other sons in tail, remainder to himself in fee. He afterwards made a conveyance of the same lands to other trustees for the payment of his debts. The creditors filed

(g) *Else v. Osborn*, 1 P. Wms. 387.

(i) *Osborne v. Bury*, 1 Ball. & B. 58.

(h) *Moody v. Walters*, 16 Ves. 302;

(k) 1 P. Wms. 358.

Biscoe v. Perkins, 1 V. & B. 491.

(1) In such a case the tenant for life would be enabled at law to defeat the contingent remainders by a simple conveyance of the estate before they came into *esse*; and if he were not *expressly made the trustee* to preserve those remainders, he would not be restrained by a court of equity from exercising his legal powers though to the disappointment of the settlement. But there can be little doubt, but that he would be prevented by the court from availing himself of his legal powers for his own benefit *in direct contravention of the express trust*.

their bill, insisting that the trustees should join in a sale to destroy the contingent remainders, none of which appear to have become vested: and Sir Joseph Jekyll, after considerable hesitation, upon the authority of a precedent which was produced, decreed the trustees to join in the conveyance, on being indemnified. In this case it will be seen that the title of the creditors was paramount to that of the parties claiming under the settlement.

So, where it is essentially for the benefit of the estate, that a sale should be effected, the trustees, on being indemnified, have been directed to join in a conveyance which destroyed the contingent remainders, although they had not then come into existence. For instance, where the settled estate was in mortgage, and the mortgagee threatened to foreclose, unless his debt was paid off by means of a sale.^(l)

And upon the same ground of benefiting the estate, where the first tenant in tail has come of age, and is desirous of resettling the property, so as to continue it in the family, or so as to rectify an omission in the original settlement, by giving portions to female members of the family, the court has decreed the trustees to join with the tenant for life, and tenant in tail, in executing such a conveyance, although its effect was to defeat the contingent remainders over.^(m)

It was stated by Mr. Vernon in *Winnington v. Foley*,⁽ⁿ⁾ that there was a later case, where the trustee had joined with the first remainderman in tail in suffering a recovery *against the consent of the father*, the tenant for life, and it had been held to be no breach of trust; but Lord Eldon observed in *Moody v. Walters*, that he had not been able to find the case alluded to.^(o)

[*322] *Where there are no circumstances rendering the execution of the new conveyance by the trustees either necessary or advantageous to the estate, the court has repeatedly refused to compel them to join in destroying the remainders over. It has been said, that trustees of this description are honorary trustees; and where there is no violation of trust, the court will be reluctant to interfere, so as to take away their discretion.^(p)

Thus, in a case where an estate was limited by a marriage settlement to the husband and wife for their lives, with remainder to trustees to preserve, with remainder to their first and other sons in tail; *and there was no issue of the marriage after twelve years*; the husband and wife filed a bill to compel the trustees to join in a sale for

(l) *Platt v. Sprigg*, 2 Vern. 303.

(m) *Frewin v. Charlton*, 1 Eq. Ca. Abr. 386; *Winnington v. Foley*, 1 P. Wms. 536.

(n) 1 P. Wms. 537.

(o) 16 Ves. 305, 6.

(p) *Woodhouse v. Hoskins*, 1 Atk. 24; *Barnard v. Large*, 1 Bro. C. C. 535; *S. C. Ambl. 775*; *Biscoe v. Perkins*, 1 V. & B. 492.

the payment of the debts, but the Lord Keeper refused to make the decree.(q)

In this case it will be observed that no person entitled in remainder had come into *esse*; but even where the first remainderman in tail has come of age, the court has refused to direct the trustees to join with him and the tenant for life in executing a conveyance barring the remainders over; though the object of the new conveyance was to resettle the estate in a different manner.(r) Still less will it compel the trustees to join in such a conveyance, for the purpose of giving effect to a sale or other disposition by the tenant for life and the remainderman in tail, where that sale or disposition is totally at variance with, and destructive of, the purposes contemplated by the original settlement.(s)

Upon the whole, the authorities leave the question, as to the propriety or impropriety of trustees joining in the destruction of the contingent remainders, in a very unsatisfactory state. It is clear, that wherever the court would compel the trustees so to join, it will be no breach of trust on their part to act, without waiting for the sanction of the court: this, however, as a practical rule for the guidance of trustees, is of very little use; for the difficulty remains to determine in what cases trustees will or will not be directed to join, a question, which Lord Eldon admitted, it was beyond his abilities to determine from the different cases on the subject.(t)

However, it is equally clear from the decisions, that there may be cases where the trustees *may* join without any breach of trust, although the court will not *compel* them to do so: and wherever the arrangement, to which their concurrence is required, is, from the circumstances of the family, fair and reasonable, and one, to which in the proper exercise of their discretion they ought to accede, the trustees may safely be advised to join in giving effect to it.(u)

But the trustees, even in such a case, will be perfectly justified in refusing to join, except under the direction of the court; and unless in the clearest cases, this is certainly the most prudent course for them to adopt, remembering the words of Lord Harcourt in *Pye v. Gorge*,(x) **"That it would be a dangerous experiment for* [*323] *trustees in any case to destroy remainders, which they were* appointed by the settlement to preserve."*"(y)*

It may be observed, that previously to the Fines and Recoveries

(q) *Davies v. Weld*, 1 Vern. 181; S. C., 1 Eq. Ca. Abr. 386.

(r) *Barnard v. Large*, 1 Bro. C. C. 534; S. C. Amb. 773.

(s) *Townsend v. Lawton*, 2 P. Wms. 379; *Symance v. Tatham*, 1 Atk. 613; *Woodhouse v. Hoskins*, 3 Atk. 22.

(t) In *Biscoe v. Perkins*, 1 V. & B. 491, 2.

(u) Lord Lansdown's case, cited by Lord Eldon, 16 Ves. 310.

(x) 1 P. Wms. 128.

(y) *Moody v. Walters*, 16 Ves. 310, 11; *Biscoe v. Perkins*, 1 V. & B. 491.

Act(z) the concurrence of the trustees in a recovery for barring the subsequent contingent and other remainders, and since that act their consent to a conveyance as protectors of a settlement, is necessary, only where they take the first estate of *freehold*; and this is usually the case, where a *chattel interest for a term of years* determinable on his life is limited to the beneficial tenant for life. Where the tenant for life has an estate of *freehold*, he and the first remainderman in tail, on coming of age, may effectually bar all the subsequent remainders over without any co-operation on the part of the trustees. And so, when the estate tail takes effect in possession by the death of the tenant for life, the tenant in tail alone will be competent to defeat the subsequent remainders, and acquire the fee.

It is not probable, that any question, as to the necessity of the concurrence of the trustees in these cases, will often arise in future: for the 22d section of the Fines and Recoveries Act(a) provides that the owner of the first existing estate under a settlement (though only an estate for years determinable on lives), shall be the protector of the settlement: and by the 34th section the consent of the protector only is required to give validity to an absolute disposition by the remainderman in tail. The 27th and 29th sections together provide that no bare trustee shall be protector of any settlement, except where the settlement was made on or before the 31st of December, 1833.

The destruction of the remainders, before any persons entitled in remainder have come into existence, is clearly a breach of trust: and such a course cannot safely be adopted by the trustees in any case, except under the direction of the court.(b)

It is the duty of trustees to preserve contingent remainders to protect the estate from injury committed by the tenant for life.(c) And they will be guilty of a neglect of duty, if they permit a tenant for life, liable to impeachment for waste, or a tenant *pur autre vie*, who by the nature of his estate is liable for waste, to destroy timber.(d) Neither ought such trustees to permit the tenant for life or years to destroy his estate for the purpose of bringing forward a remainder to himself or another for the purpose of cutting timber.(e) And, to enable them to discharge this duty, the trustees may have an injunction against the tenant for life, to restrain the commission of the waste before the contingent remainderman comes into *esse*.(f)

(z) 3 & 4 Will. IV. c. 74.

(a) Ibid.

(b) *Davies v. Weld*, 1 Vern. 181; *Pye v. Gorge*, 1 P. Wms. 128; *Mansell v. Mansell*, 2 P. Wms. 678; *Moody v. Waller*, 16 Ves. 302.

(c) *Barnard v. Large*, 1 Bro. C. C. 535; *Ambl. 774*.

(d) *Stansfield v. Habbergham*, 10 Ves. 282; *Garth v. Cotton*, 1 Dick. 183; 1 Ves. 524, 46; 3 Atk. 751; 1 Mad. Ch. Pr. 622.

(e) 10 Ves. 278.

(f) *Garth v. Cotton*, 3 Atk. 754.

If the trustees consent to the commission of the waste, and bind themselves not to sue for an injunction, they will be personally liable for the value.(g) But this liability will not exist, if they have not acted in the trust, or have no notice of the waste.(h)

*In the case of copyholds, the lord's estate will suffice to support the contingent remainders, without any express appointment of trustees for that purpose. But it does not appear to be the duty of the lord (though a trustee by legal construction), to interpose actively to prevent waste.(i) [*324]

The recent act of 7 & 8 Vict. c. 76, has made a very important alteration in the law affecting contingent remainders. The 8th section enacts, that after that act comes into operation (from the 31st of December, 1844), no estate in land shall be created by way of contingent remainder, but every estate, which before that time would have taken effect as a contingent remainder, shall take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature and having the same properties as an executory devise: and contingent remainders existing under deeds, wills, or instruments, executed or made before the time when that act comes into operation, shall not fail or be destroyed or barred merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of time, or some event on which it was in its creation limited to determine.¹

The effect of this enactment is to do away with the necessity of creating trustees for the preservation of contingent remainders for the future; as well as to remove the probability of any question arising hereafter, as to the duties or powers of the trustees already created for that purpose. It is to be observed, that the 13th section declares, that the act shall not extend to any estate, right, or interest created before the 1st of January, 1845, *except so far as regards the provisions as to existing contingent remainders.*

III.—OF TRUSTEES OF ATTENDANT TERMS OF YEARS.

Where a term of years is created by deed or will, either by way of mortgage, or for securing jointures, or portions, or any other particular purpose, and there is no proviso for its cesser or determination, upon the satisfaction of the trusts, the term, upon the accom-

(g) 3 Atk. 754.

(h) Ibid.

(i) *Stansfield v. Habergham*, 10 Ves.

282.

¹ This act is repealed by the 8 & 9 Vict. c. 106, sect. 1, so far as it destroyed contingent remainders.

plishment of the particular purpose, will in general remain vested in the termor as a trustee for the owner of the inheritance: and it is then technically known as an attendant term, in contradistinction to a term in gross.^(k)¹

A term may become attendant, either by an express declaration, or by the construction of law; the powers and duties of the trustee of the term are the same in either case.^(l)

It has been long established, that wherever the title to the inheritance, and the term of years, is so situated, that the whole legal interest in the one, and the whole equitable interest in the other, are vested in the same person, so that if they were both legal estates the term would merge, *then the term will in equity become attendant on the inheritance, although there may be no express declaration to that effect.^(m)

Therefore, where a purchaser of land took a conveyance of the fee to himself, and an assignment of an outstanding term of years to two persons in trust for him, but without declaring that the term was to attend, Lord Nottingham decided, that the trustees held the term for the benefit of the heir of the purchaser as the owner of the inheritance, and that his executrix, who laid claim to it as a chattel or term in gross, had no interest;⁽ⁿ⁾ and it is immaterial whether the term, or the legal fee, be vested in the trustee for the purchaser.^(o)

So, where a person entitled as mortgagee to a long term of years, which was vested in a trustee for him, purchased the inheritance, and devised the fee by a will not attested by three witnesses; it was held, that the devisee should not take the trust of the term under the will, but that it went to the heir-at-law as attendant on and part of the inheritance.^(p)

And the law is the same, where the termor for years, subsequently to his will, contracts to purchase the inheritance, and dies before conveyance. The residuary legatees in that case will have no claim

(k) *Willoughby v. Willoughby*, 1 T. R. 765; S. C. Ambl. 282; *Best v. Stamford*, 1 Salk. 154; S. C. 1 P. Wms. 374; *Prec. Chan.* 252; 2 Vern. 520; *Wynch v. Packington*, 2 Eq. Ca. Abr. 507; S. C. 1 Bro. C. C. 90, cited; *Hayter v. Rod*, 1 P. Wms. 373; *Maundrell v. Maundrell*, 10 Ves. 259; 2 Fonbl. Eq. B. 2, Ch. 4, Sect. 4, 5; *Co. Litt.* 290, b. Butl. note, XV.

(l) *Cholmondeley v. Clinton*, 1 Sugd. V. & P. 506, 7, 9th ed.; 1 *Cruis. Dig.*

Tit. 12, ch. 3, sect. 9; 1 *Sugd. V. & P.* 521, &c., 9th ed.

(m) *Capel v. Girdler*, 9 Ves. 510; *Kelly v. Power*, 2 Ball. & B. 253.

(n) *Tiffin v. Tiffin*, 1 Vern. 1; S. C. 2 Eq. Ca. Abr. 241; 2 *Chan. Ca.* 55.

(o) *Langton's Case*, 2 *Chan. Ca.* 156; *Dowse v. Percival*, 1 Vern. 104.

(p) *Witchurch v. Witchurch*, 2 P. Wms. 236; *Goodright v. Shales*, 2 *Wils.* 239.

¹ These terms are now abolished in England; see ante, p. 253, and notes.

to the legal term, which will in equity belong to the heir, as attendant upon his equitable title to the inheritance.(q)

And where a testator devised an estate to trustees for a term of ninety-nine years, but declared no trust of the term, and went on to devise the estate to persons for life with remainders over; it was held, that there was no resulting trust of the term, but that it attended the inheritance.(r)

So, where a term is carved out of the inheritance for any particular purpose, when that purpose is satisfied, the term becomes attendant on the inheritance without any express declaration: and this is in accordance with the maxim of equity, that "that should have the satisfaction which has sustained the loss."(s) And this doctrine will hold good, whatever may have been the purpose which the term was destined to answer; whether to secure a mortgage debt—or any pecuniary charge for a wife or children—or to carry out any other temporary arrangement.(t)

Therefore, where the owner of the inheritance, though only tenant in tail,(u) pays off a charge, secured by a term of years, it will be presumed, in the absence of a declaration to the contrary, that he acted for the benefit of the inheritance, and the term will become attendant.(x) But it is otherwise where the incumbrance is discharged by a tenant for life,(y) *or tenant in tail in remainder.(z) Although if the tenant for life, or a tenant for any [*326] other partial estate, pay off the charge, and afterwards acquire the inheritance, the charge, although kept on foot up to that time, will then merge, and the term will become attendant.(a)

If there be any intermediate legal estate and beneficial interest between the term and the inheritance, the term will not be attendant, but will remain in gross; for in that case it would not merge, if vested in the owner of the legal inheritance. For instance, where the trustee of an outstanding term granted a derivative lease of it to a trustee for the purchaser, reserving a nominal reversion of eleven

(q) *Capel v. Girdler*, 9 Ves. 509; and see *Cooke v. Cooke*, 2 Atk. 67.

(r) *Sidney v. Miller*, Coop. 206, and 19 Ves. 352; *Anon.* 2 Ventr. 359; see *Brown v. Jones*, 1 Atk. 191.

(s) *Francis Max.*, p. 21, 22; 2 Fonbl. Eq. B. 2, Ch. 4, Sect. 4, 5; 1 Cruis. Dig. Tit. 12, Ch. 3, Sect. 10; *Co. Litt.* 290, b. Butl. note, XV.

(t) *Bodmin v. Vandebendy*, 2 Chan. Ca. 172; *Gore v. Black*, 2 Vern. 139, cited; *Best v. Stampford*. Prec. Chan.

252; S. C. 2 Vern. 520; *Maundrell v. Maundrell*, 10 Ves. 270.

(u) *Jones v. Morgan*, 1 Bro. C. C. 206; *St. Paul v. Lord Dudley and Ward*, 15 Ves. 173; *Astley v. Milles*, 1 Sim. 298; *Lord Selsea v. Lord Lake*, 1 Beav. 146.

(x) *Ibid.*

(y) *Wyndham v. Earl of Egermont*, Ambl. 753; *Countess v. Earl of Shrewsbury*, 1 Ves. jun. 227.

(z) *Wigsell v. Wigsell*, 2 S. & St. 364.

(a) *Astley v. Milles*, 1 Sim. 298; *Lord Selsea v. Lord Lake*, 1 Beav. 146.

days, instead of assigning over the entire interest, the derivative term was held not to be attendant.(b)

A term may be prevented from becoming attendant, although the beneficial title to it becomes vested in the owner of the inheritance, if in creating it there was an obvious intention that it should be separated from the inheritance, and held in gross.(c) And so a term, having become attendant, may be disannexed, and turned into a term in gross, by the act of the owner of the inheritance.(d)

Terms attendant on the inheritance are considered as absolutely annexed to it; and the beneficial title to them follows all alienations of the inheritance, or any partial estate created out of it by deed, or will, or act of law.(e)

The legal ownership of the term devolves, upon the death of the original trustee, in the usual course of representation, where it has not been previously assigned to a new trustee. But in all cases, the legal holder of the term will hold in trust for the person entitled for the time being to the inheritance, and will be bound to exercise his legal powers only according to his direction, or for his benefit.(f)

It has been already seen, that as the legal estate is vested in the trustee of the term, any action at law respecting the title to the property can be tried only in his name.(g) And hence arises the security to a purchaser by having an outstanding term vested in a trustee for him; for if an ejectment be brought against him by any incumbrancer or other adverse claimant, and the origin of the adverse title be subsequent to the creation of the term, the plaintiff in such an action cannot recover during the continuance of the prior legal estate.(h)

The duties of the trustee of an attendant term, therefore, are mainly to suffer his name to be used by the owner of the inheritance in any action at law respecting the title, and to assign or dispose of the term according to the requisitions of the same party.

Where a person who lays claim to the inheritance, requires an assignment of an attendant term, which has not been expressly assigned to a trustee for himself, the trustee of the term is of course [*327] entitled to clear *proof of the right of the party to have the required assignment, and for that purpose to require the de-

(b) *Scott v. Fenhouillet*, 1 Bro. C. C. 69.

(c) *Hayter v. Rodd*, 1 P. Wms. 362; see *Nourse v. Yerworth*, 3 Sw. 612.

(d) Per Lord Hardwicke in *Willoughby v. Willoughby*, 1 T. R. 763; S. C. Ambl. 283; *Duke of Norfolk's case*, 3 Chan. Ca. 46.

(e) *Willoughby v. Willoughby*, 1 T. R. 763; Ambl. 282; *Maundrell v. Maundrell*, 7 Ves. 567, and 10 Ves. 246; Co.

Litt. 290, b. Butl. note, XV.; 2 Fonbl. Eq. B. 2, Ch. 4, Sect. 4, 5; 1 Mad. Chan. Prac. 636, 3d ed.; *Earl of Buckinghamshire v. Hobart*, 3 Sw. 201.

(f) 1 Sugd. V. & P. 519, 520, 9th ed. (g) Ante, p. 274, and note.

(h) Co. Litt. 290, b. Butl. note, XV.; 2 Fonbl. Eq. B. 2, Ch. 4, Sect. 4; 1 Mad. Chan. Prac. 636.

duction of his title from the person for whose benefit the term was last assigned to attend. And in the absence of such proof, the trustee would unquestionably be justified in refusing to make the assignment, except under the sanction of the court.⁽ⁱ⁾

This leads to the observation, that if the trustee of the term have notice of any disposition, or incumbrance, created by the owner of the inheritance, he cannot safely make any assignment of the term, or suffer any proceeding to be carried on in his name, to the prejudice of the party taking an interest under that disposition or incumbrance; and Lord Eldon has intimated, that the trustee in such a case might be restrained by injunction from permitting his name to be used for such a purpose.^(k)

If a trustee of a term refuse to assign it, when required by the party who is clearly entitled to the inheritance, he will be compelled to do so by the decree of the court:^(l) and if the refusal be unreasonable or proceed from any improper motive, the decree would be made against the trustee with costs.^(m)

A court of equity will not suffer the trustee of an attendant term to use his legal powers for the purpose of defeating or opposing the title of the owner of the inheritance; and even the courts of law will lay hold of any circumstance in order to prevent so gross an injustice, and will presume the surrender of the term.⁽ⁿ⁾

The other cases, in which the surrender of an attendant term may, or may not, be presumed, have already been considered at large in a previous chapter.^(o)

Where the trustee of a term marries a woman who has an estate of freehold in the property, the term will not by this means become merged in equity, whatever may be the case at law.^(p) And in like manner, if an attendant term become vested in the wife of the owner of the inheritance, as administratrix of the previous trustee, there will be no merger; nor will the wife thus acquire any right, which she would have had if the term had been vested in a third person as trustee.^(q)

A trustee of a term, who is required to assign it, is unquestionably entitled to satisfy himself as to the right of the party requiring the assignment, by taking legal advice, and the costs and expenses thus incurred must be defrayed by the persons by whom the assignment is required.

(i) Ante, Pt. II. Ch. IV. Sect. 1; and see *Goodson v. Ellison*, 3 Russ. 583.

(k) Ex parte Knott, 11 Ves. 613; 1 Sugd. V. & P. 520, 9th ed.

(l) *Mole v. Smith*, Jac. 490.

(m) *Willis v. Hiscox*, 4 M. & Cr. 197; vide ante, page 271, &c., and post, [Costs.] p. 551.

(n) *Lade v. Holford*, Bull. N. P. 110; *Doe v. Staple*, 2 T. R. 696; *Doe v. Syborn*, 7 T. R. 2; *Goodtitle v. Jones*, id. 47; *Bartlett v. Downes*, 3 B. & Cr. 616.

(o) Ante, p. 253, and notes.

(p) *Thorn v. Newman*, 3 Sw. 603.

(q) *Mole v. Smith*, Jac. 490.

It may be observed, that where the trust term is in a different diocese from that in which the trustee is domiciled, a prerogative probate or administration will be requisite to enable his representative to transfer the term.^(r)

[*328] *II.—OF TRUSTEES OF AN ESTATE CLOTHED WITH ACTIVE DUTIES.

I. OF TRUSTEES OF EXECUTORY TRUSTS [328].	IX. OF TRUSTEES OF FREEHOLDS [428].
II. OF TRUSTEES FOR THE PAYMENT OF DEBTS [336].	X. OF TRUSTEES OF COPYHOLDS [429].
III. OF TRUSTEES FOR THE PAYMENT OF LEGACIES [359].	XI. OF TRUSTEES OF LEASEHOLDS [432].
IV. OF TRUSTEES FOR RAISING PORTIONS [364].	XII. OF TRUSTEES OF ADVOWSONS AND PRESENTATIONS TO BENEFICES [439].
V. OF INVESTMENT BY TRUSTEES [368].	XIII. OF TRUSTEES OF STOCK OR SHARES [445].
VI. OF TRUSTEES FOR TENANT FOR LIFE [384].	XIV. OF TRUSTEES OF CHUSES IN ACTION [446].
VII. OF TRUSTEES FOR INFANTS [395.]	XV. OF TRUSTEES FOR CHARITABLE OR PUBLIC PURPOSES [449].
VIII. OF TRUSTEES FOR MARRIED WOMEN [405].	

I.—OF TRUSTEES OF EXECUTORY TRUSTS.

Where directions are given, for the execution of some future conveyance or settlement of trust property, but the particular limitations are not fully or accurately specified, this is an executory trust, and in carrying such a trust into execution regard must be had to the general intention, rather than to the technical import of any particular expressions used.^(a)

The distinction between trusts executed and executory, though questioned by Lord Hardwicke in an early case,^(b) has been long firmly established as one of the settled doctrines of the court.¹ And

(r) 3 Sugd. V. & P. 14, 10th ed.; Fonbl. Eq. Tr. B. 1, Ch. 6, Sect. 8, n. Crossley v. Archdeacon of Salisbury, 3 Hag. 201. (s); 2 Jarm. Pow. Dev. 441 to 445.

(a) 7 Bac. Abr. [Uses and Trusts, R.]; Fearn, Cont. Rem. 124, et seq.; 1 (b) 2 Atk. 142; S. C. 1 Ves. 142, 152; Bagshaw v. Spencer.

¹ Dennison v. Goehring, 7 Barr, 177; 4 Kent. Comm. 218, &c.; notes to Lord Glenorchy v. Bosville, 1 Lead. Cas. Eq. 1; Wood v. Burnham, 6 Paige, 518; 26 Wend. 19; Horne v. Lyeth, 4 H. & J. 434; Garner v. Garner, 1 Desaus. 444; Porter v. Doby, 2 Rich. Eq. 49; Loving v. Hunter, 8 Yerg. 31; Edmondson v. Dyson, 2 Kelly, 307; Wiley v. Smith, 3 Id. 559; Lessee of Findlay v. Riddle, 3 Binn. 152; See Imlay v. Huntington, 20 Conn. 162; Neves v. Scott, 9 How. U. S. 211; 11 B. Monr. 251. Land was conveyed to a trustee, to be by him laid off in lots,

this doctrine applies equally, whether the executory trust be created by marriage articles, or by will or voluntary settlement.(c)

But a material distinction has been recognised in equity between an executory trust, founded on marriage articles, and one voluntarily created, as by will. In the former case the object of the settlement is usually to provide for the issue.(d) Therefore, *unless the contrary clearly appear*, equity presumes, that it could not have been the intention of the parties to put it in the power of the parent to defeat the object of the settlement, by appropriating the whole estate; and on this presumption the articles will usually be decreed to be executed by limitations in strict settlement.—And it is immaterial, that the words of the articles, if strictly followed, would entitle the parent to a more extensive interest: as for instance, where the covenant or agreement is, to settle the estate on the parent for *life with remainder to *the heirs of his body*, which according to the [*329] rule in Shelly's case would give him an estate in tail.(e)(1)¹

Although a settlement may have actually been executed in pursuance of, and following *verbatim*, the terms of the articles, and the instrument as framed limits to the husband an estate tail; yet the court will rectify such a settlement on behalf of the issue of the mar-

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| <p>(c) Earl of Stamford <i>v.</i> Hobart, 1 Bro. P. C. 288; Papillon <i>v.</i> Voice, 2 P. Wms. 474; Leonard <i>v.</i> Earl of Sussex, 2 Vern. 527; Countess of Lincoln <i>v.</i> Duke of Newcastle, 12 Ves. 227; Blackburn <i>v.</i> Stables, 2 V. & B. 269; Jervoice <i>v.</i> Duke of Northumberland, 1 J. & W. 571-4; Rochfort <i>v.</i> Fitzmaurice, 2 Dr. & W. 1, 20, 1.</p> | <p>(d) Blackburn <i>v.</i> Stables, 2 V. & B. 369; Jervoice <i>v.</i> Duke of Northumberland, 1 J. & W. 574.
(e) Trevor <i>v.</i> Trevor, 1 Eq. Ca. Abr. 387; S. C. 1 P. Wms. 622; 1 Bro. P. C. 122; Jones <i>v.</i> Laughton, 1 Eq. Ca. Abr. 392; Nandick <i>v.</i> Wilkes, <i>id.</i> 393; Casack <i>v.</i> Casack, 1 Bro. P. C. 470; Dodd <i>v.</i> Dodd, Ambl. 274.</p> |
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(1) In the late case of Rochfort *v.* Fitzmaurice, it was laid down by Sir E. Sugden, Lord Chancellor of Ireland, that there is no difference between executory trusts created by will, and those created by voluntary settlements. Indeed his Lordship in that case denied the distinction between a will and marriage articles in this respect. See Rochfort *v.* Fitzmaurice, 2 Dr. & W. 19, 20.

and sold, and the proceeds to be vested in other lands, to be selected by the *cestui que trusts*, to be held by them respectively during their lives, with the remainder to their heirs, and the trust was held executory. Berry *v.* Williamson, 11 B. Monroe, 251.

¹Garner *v.* Garner, 1 Desaus. 444; Berry *v.* Williamson, 11 B. Monroe, 251. See Imlay *v.* Huntington, 20 Conn. 146. But, where by marriage contract, executed before marriage, personal property had been conveyed to a trustee, in trust, "from and after the solemnization of said marriage, to the use and behoof of (the intended wife) for and during the term of her natural life, and at her death, to the heirs of her body, and their heirs for ever; and if she should die without such heirs, or having such heirs, they should die before they arrived at mature age, then to her brothers by her mother's side, their heirs and assigns, for ever;" it was held that the settlement was executed, not executory, and that the rule in Shelley's case applied; Carroll *v.* Renick, 7 Sm. & M. 799. And see also Neve *v.* Scott, 9 How. U. S. 196; and, generally, the notes to 1 Lead. Cas. Eq. 1.

riage, by directing a limitation in strict settlement.(f) However, in one case, Lord Cowper refused to alter a settlement of this description, on the ground apparently, that it had been accepted by the parties.(g) And if the *settlement* itself, as well as the articles, be made *previously to the marriage*, and the settlement does not refer to the articles, the court will not make any alteration in the settlement; for it will be presumed to have been made in consequence of a new agreement; though it will be otherwise if the settlement be made *after the marriage*.(h)

Where a *partial* provision is made by the articles for the issue of the marriage, although that provision does not affect the whole of the estate, which is intended to be settled, equity in decreeing the execution of the trust will not extend that provision in favor of the children, by directing a strict settlement of the *whole* estate, for it is not unreasonable for the parents to reserve some power to themselves.(i) And if by the articles the wife is to take an estate tail, *ex provisione viri*, or a power of alienation is given to the husband and wife jointly; such limitations, being consistent with the probable intention of the parties, will not be varied by the court in directing the execution of the settlement.(k)

However, in executory trusts created by *will*, all parties claim equally as volunteers under the bounty of the testator. In these cases, therefore, the words of the will receive their full legal effect, unless it appear from the will itself, that the testator's real meaning would be frustrated by a strict execution of his directions.(l)

Thus in a case where a testator bequeathed money to be laid out in the purchase of lands, and *settled* on A. and the heirs of his body, Lord Cowper refused to direct the execution of the trust by a strict settlement, and drew the distinction between a covenant to settle *in marriage articles*, and a trust *by will*, in which last case, he said that [*330] where the testator expresses *his intent to give an estate tail, a court of equity ought not to abridge his bounty.(m)

(f) *West v. Erissey*, 2 P. Wms. 349; *Roberts v. Kingsley*, 1 Ves. 238; *Honor v. Honor*, 1 P. Wms. 128; 2 Vern. 658; 123.

(g) *Powell v. Price*, 2 P. Wms. 535. (l) 2 Jarm. Pow. Dev. 442, et seq.; 1 Fonbl. Tr. Eq. B. 1, Ch. 6, Sect. 8, n.(s); 2 Story, Eq. Jur. § 974, &c.; *Blackburn v. Stables*, 2 V. & B. 370.

[See *Neve v. Scott*, 9 How. U. S. 196.] (m) *Seale v. Seale*, Prec. Chan. 421; *S. C.* 1 P. Wms. 290; and see *Legatt v. Sewell*, 1 Eq. Ca. Abr. 395; *Sweetapple v. Bindon*, 2 Vern. 536; *Blackburn v. Stables*, 2 V. & B. 367; *Synge v. Hales*, 2 Ball & B. 499, 508; *Britton v. Twining*, 3 Mer. 176; *Marshall v. Bousefield*, 2 Mad. 166; *Lord Deerpur v. Duke of St. Albans*, 5 Mad. 260

(h) *Burton v. Hastings*, 1 Eq. Cas. Abr. 393; *S. C.* Gilb. Eq. Rep. 113.

(i) *Legg v. Goldwire*, Cas. Temp. Talb. 20.

(j) *Chambers v. Chambers*, Fitzgibb. 127; *S. C.* 2 Eq. Ca. Abr. 35; *Howell v. Howell*, 2 Ves. 358.

(k) *Whately v. Kemp*, cited 2 Ves. 358; *Green v. Ekins*, 2 Atk. 473, 477; *Highway v. Banner*, 1 Bro. C. C. 584; see *Streatfield v. Streatfield*, Cas. Temp.

In *Blackburn v. Stables*, (n) a testator devised the residue of his real and personal estate to trustees, in trust for the sole use of a son of J. B. at the age of twenty-four, with a direction that the trustees should not give up their trusts, till a proper entail was made to the male heir by him (the son of J. B.) Sir Wm. Grant, M. R., after observing that it was settled that the words of the will would make an estate tail in the plaintiff (the son of J. B.), added, that there was nothing in the context of the will in that case, to show that the testator did not mean to use the words in their technical sense; and his Honor therefore declared, that the plaintiff was entitled to a conveyance in tail male.(n)

So in *Britton v. Twining*, (o) a testator, after directing 20,000*l.* in the three per cents "to be firmly fixed, and there to remain" during the life of his wife, for her to receive the interest, desired, that after the death of his wife the same sum should be *in the same manner* firmly fixed upon W. Cobb, and then continued as follows,—“I say *I would have it so secured* that he may only receive the interest of the same *during his life*, and after his decease to *heir male of his body*, and so on in succession to the *heir-at-law*, male or female. But let it be noticed, that the principal 20,000*l.* stock is never to be broken into, but only the interest to be received as aforesaid; my intent being, that there should always be the interest aforesaid to support the name of Cobb as a private gentleman.” Sir Wm. Grant, M. R., said, he did not conceive that the testator in using the word “secured” had any reference to a further or future settlement to be made of the money; and if he had, *he did not see that there was anything that would authorize the court to make the settlement in any manner different from that, which the testator had himself directed.* And as the limitation to the heir male of W. Cobb would have given him an estate tail in freehold property, notwithstanding the express limitation to him for life, his Honor held that he took the absolute interest in the fund in question.(p)

In *Marshall v. Bousfield*,(q) the testator devised real and personal estate to his wife, upon trust, that she should enjoy the same during her life, and after her decease that the same should *be settled by able counsel*, and go to and amongst his grandchildren of the male kind, *and their issue in tail male*, and for want of such issue upon his female grandchildren living at his decease, and he declared, that the shares and proportions of the male and female grandchildren and their respective issues, should be in such proportions as his wife should

(n) *Blackburn v. Stables*, 2 V. & B. 367. and see *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 218.

(o) 3 Mer. 176.

(q) *Marshall v. Bousfield*, 2 Mad.

(p) *Britton v. Twining*, 3 Mer. 176; 166.

appoint. The wife appointed in favor of the testator's grandson W., who was not born until after the testator's death, and the heirs male of his body. It was objected, that this was an executory trust, under which W. ought to have been made tenant for life with remainder to his issue in strict settlement. But Sir Thomas Plumer, *V. C., though he admitted that the trust was executory, held, that there was no sufficient indication of the testator's intention in the will to enable the court to control the limitation to the grandson in tail, and overruled the objection; thereby compelling a purchaser to take a title founded on a recovery suffered by the grandson W.(q) His Honor observed, that unless the grandchildren took an estate tail, the limitation as far as regarded those born after the testator's death was too remote. But divested of that circumstance, which appears to have been the peculiarity of the case, it has been remarked by Mr. Jarman that *Marshall v. Bousfield* is a very strong case.(r) The estate was *to be settled by able counsel*.(s) and the word used was "issue" and not "heirs" or "heir" of the body,(t) both which circumstances have been relied upon in other cases as favorable to the introduction of uses in strict settlement. Lord Eldon's judgment in the subsequent case of *Jervoise v. The Duke of Northumberland*.(u) appears to be considerably at variance with the decision in *Marshall v. Bousfield*, and has also much weakened the authority of that decision.(x)

If the directions of the testator as to the disposition of the trust estate show, that he could not have intended the expressions to have their strict technical operation; the court in decreeing a settlement will depart from the words in order to execute the intent.(y)

However, a simple direction by a testator, to settle an estate on A. *for life* and after A.'s death to the *heirs of his body*, will not enable the court to restrict the estate tail, created by those words in favor of A., to an estate for life.(z) There must be some stronger and less equivocal expressions in addition to the mere limitation for life, as for instance a direction, that the estate for life shall be *without impeachment of waste*;(a) or a limitation to trustees *to preserve contingent remainders*;(b) or a direction, that the estate *shall be*

(q) *Marshall v. Bousfield*, 2 Mad. 166.

(r) 2 Jarm. Pow. Dev. 450.

(s) *White v. Carter*, 2 Ed. 366; S. C. Amb. 670; *Bastard v. Proby*, 2 Cox, 6.

(t) *Meure v. Meure*, 2 Atk. 266; *Blackburn v. Stables*, 2 V. & B. 371; see *Stonor v. Curwen*, 5 Sim. 264, 272; *Knight v. Ellis*, 2 Bro. C. C. 570.

(u) 1 J. & W. 559.

(x) See 2 Jarm. Pow. Dev. 450.

(y) 2 Jarm. Pow. Dev. 442, et seq.; 2 Story, Eq. Jur. § 974, &c.

(z) *Meure v. Meure*, 2 Atk. 266; *Blackburn v. Stables*, 2 V. & B. 370.

(a) *Papillon v. Voice*, 2 P. Wms. 471; *Lord Glenorchy v. Bosville*, Cas. Temp. Talb. 3; *Bagshaw v. Spencer*, 1 Ves. 153.

(b) *Papillon v. Voice*, 2 P. Wms. 471; *Bagshaw v. Spencer*, 1 Ves. 153.

settled by legal advice; (c) or that the tenant *shall not have absolute power over the estate*. (d) However, it seems, that where the words of limitation are to A.'s *issue* after his life estate, and not his *heirs*, the court will execute the trust by giving A. an estate for life, and not an estate tail; on the ground of the different legal operation of the words "heirs" and "issue." (e)

On the same principle, where a testator has directed a settlement of the devised estate, in a particular manner, the court, in order to carry out his intentions, has ordered the insertion of a limitation to trustees to preserve *contingent remainders, (f) and also [*332] limitations in cross remainder between two families. (g)

If there be any doubt as to the technical operation of the words, by which the testator has declared an executory trust, the court in directing its execution will follow that construction, which it conceives to be most agreeable to the intention; for although the same construction must be put upon the words whether the trust be executed or executory, yet that is only, where the words, which declare the executory trust, are so clear in themselves as to point out what the trust is to be. Thus in *Stonor v. Curwen* (h) a testator gave one-third of his residue to his niece, which he desired might be settled by his executors on her *for her separate use during her life*, but to devolve *to her issue at her death*, and failing issue then to revert to his nephew. Sir. L. Shadwell, V. C., said, that this was an executory trust, as to which nobody could say, that the words used were so clear, as at once to show what was the sort of conveyance meant, and his Honor directed a settlement on the niece *for life* for her separate use, with remainder to her issue living at her death, remainder in default of such issue to the nephew. (h)

In all the cases that have been hitherto considered, there was a direction to the trustees in the will to *settle or convey* the estate; but a distinction has been taken, where the testator merely directs the *purchase* of the estate by the trustees, and himself declares the uses of the estate when purchased: for in that case the court has no power to alter or modify the testator's words. In *Austen v. Taylor* the testator devised lands to A. for life without impeachment of waste, remainder to trustees to preserve, remainder to the heirs of the body of A., and bequeathed personal estate *to be laid out in land*,

(c) *White v. Carter*, 2 Ed. 366; *Blackburn v. Stables*, 2 V. & B. 371; *Ambl.* 670; *Bastard v. Proby*, 2 Cox, 6; *Rochfort v. Fitzmaurice*, 2 Dr. & W. 1.

(d) *Leonard v. Earl of Sussex*, 2 Vern. 525.

(e) *Meure v. Meure*, 2 Atk. 266; (f) *Baskerville v. Baskerville*, 2 Atk. 279; see *Harrison v. Naylor*, 2 Cox, 248; 3 Bro. C. C. 108.

(g) *Horne v. Burton*, Coop. 257.

(h) *Stonor v. Curwen*, 5 Sim. 264, 268.

which should remain, continue, and be, to the same uses as the land before devised. Lord Northington observed, that the testator had referred no settlement to the trustees, but had declared his own uses and trusts, which the court could not alter or change, and he accordingly held, that A. was tenant in tail of the lands to be purchased.⁽ⁱ⁾ But some doubt has been entertained in the profession as to the soundness of this last decision:^(k) and the distinction, on which it was founded, has not been invariably adopted. In *Meure v. Meure*^(l) trustees were directed to purchase lands, and to permit the plaintiff and his assigns to receive the rents and profits during his natural life, and after his decease then in trust for the use of the issue of his body lawfully begotten: and Sir J. Jekyll, M. R., held, that the plaintiff should be made only tenant for life of the lands to be purchased.^(l) In this case it will be observed, that the lands to be purchased were devised *immediately* to the limitations declared by the will, without any direction to the trustees to settle, and the estate tail clearly given to the plaintiff by those limitations was notwithstanding modified by the court, to an estate for life.

This at once leads to the observation, that it is only where something is left incomplete and executory by the creator of the [*333] trust, that equity would mould or modify the words in order to give effect to the intentions of the party. For if the limitations of the trust estate are definitely and finally declared by the instrument itself, that will be an executed trust; and it must be carried into execution as strictly and literally, as if it were a limitation of the legal interest.^(m)

For instance, in *Bale v. Coleman*,⁽ⁿ⁾ a testator devised lands to trustees to pay debts and legacies, and then *in trust for A. for life, with power of leasing, and after his decease, in trust for the heirs male of his body.* It was held by Lord Harcourt, Lord Keeper, reversing Lord Cowper's decision, that this was an executed trust for A. in tail male, and the trustees were decreed to make a conveyance to him accordingly. And this distinction was strikingly exemplified in the case of *Papillon v. Voice*,^(o) where there was a direct devise of *certain specified lands* to A., with the same limitations as those declared of the lands which the trustees *were directed to purchase and settle*; and A. was held to take an estate tail in the lands *directly*

(i) *Austin v. Taylor*, Ambl. 376; S. C. 1 Ed. 361.

(k) Ambl. 378; see Lord Eldon's remarks in *Green v. Stephens*, 17 Ves. 76; and in *Jervoise v. Duke of Northumberland*, 1 J. & W. 572; 2 Jarm. Pow. Dev. 445, 6; but see note 1, Ed. 369.

(l) *Meure v. Meure*, 2 Atk. 265.

(m) *Jervoise v. Duke of Northumberland*, 1 J. & W. 570, 1; 1 Fonbl. Eq. B. 1, Ch. 6, sect. 7; *Fearne*, Cont. Rem. 7th ed. 133 to 148.

(n) 1 P. Wms. 142; S. C. 2 Vern. 670.

(o) 2 P. Wms. 477.

devised, although his estate in the lands *to be purchased and settled* was restricted to one for life. (p) (1)

A direction, that property invested in the funds shall be "*secured*" for the benefit of the legatee, will not be construed into an executory direction, so as to enable the court to modify the bequest, which in its terms gives the legatee the absolute interest. (q) And where there are words of direct gift, as, for instance, a *devise upon trust* for such person as shall from time to time be Lord V., the subsequent addition of the testator's motive or intention,—as, for example, a declaration that the property should go and be held with the title, as far as the rules of law and equity would permit,—will not convert the executed gift into an executory trust. (r) Where, however, the estate is directed to be "*purchased*," (s) or "*settled*," (t) or "*conveyed*," (u) by the trustees, that is clearly an executory trust: and so, it seems, is a devise to a person "*to be entailed* upon his male heirs." (x)

If a testator create an executory trust, which cannot be carried strictly into execution, from its illegality,—as where it violates the rules against perpetuity,—the court will endeavor to give effect to the testator's intentions as far as possible, and the duty of the trustees in such a case is to make as strict a settlement as the law will allow. Therefore, where there **was* a devise to a corporation, in trust to convey to A. for life, and afterwards to his [*334] first son for life, and so to the first son of that son for life, with remainder in default of such issue to B. for life, and his sons and their sons for their lives in the same manner, Lord Cowper said, that though the attempt to create a perpetuity was vain, yet so far as consistent with the rules of law, it ought to be complied with; and

(p) And see *Jones v. Morgan*, 1 Bro. C. C. 206; *Wright v. Pearson*, Ambl. 358; *Garth v. Baldwin*, 2 Ves. 646; *Deerhurst v. Duke of St. Albans*, 5 Mod. 232, 277; *Douglass v. Congreve*, 1 Beav. 59, 71.

(q) *Britton v. Twining*, 3 Mer. 176, 182.

(r) *Lord Deerhurst v. Duke of St. Albans*, 5 Mad. 232, 277; S. C. on appeal, *sub nom.*; *Tollemache v. Earl of Coventry*, 2 Cl. & Fin. 611, and 8 Bligh, N. S. 547.

(s) *Papillon v. Voice*, 2 P. Wms. 471; *Meure v. Meure*, 2 Atk. 265; *White v. Carter*, 2 Ed. 366.

(t) *Leonard v. Earl of Sussex*, 2 Vern. 525; *Stonor v. Curwen*, 5 Sim. 264; *Burrell v. Crutchley*, 15 Ves. 552.

(u) *Lord Glenorchy v. Bosville*, Ca. Tem. Talb. 3; *Humberston v. Humberston*, 2 Vern. 737. [*Edmondson v. Dyson*, 2 Kelly, 307; *Tallman v. Wood*, 26 Wend. 9; 6 Paige, 513.]

(x) *Jervoise v. Duke of Northumberland*, 1 J. & W. 559, 72.

(1) It is extremely difficult to reconcile Lord Hardwicke's decision in *Bagshaw v. Spencer*, 1 Ves. 142, with the principle of these cases. See *Fearne*, Cont. Rem. 133 to 148; *Jervoise v. Duke of Northumberland*, 1 J. & W. 572.

he directed that all sons already born should take estates for life, with limitation to the unborn sons in tail.(y)

So it frequently happens that a testator, in creating an executory trust, makes use of expressions, which of themselves have no strict technical operation, and which must therefore receive some definite construction, in order to the execution of the trust. In these, as in other cases depending on the construction of wills, the rule is, to carry out as far as possible the intentions of the testator.

Thus, where a trust was created by will to purchase land, *to be added and closely entailed* to the testator's family estate in the possession of T. B., and the testator declared by a codicil, that his object was to have a head to the family, and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B., or his nearest relative in the male line,—the court directed such limitations to be inserted in the settlement, as would best effectuate the obvious intentions of the testator, by tying up both the estates in his family as far as possible.(z)

So in the case of *Lord Dorchester v. Earl of Effingham*,(a) Guy Lord Dorchester was tenant for life of settled estates with remainder to his sons and their issue, so that his sons were tenants for life, and their sons tenants in tail, and he had a general power of revocation and new appointment by deed or will. He made his will, in which there was the following expression: “all my landed estate *to be attached to my title as closely as possible*,” and he left his timber and residuary personal estate to his executors, in trust “to increase his landed property.” On the death of Guy, the next Lord Dorchester, who was his grandson and tenant in tail under the original settlement, came into possession, and filed a bill, praying to be declared tenant in tail. But it was held by Sir Wm. Grant, M. R., that the effect of the will was to reduce the estates tail of the plaintiff Lord Dorchester, and of all the other issue male, to estates for life, and his Honor directed the estates to be purchased with the timber money and personal estate, to be settled accordingly.

In the recent case of *Bankes v. Le Despencer*,(b) the same principles of construction were applied to an executory trust created by deed. There, Thomas Lord Le Despencer, by deed conveyed real estates to trustees, in trust, after the death of himself and his eldest

(y) *Humberston v. Humberston*, 2 Vern. 737; S. C. 1 P. Wms. 332; Prec. Ch. 455.

(z) *Woolmore v. Burrows*, 1 Sim. 512.

(a) 3 Beav. 180, n.; S. C. stated, 10 Sim. 592; [and see *Rowland v. Morgan*, 13 Jur. 23.]

(b) *Bankes v. Le Despencer*, 10 Sim. 576; [11 Sim. 508;] see *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 218; *Deerhurst v. Duke of St. Albans*, 5 Mad. 232; *Jervoise v. Duke of Northumberland*, 1 J. & W. 559; *Blackburn v. Stables*, 2 V. & B. 367. [*Rowland v. Morgan*, 13 Jur. 23.]

son to *settle* the estates to the use of such persons for such estates and in such manner that the same should, so far as the law would permit, be strictly settled, so as to go along with the dignity of *Le Despencer*, so long as the person *possessed of the same dignity should be a lineal descendant of the settlor. It was held by [*335] Sir L. Shadwell, V. C., that this was a case in which it was the duty of the court to try to give effect to the intention of the parties, by making a settlement; and his Honor accordingly referred it to the Master, to approve of a proper settlement according to the language of the trust.(b)

It seems, however, that the court will not enforce the execution of an executory trust of this loose and uncertain description, if it be founded upon mere precatory expressions, or words of recommendation. Thus in *Knight v. Knight*(c) a testator made an absolute gift of all his real and personal estate to his next male descendant, who should survive him; adding, that *he trusted to the justice of his successors in continuing the estates in the male succession* according to the will of the founder of the family, and Lord Langdale, M. R., held, that the directions were not sufficiently imperative, to be enforced as a trust against the devisee.(c)

There is no doubt, but that personal estate may be made the subject of an executory trust, which will be carried into execution in the same manner and to the same extent as that of real estate.(d) But it is to be observed, that, in accordance with the rules of law on this point, where such words are used as would be executed by the creation of an estate tail in real estate, the party will be entitled to the absolute interest in the personalty; and it has been seen that a direction that the property is to be "settled" or "secured" will not prevent the application of this doctrine.(e)¹

(b) *Bankes v. Le Despencer*, 10 Sim. 576; [see the form of settlement finally approved in this case, 11 Sim. 508;] see *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 218; *Deerhurst v. Duke of St. Albans*, 5 Mad. 232; *Jervoise v. Duke of Northumberland*, 1 J. & W. 559; *Blackburn v. Stables*, 2 V. & B. 367.

(c) *Knight v. Knight*, 3 Beav. 148 177. [Aff'd. 11 Cl. & F. 513.]

(d) *Stonor v. Curwen*, 5 Sim. 264.

(e) *Lord Chatham v. Tothill*, 7 Bro. P. C. 453; *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 218; *Britton v. Twining*, 3 Mer. 176; *Deerhurst v. Duke of St. Albans*, 5 Mad. 232. [Rowland v. Morgan, 13 Jur. 23.]

¹ In the recent case of *Rowland v. Morgan*, 13 Jur. 23, the Earl of Abergavenny had bequeathed to his son Viscount Neville, and his heirs, Earls of Abergavenny, certain chattels, consisting of plate, jewels, and other ornamental articles, to be held as heir-looms, and directed his executors to make an inventory of such chattels. By a codicil to the will, the testator declared it to be his will, that in addition to the articles which he had made heir-looms in his will, certain other articles of the same description, deposited in a particular locality, should be con-

In conclusion of this subject, it may be stated generally for the guidance of trustees, that where an executory trust arises on *marriage articles*, whose object is to provide for the husband and wife and their issue, the trustees will be justified in executing the trust by limiting the estate in strict settlement, although it would certainly be the more prudent course for them to obtain a declaration of the court for their guidance even in these cases.

But where the trust is created by *will*, and the testator has not himself distinctly and accurately specified the limitations which are to be inserted, trustees could seldom or ever be advised to take upon themselves the responsibility of putting a construction on the directions of the testator, by the execution of any particular settlement; this can be done with safety only under the sanction of the court. And the same remark applies to executory trusts, created by any *voluntary deed* or instrument operating *inter vivos*.

If a husband have entered into articles on his marriage, binding himself to make a particular provision for his wife and children, it will not be competent for the trustees of their own authority to accept any other provision in lieu of that contemplated by the articles; [*336] although they will be *justified in instituting a suit, for the purpose of bringing the propriety of such a substitution before the court. (f)

II.—OF TRUSTEES FOR THE PAYMENT OF DEBTS.

1ST. WHERE THE TRUST IS CREATED BY DEED.—2D. WHERE BY A DEVISE FOR PAYMENT OF DEBTS.

1st. *Of Trustees for the payment of Debts, where the Trust is created by Deed.*

A conveyance or assignment of real or personal estate to trustees,

(f) *Cooke v. Fryer*, Vice-Chancellor Wigram, 19th November, 1844, MS.

sidered as heir-looms, and he gave the same to his executors as heir-looms in his family, and directed an inventory to be made of them at the death of the testator. His son succeeded to the title, and also to certain estates annexed to the title, and strictly and inalienably settled in tail male. It was held, in accordance with the text, that the chattels had become the absolute property of Viscount Neville at the death of his father. It is to be remarked, however, on this case, and those above cited, that a different doctrine had been held by Lord Hardwicke, in *Gower v. Grosvenor*, 3 Barn. 54; 5 Madd. 337; and *Trafford v. Trafford*, 3 Atk. 347; and that, though these last decisions were overruled in *Foley v. Burnell*, 1 Bro. C. C. 274; 4 Br. P. C. 319 (A.D. 1783, 1785); it was regretted by Lord Eldon in *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 218, and Lord Cottenham in *Rowland v. Morgan*, that they had been departed from, as they "were not obnoxious to any principle, and enabled the court to carry into effect the very obvious intentions of the testator." Should the question, therefore, ever arise in the United States, it may perhaps be still considered an open one. See 2 Kent's Comm. 253, &c.; 4 Id. 279.

in trust, for the payment of the debts of the grantor, is of very frequent occurrence, and such a trust may either be limited to the payment of one particular debt, (a) as in the case of a mortgage, which is frequently taken in this form, or of several debts, specified in the deed or in a schedule annexed to it. (b)¹ Or the trust may be extended generally for the benefit of all the grantor's creditors, (c) or all such of them as may execute or otherwise assent to the deed; (d) and this either equally and without distinction, (e) or with certain priorities and preferences amongst them. (f) And the debts may be directed to be paid either in full, (g) or according to a certain composition or proportion fixed by the deed. (h)²

(a) *Page v. Broom*, 4 Russ. 6. [See *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Ex parte Richardson*, 14 Ves. 184.]

(b) *Walwyn v. Coutts*, 3 Mer. 707; S. C. 3 Sim. 14; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Purefoy v. Purefoy*, 1 Vern. 28; *Shirley v. Earl Ferrers*, 1 Bro. C. C. 41; *Hamilton v. Houghton*, 2 Bligh, 169; *Boazman v. Johnston*, 3 Sim. 377.

(c) *Barwell v. Parker*, 2 Ves. 364; *Acton v. Woodgate*, 2 M. & K. 492; *Hinde v. Blake*, 3 Beav. 234; *Carr v. Countess of Burlington*, 1 P. Wms. 228.

(d) *Dunch v. Kent*, 1 Vern. 260; *Spottiswoode v. Stockdale*, Coop. 102; (e) *Carr v. Countess of Burlington*, 1 P. Wms. 228; *Acton v. Woodgate*, 2 M. & K. 492; *Hamilton v. Houghton*, 2 Bligh, 169.

(f) *Purefoy v. Purefoy*, 1 Vern. 28; *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; *Garrard v. Lauderdale*, 3 Sim. 1.

(g) *Carr v. Countess of Burlington*, 1 P. Wms. 228; *Acton v. Woodgate*, 2 M. & K. 492; *Hamilton v. Houghton*, 2 Bligh, 169.

(h) *Stephenson v. Hayward*, Prec. Ch. 310; *Constantein v. Bleache*, 1 Cox, 287; *Tatlock v. Smith*, 6 Bingh. 339.

¹ But in *Manufacturers and Mechanics' Bank v. Bank of Pennsylvania*, 7 W. & S. 335, it was held that a mortgage, limited to a trustee, with power to sell for the payment of a debt secured by it, was not a voluntary assignment within the Pennsylvania Act; and see *Barker v. Hall*, 13 N. H. 298; *Davis v. Anderson*, 1 Kelly (Geo.), 176, accord. But see cases cited in *Burrill on Assignments*, 32, from other States. In *Watson v. Bagaley*, 12 Penn'a. St. 164, a power of attorney to collect certain moneys and to pay them to certain creditors in prescribed order of preference, was held an assignment.

² Assignments for the benefit of creditors, though containing preferences, are in general held valid in the United States, where not interfering with the policy of a bankrupt law, or other statutory regulation. *Brashear v. West*, 7 Pet. 609; *Lippincott v. Barker*, 2 Binn. 174; *Walker v. Ferris*, 5 John. R. 335; and other cases cited in the note to *Thomas v. Jenks*, 1 Am. Lead. Cas. 89, (2d ed.) In some of the States, however, as Ohio, Pennsylvania, New Jersey, Maine, New Hampshire, and Connecticut, preferences are abolished, and the trust enures to the benefit of all the creditors (Am. Lead. Cases, 85). In many of the States it has been held by the courts, or declared by statute, that a stipulation for releases renders an assignment void as to non-assenting creditors, where there is a resulting trust for the grantor, *Wakeman v. Grover*, 11 Wend. 187; *Goodrich v. Downs*, 6 Hill's N. Y. 438; *Robins v. Embury*, 1 Sm. & M. Ch. 208; *Atkinson v. Jordan*, 5 Ohio, 293; *Hafner v. Irwin*, 1 Ired. Law, 490; *Brown v. Knox*, 6 Mis. 302; *Pearson v. Crosby*, 23 Maine, 261; 1 Am. Lead. Cases, 95; *Ingraham v. Wheeler*, 6 Conn. 277; *Howell v. Edgar*, 3 Scamm. 417; *Swearingen v. Slicer*,

An arrangement of this description, if made under a contract with the creditors, or when accepted or acted upon by them, is valid(1)

(1) A conveyance by *deed* for the payment of debts generally was not within the Statute of Fraudulent Devises (3 W. & M. c. 14), although the rights of specialty creditors might thus be prejudiced in favor of those by simple contract. *Parslow v. Weedon*, 1 Eq. Cas. Abr. 149; see *Prec. Ch.* 521; 1 *Fonbl. Eq. Tr. B.* 1, ch. 4, s. 14. And this is equally an authority against the application of the recent statute, 1 Will. IV. c. 47 (by which that of William and Mary was repealed), to conveyances of this description.

So, a conveyance in trust for creditors is not within the statute 13 Eliz. c. 5, for avoiding alienations of property made in fraud of creditors. *Estwich v. Cailland*, 5 T. R. 424; *Mense v. Howell*, 4 East, 9. [*Wilt v. Franklin*, 1 Binn. 514; and cases cited in note to *Thomas v. Jenks*, 1 Am. Lead. Cases, 78.]

Although such a conveyance will be void under that statute, if it be attended by fraudulent circumstances, as where the conveying party remains in possession of the property; *Twyne's case*, 3 Rep. 80, b. [1 *Smith Lead. Cases*, 1; Am. notes]; *Edwards v. Harben*, 2 T. R. 587; *Worsely v. Demattos*, 1 Burr. 467. However, possession retained by the assignor, though a strong circumstance of evidence of fraud, may be rebutted, and the assignment supported. *Eastwood v. Brown*, 1 R. & M. 312; *Hoffman v. Pitt*, 5 Esp. 25; *Benton v. Thornhill*, 7 Taunt. 149; *Manton v. Moore*, 7 T. R. 70. [In New York, retention of possession by the assignor, of property assigned for the benefit of creditors, makes the assignment void. *Dewey v. Adams*, 4 Edw. Ch. 21; *Connah v. Sedgwick*, 1 Barb. 210. So, in Vermont, such retention is fraudulent as to attaching creditors. *Rogers v. Vail*, 16 Verm. 329. So, in Indiana, *Caldwell v. Williams*, 1 Carter, 405. In other States, however, it is not in itself fraudulent, where before the time of sale, but may be evidence of fraud. *Brooks v. Marbury*, 11 Wheat. 82; *Vernon v. Morton*, 8 Dana, 247; *Pike v. Bacon*, 8 Shepley, 280; *Christopher v. Carrington*, 2 B. Monr. 357; *Raviesies v. Alston*, 5 Alab. 277; *Barker v. Hall*, 13 N. H. 298; *Darwin v. Hanley*, 3 Humph. 502; *Dewey v. Littlejohn*, 2 Ired. Eq. 495; *Hardy v. Skinner*, 9 Ired. Law, 191; see *Lockhart v. Wyatt*, 10 Alab. 231. In Connecticut, under the statute of 1828, where its requisitions have been complied with, retention of possession is not fraudulent, unless the trustee permits the assignor to hold himself forth to the world as the owner of the property. *Osborne v. Fuller*, 14 Conn. 530; *Strong v. Carrier*, 17 Conn. 329. So, in Pennsylvania,

5 Miss. 241; *The Watchman*, Ware, 232; 1 Am. Lead. Cases, 95; so, where preferences are given, *Wakeman v. Grover*, *Robins v. Embry*, ut supra; *Barrett v. Reads*, Wright, 701. But in other States it has been held, that assignments for the benefit of releasing creditors are valid. *Lippincott v. Barker*, 2 Binn. 174; *Skipwith's Exr. v. Cunningham*, 8 Leigh, 272; *Le Prince v. Guillemott*, 1 Rich. Eq. 187; *Brashears v. West*, 7 Pet. 609; *Halsey v. Whitney*, 4 Mason, 207; *Borden v. Sumner*, 4 Pick. 265; 1 Am. Lead. Cases, 84. In Pennsylvania, now, by Act of 1849, a condition for a release is declared void. In all cases, however, a stipulation for a release in an assignment, which does not in its terms pass all the debtor's property, or by which any benefit is stipulated to him, renders the whole fraudulent and void. *Seaving v. Brinkerhoff*, 5 J. C. R. 329; *Skipwith v. Cunningham*, 8 Leigh, 272; *Thomas v. Jenks*, 5 Rawle, 221; *Hennessey v. Western Bank*, 6 Watts. & Serg. 301. See this subject very fully and ably discussed, and the various cases with regard to the validity of assignments collected in the note to *Thomas v. Jenks*, 1 Am. Lead. Cases, 89. Most of the States have express statutes regulating the subject, which it would be inconvenient to detail here.

and binding *on all the parties;(i) and the court will interfere by injunction to restrain the commission of any act by [*337] which the arrangement would be violated.(k) And in equity, a judgment obtained by a creditor subsequently to his execution of the deed of trust will not bind the property which passed by the deed.(l)¹

However, it has been decided, that where there is a voluntary conveyance or assignment of property to trustees, upon trust for the benefit of creditors, but the transaction is not communicated to the creditors, and they are not made parties to the deed, and are not privy to its execution, this merely confers a power on the trustees, which may be revoked or altered at the will of the grantor: and the creditors, though named in the schedule to the deed, cannot enforce the execution of the trust either as against the grantor, or the trustees.(m)²

But it seems to have been the opinion of Sir J. Leach, in *Acton v. Woodgate*,(n) in opposition to that expressed by Sir L. Shadwell, V. C., in *Garrard v. Lord Lauderdale*,(o) that the communication by the trustees to the creditors, of the creation of such a trust, would defeat the power of the grantor to revoke it. And it has been decided in a recent case, that the trustees of such a deed, *who had acted upon it by making payments in advance*, were at any rate entitled to an

(i) *Small v. Marwood*, 9 B. & Cr. 300. (m) *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; *Page v. Broom*, 4 Russ. 6;

(k) *Ex parte Sadler*, 15 Ves. 52; *Garrard v. Lauderdale*, 3 Sim. 1; S. C. *Mackenzie v. Mackenzie*, 16 Ves. 372; 2 R. & M. 451; *Acton v. Woodgate*, 2 Spottiswoode v. Stockdale, Coop. 102. M. & K. 492; see *Bill v. Cureton*, 2 M.

(l) *Stephenson v. Hayward*, Prec. & K. 511. (n) 2 M. & K. 495.

(o) 3 Sim. 13.

under the Act of 1836. *Fidler v. Maitland*, 5 W. & S. 307; *Dallam v. Fidler*, 6 W. & S. 323; *Klapp v. Shirk*, 13 Penn. St. R. 589.]

But a conveyance by a trader of *all* his property in trust for creditors is void within the policy of the Bankrupt Laws, if a commission issue within six months from its execution, according to the 4th section of 6 Geo. IV. c. 16.

Although a similar disposition of *part* of the trader's property is good, unless made in contemplation of bankruptcy, and with a view to a fraudulent preference; when it will be void. *Bevan v. Nunn*, 9 Bingh. 107.

By the Insolvent Act, 7 Geo. IV. c. 57, s. 32, a similar disposition of any property by an insolvent is made void, if made with a view to his taking the benefit of the act, or within three months before his imprisonment under the act.

¹ But neither in law or in equity will an assignment preclude an assenting creditor from obtaining a formal judgment for his debt. *Le Prince v. Guillemott*, 1 Rich. Eq. 220; *Bank of U. S. v. Comm.* 17 Penn. St. R. 400; *Trotter v. Williamson*, 6 Monr. 39; see *Rice v. Catlin*, 14 Pick. 231; *New England Bank v. Lewis*, 8 Pick. 113.

² See note, ante, to page 83.

answer to a bill filed by them against the author of the deed, and the person in whom the legal interest in the assigned property was vested, to obtain possession of the property; and Lord Langdale, M. R., in overruling the demurrer in that case, appears to have been strongly inclined to support the validity of the deed on general grounds.(p)

Where a deed of assignment and composition for the benefit of creditors generally declared, that if *all* the creditors to a certain amount did not execute the deed, or accede to its terms by a certain day, the assignment should be void; and the deed was not executed or acceded to by two of the creditors within the prescribed time, but they had notwithstanding acted under it; it was held by Lord Eldon, that the deed, though void at law, was under the circumstances valid and binding in equity.(q)

And even at law a composition deed will not be held void, because one of the two trustees refuses to execute it; although there is a proviso, that both should execute by a specified time.(r)

But where the deed is expressly stated to be made with, and the trusts are declared for, the benefit of those creditors *who should become parties to it*, it seems that even in equity no creditor *who has* [*338] *not executed the deed*, will have any right to enforce its provisions.(s) However, in a late case in Ireland it was held, by Sir E. Sugden, L. C., that it is not absolutely necessary, that

(p) *Hinde v. Blake*, 3 Beav. 234.

360; see *Good v. Cheesman*, 2 B. &

(q) *Spottiswoode v. Stockdale*, Coop. Ad. 328.

102; and see *Dunch v. Kent*, 1 Vern. 260.

(s) *Garrard v. Lord Lauderdale*, 3 Sim. 13; see *Balfour v. Welland*, 16

(r) *Small v. Marwood*, 9 B. & Cr. Ves. 151, 157.

¹ The doctrine of the American cases on this subject appears to be that where a trust is created for the benefit of third persons without their knowledge, they may, as soon as they have notice of it, affirm the trust, and call upon a court of equity to enforce the performance of it. *Moses v. Murgatroyd*, 1 Johns. Ch. Rep. 129; *Neilson v. Blight*, 1 Johns. 205; *Weston v. Barker*, 12 Johns. Rep. 281. And Chancellor Kent observes, 4 Com. 307, 3d ed., that this doctrine is much and quite unreasonably restricted in the case of *Garrard v. Lord Lauderdale*, cited in the text; that in *Marigny v. Remy*, 15 Martin's Louis. Rep. 607, it was decided, that one might have an action on a stipulation in his favor in a deed to which he was not a party, and that the doctrine was conformable to the French law. *Toullier, Droit Civil*; liv. 3, c. 2, n. 150. In the case of an assignment to trustees for the benefit of creditors, in this country, the legal estate passes to, and vests in the trustees; and a court of equity will compel the execution of the trust for the benefit of the creditors, though they be not, at the time, assenting, and parties to the conveyance. *Nicoll v. Mumford*, 4 Johns. Ch. Rep. 529; *Brooks v. Marbury*, 11 Wheaton, 97; *Gray v. Hill*, 10 Serg. & Rawle, 436; *Halsey v. Whitney*, 4 Mason, 206. The assent of absent persons to an assignment will be presumed, unless their dissent be expressed, if it be made for a valuable consideration, and be beneficial to them. *North v. Turner*, 9 Serg. & Rawle, 224; *De Forest v. Bacon*, 2 Conn. Rep. 633.—T. [See ante, p. 83, and note; and *Burrill on Assignments*, p. 280, 306.]

every creditor seeking the benefit of a trust deed made by the debtor, should actually subscribe the deed; although the court will see, that he has performed all the fair conditions of the deed, before it suffers him to take any benefit under it; and if he has taken any step inconsistent with its provisions, it will deprive him of all advantage under it.(t)

Where *some* of the creditors have executed a composition deed, by which an estate is conveyed for the payment of debts *generally*, but *others* refuse to execute, it has been held that a suit by those who have executed, to have the trust performed by the sale of the estate, cannot be maintained.(u)

If a trust be created by deed for the payment of debts, *generally*, or of the debts specified in a schedule, and a bill be filed by *one* of the creditors to enforce payment of his debt; that purpose can only be effected by the general execution of the trust; and the decree ought to direct an account and payment of *all* the debts, and a decree for the payment of the plaintiff's debt *only* is erroneous.(x)¹

In a suit by a creditor to enforce the execution of such a trust deed, the then existing trustees must be before the court, and a de-

(t) *Field v. Lord Donoughmore*, 1 Dr. & Warren, 227. (x) *Hamilton v. Houghton*, 2 Bligh, 169, 187.

(u) *Atherton v. Worth*, 1 Dick, 375.

¹ *Wakeman v. Grover*, 4 Paige, 24; *Russell v. Lacker*, 4 Barb. S. C. 233; *Bryant v. Russell*, 23 Pick. 523; *Reynolds v. Bank of Virginia*, 6 Gratt. 174; *Haughton v. Davis*, 23 Maine, 28; *Fisher v. Worth*, 1 Busbee, Eq. (N. C.) 63; see *Weir v. Tannehill*, 2 Yerg. 56. So where the bill is for impeaching the trust deed. *Stout v. Higbee*, 4 J. J. Marsh. 632. But in Ohio it has been held, that the creditor first filing a bill for that purpose, is entitled to priority. *Atkinson v. Jordan*, Wright, 247. So in New York, under the Revised Statutes. *Corning v. White*, 2 Paige, 567; *Burrell v. Leslie*, 6 Paige, 445; see, also, *Lucas v. Atwood*, 2 Stewart, 378. The effect of setting aside such deed, is to leave the creditors to enforce their claims and obtain satisfaction according to their legal priorities; or, if the court takes charge of the fund, it will direct them to be paid according to their legal rank. *Gracey v. Davis*, 3 Strobb. Eq. 58; *Austen v. Bell*, 20 John. 442; *McDermott v. Strong*, 4 J. C. R. 687; *McMeekin v. Edmonds*, 1 Hill's Eq. 293. But this depends upon diligence *at law*; equity will, otherwise, distribute the assets *pari passu*; *Codwise v. Gelston*, 10 Johns. R. 519; and, therefore, a creditor obtaining judgment *after* the assigned property has been sold, has no priority on the fund. *Le Prince v. Guillemott*, 1 Richardson's Eq. 220; *Gracey v. Davis*, *ut supra*. Where a bill had been filed by the representatives of one creditor only, and it appeared that no claim had been made by the others for twenty years, during which the trust fund had been constantly in controversy, and the trustee had repeatedly stated to the plaintiff that the creditor had been satisfied, it was held that the trustee could not set up the defence of want of proper parties. *Mumford v. Murray*, 6 J. C. R. 1. Where the assignment expressly stipulates that the surplus shall be paid over to the assignor, he must also be made a party, *Haughton v. Davis*, 23 Maine, 28; otherwise if the assignment be unconditional. *Hobart v. Andrews*, 21 Pickering, 532.

creditor taken in their absence cannot be sustained.(y) But the heir of the grantor need not be made a party to the suit, unless he be entitled to the surplus; though it is otherwise with regard to a trust created by will.(z)

It is in the power of the party who by deed vests property in trustees for the payment of his debts, to prescribe the manner in which the trust shall be carried into execution;(a) and in paying the debts the trustees are bound to follow the directions of the deed; and if by the terms of the trust any particular debts are to have preference or priority, they must *first be discharged.(b) [339] Thus where two persons made an assignment of their joint property to trustees in trust, *in the first place* to pay their joint debts, and then as to a moiety to pay the separate debts of one of them, the joint creditors were held to be entitled to receive their debts with interest, before the separate creditors took anything.(c)¹ However, if no preference be given by the deed to any one debt, and *à fortiori* if there be an express direction, that all the debts are to be paid

(y) *Hamilton v. Houghton*, ubi supra; but see *Routh v. Kinder*, 3 Sw. 144, n.

(z) *Harris v. Ingledew*, 3 P. Wms. 93.

(a) *Carr v. Countess of Burlington*, 1 P. Wms. 229; *Boazman v. Johnston*, 3 Sim. 381, 2.

(b) See *Garrard v. Lauderdale* 3 Sim. 1; *Douglas v. Allen*, 2 Dr. & W. 213.

[As to preferences in assignments, see *Notes to Thomas v. Jenks*, 1 Am. Lead. Cas. Eq. 89.]

(c) *Pearce v. Slocombe*, 3 Y. & C. 84.

¹ The general rule with regard to assignments by partners is, as in other cases of their insolvency, that the trustee is bound to apply the partnership effects first to the joint creditors, and separate estate, to the separate creditors. *Murrill v. Neill*, 8 How. U. S. 414. In *Jackson v. Cornell*, 1 Sandf. Ch. 348, it was held that a general assignment of his separate property made by an insolvent partner, which preferred firm creditors to the exclusion of his own, was void as to the latter; and it was said that a firm assignment preferring separate creditors to firm creditors, would be also invalid. But in the subsequent case of *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, this decision appears to be overruled, and it was there held that in a partnership assignment, preferences might be given either to separate or joint creditors, at the pleasure of the partners, except where the separate estate of one was applied to pay the separate debts of the other. In the case of a limited partnership, it is provided by the statute, that any preference whatever, will avoid the assignment. See *Mills v. Argall*, 6 Paige, 577. But an express provision in an assignment by an ordinary partnership, which does not in substance go beyond what is implied by law, will not avoid it, though there be a release stipulated. *Andress v. Miller*, 15 Penn. St. Rep. 318. A firm assignment, however, requiring releases, must be so executed as to pass all property, joint and separate, of the firm; and if the deed be not sealed by one, it is void, though it does not appear that he had real estate. *Hennessey v. Western Bank*, 6 W. & S. 300. A general assignment by one partner will not pass any control over the partnership effects. *Moddewell v. Keever*, 8 W. & S. 63. So an assignment in general terms by the only general partner in a limited partnership, of all his property, will not pass the firm assets. *Merritt v. Wilson*, 29 Maine, 58.

equally, the trust fund must be applied *pari passu*, in or towards the discharge of all the debts without distinction, as well those by simple contract, as by specialty.(d) But it need scarcely be observed, that the rights of mortgagees, or judgment creditors, or others, who take an interest in the trust property by a title paramount to that created by the deed, cannot be affected by its provisions.¹

A trust of this description extends only to the payment of such debts, as are at the time contemplated by the deed. Therefore, where A. conveyed lands to trustees in trust after his death, to pay the debts *mentioned in the schedule to the deed annexed*, amounting in all to 6,400*l.*, and A. contracted debts *subsequently to the execution of the deed*, it was urged, that the land ought to be charged with the subsequent debts, at any rate to an amount not exceeding the sum mentioned in the schedule; but the Lord Chancellor held, that the trust extended to those debts only, which were owing at the time of the execution of the deed.(e)

It has been decided, that the court in executing the trusts of a deed for the payment of debts, will not after the death of the grantor, marshal his assets as between the creditors; although some of them may have another fund to resort to, in addition to that created by the trust deed. Thus in *Carr v. Countess of Burlington*, (f) the Earl of Burlington by deed vested lands in trustees for a term, in trust to pay all the debts, which he should owe at his decease in a just proportion, without preference of one debt before another. After the Earl's death his bond creditors were paid a great part of their debts by his executors out of his personal estate, and it was thereupon objected on the part of the simple contract creditors, that the bond creditors ought not to have any benefit of the trust term, until they had waived their preference out of the personal estate. But it was held by Lord Harcourt, that the bond creditors might still come in to be paid the remainder of their debts, in proportion with the simple contract creditors,—for the law gave them the fund of the personal estate, and the party gave them the fund of the trust term,—and the clause, that no debts should have preference, applied only to their satisfaction out of the trust term.(f)

(d) *Carr v. Burlington*, 1 P. Wms. 228; *Boazman v. Johnston*, 3 Sim. 377, 382; see *Anon.* 3 Ch. Ca. 54; *Child v. Stephens*, 1 Vern. 102; *Wolestoncroft v. Long*, 1 Ch. Ca. 32; *Hamilton v. Houghton*, *ubi supra*. (e) *Purefoy v. Purefoy*, 1 Vern. 28; and see *Loddington v. Kime*, 3 Lev. 433; [*Pratt v. Adams*, 7 Paige, 615; see *Stoddard v. Allen*, 1 Rawle, 250.] (f) *Carr v. Countess of Burlington*, 1 P. Wms. 228.

¹ *Codwise v. Gelston*, 10 John. 517; *Hays v. Heidleberg*, 9 Barr, 203. But in general, a creditor who has received a benefit under an assignment, cannot afterwards impeach it, but must comply with its provisions. *Adlum v. Yard*, 1 Rawle, 163; *Pratt v. Adams*, 7 Paige, 615; *Burrows v. Jennings*, 7 Mis. 424; *Jewett v. Woodward*, 1 Edw. Ch. 195.

This decision was questioned by Lord Hardwicke on two occasions; (g) but the modern case of *Boazman v. Johnston*, (h) before Sir L. Shadwell, V. C., is to the same effect as that of *Carr v. Countess of Burlington*, *although it does not appear to have been [*340] decided on the authority of that case. There a husband and wife assigned a beneficial lease, their joint property, to trustees, to sell and pay certain debts of the husband, some of which were secured by his bonds, and others by mortgages of his estates, and at the same time the husband by another deed conveyed those mortgaged estates, in trust after the death of himself and his wife, to be sold for the benefit of their children. Upon the death of their parents the children instituted a suit to have the trusts of these deeds carried into execution. By the decree the beneficial lease was ordered to be sold, but the proceeds of the sale proved to be insufficient to pay off in full the bond debts and also the debts secured by the mortgages; and a question arose at the hearing on further directions, whether the bond creditors had not a right to throw the mortgagees upon the estates comprised in the mortgages, at any rate to the extent of the deficiency of the proceeds of the leasehold to pay the bond debts in full; but it was held by the Vice-Chancellor, that the bond creditors were not entitled to more than was given by the trust deed, and consequently that they could only share the produce of the leasehold, *pro rata* with the mortgagees. His Honor appears to have rested his decision mainly on the fact of the creditors taking under the deed merely as volunteers. (i)

Although the deed of trust is for the payment of such creditors, as shall come in and accept its provisions within a certain time, as within a twelvemonth, a creditor will not necessarily be excluded, although he does not come in within the prescribed time;¹ but after that time is elapsed, a bill may be exhibited to compel the creditors who stand out to come in, or renounce the benefit of the trust. (k)

Where by the terms of the trust deed, no creditors are to be paid under its provisions, until their claims have been investigated and allowed by the trustees, a creditor can claim no benefit under the deed, and cannot apply to the court to enforce its performance, until he has submitted his debt to the trustees for their investigation, or

(g) *Barwell v. Parker*, 2 Ves. 364; (k) *Dunch v. Kent*, 1 Vern. 260; and
Lloyd v. Williams, 2 Atk. 110. see *Spottiswoode v. Stockdale*, Coop.

(h) 3 Sim. 377.

102.

(i) *Boazman v. Johnston*, 3 Sim. 382.

¹ *Tennant v. Stoney*, 1 Rich. Eq. 222; *Hosack v. Rogers*, 6 Paige, 415; See *De Caters v. Le Roy de Chamont*, 2 Paige, 490; but *contra*, *Phoenix Bank v. Sullivan*, 9 Pick. 416; *Pierpont v. Graham*, 4 Wash. C. C. 232; *Stoddard v. Allen*, 1 Rawle, 250; *Dedham Bank v. Richards*, 2 Metcalf, 105.

until the trustees having been applied to, have refused to enter upon that investigation.^(l)

And if the trustees are invested with an absolute discretion to reject or allow the claims of all *lawful* creditors, the court cannot on the application of any creditor interfere with them in the exercise of that discretion.^(m) However, the court will be reluctant to concede to the trustees the exercise of so unreasonable an authority, and if possible it will adopt such an interpretation of the trust as will negative the existence of such a power.⁽ⁿ⁾¹

A trust created by deed for the payment of simple contract or other debts, which do not bear interest, will not of itself change their nature, so as to make them carry interest in future. This, however, at one time appears to have been not altogether free from doubt. For in the report of the case of *Carr v. Countess of Burlington*,^(o) Lord Harcourt is represented to have declared, that by the creation of the trust term for the *payment of debts the simple contract debts became as debts due by mortgage, and conse- [*341] quently should carry interest, although Mr. Cox in his note observes, that no such declaration as this appears in the registrar's book. Again, in *Bardwell v. Parker*,^(p) Lord Hardwicke, although dissenting from the doctrine laid down as above in *Carr v. Countess of Burlington*, said, "that if a man in his life creates a trust for payment of debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a specialty, that

(l) *Wain v. E. of Egmont*, 3 M. & K. 445.

(m) 3 M. & K. 448.

(n) See 3 M. & K. 448; and *Nunn v. Wilsmore*, 8 T. R. 521.

(o) 1 P. Wms. 229; and see *Bottomley v. Fairfax*, 1 P. Wms. 334; *Maxwell v. Wettenhall*, 2 P. Wms. 27; *Loyd v. Williams*, 2 Atk. 111.

(p) 2 Ves. 364.

¹The preference of a fictitious debt renders an assignment void. *Irwin v. Keen* 3 Whart. 347; *Webb v. Daggett*, 2 Barb. S. C. 10. A general provision for the payment of debts in an assignment, will not include debts founded on an usurious consideration. *Pratt v. Adams*, 7 Page, 617; *Beach v. Fulton Bank*, 3 Wend. 584. Where, however, such debts are specifically provided for, it was held in *Green v. Morse*, 4 Barb. S. C. 332; and *Pratt v. Adams*, 7 Paige, 641, that the assignee cannot refuse to pay them. But in *Morse v. Crofoot*, 4 Comstock, 114, it was said that where, subsequently to an assignment, a bill had been sustained to avoid a note specially preferred in the assignment, it would be the duty of the trustees to refuse payment thereof. Though there be such specific provision for a debt, the usurious excess cannot be recovered from the trustees; *Pratt v. Adams*, see *Green v. Morse*, *ut supra*; though this was doubted in the latter case. In an opinion of Chancellor Kent, printed in 6 Humph. 532, it was said by that distinguished Jurist, that a preference in an assignment by a corporation for notes illegally issued by it for moneys borrowed, was valid. A general direction to pay debts in a *will* does not apply to a debt which is *nudum pactum*, or not a legal debt, at the testator's death. *Rogers v. Rogers*, 3 Wend. 503; *Chandler v. Hill*, 2 Henn. & M. 124.

will make these, though simple contract debts, carry interest.”(g) But the distinction, as to the effect of scheduling the debts, does not appear to have been attended to; and it is now settled, that a trust by deed for the payment of debts, *though scheduled*, will not make them bear interest, which they would not otherwise carry.(r) And it is immaterial, that the direction is for the payment of debts *with interest* if there are any specialty debts, to which that direction can be held to apply.(s) It will of course be otherwise, where there is *an express direction* for the payment of interest, or where *it is part of the contract*, that the debts should be payable with interest.(t)

Debts which from their nature carry interest, must of course be paid with all arrears of interest up to the time of payment.¹ But in the case of bond debts, the creditors will not be entitled to receive more for principal and interest, than the amount of the penalty secured.(u)

If any fund has been actually realized under the trusts of the deed for the payment of debts, but instead of being applied immediately in discharge of the debts, it is invested by the trustees on securities bearing interest, and the interest is accumulated, the creditors, though by simple contract, will be entitled to interest on their respective debts at four per cent., as interest was actually made from their fund.(x)

It is settled, that a general devise or charge *by will* for the payment of debts out of real estate, will prevent the Statute of Limitations from running against such debts, as are not barred at the time when the will comes into operation, viz., the death of the testator;(y)² although a debt, upon which the Statute of Limitations has

(g) *Stewart v. Noble*, Vern. & Scriv. 588; *Stewart v. Noble*, Vern. & Scriv. 528; and see *Creuze v. Hunter*, 2 Ves. 536.

jun. 157; 4 Bro. C. C. 316; *Tait v. Northwick*, 4 Ves. 618. (u) *Anon.* 1 Salk. 154; *Burke v. Jones*, 2 V. & B. 284; *Hughes v. Wynne*, 1 M. & K. 20.

(r) *Shirley v. E. Ferrers*, 1 Bro. C. C. 41; *Hamilton v. Houghton*, 2 Bligh, 169. (x) *Pearce v. Slocombe*, 3 Y. & Coll. 84.

(s) *Hamilton v. Houghton*, 2 Bligh, 187; and see *Tait v. Lord Northwick*, 4 Ves. 618. (y) *Fergus v. Gore*, 1 Sch. & Lef. 107; *Hargreaves v. Mitchell*, 6 Mad. 326; *Hughes v. Wynne*, T. & R. 307; *Crallan v. Oughton*, 3 Beav. 1. [But see *Story*, Eq. § 154, n.]

(t) See *Hamilton v. Houghton*, 2 Bligh, 184; *Bath v. Bradford*, 2 Ves.

¹ In *Bryant v. Russell*, 23 Pick. 508, it was held that in an assignment for the benefit of scheduled creditors, holding notes and drafts, the latter were to be paid with interest from the time of maturity. But in *Mann's Appeal*, in *Re Piesch's Estate*, March, 1853, the Supreme Court of Pennsylvania ruled, that where certain notes were preferred in an assignment, the preference extended to principal only, and not to interest. But see *Winslow v. Ancrum*, 1 McCord Ch. 100. As to insolvent assignments, see *Matter of Murray*, 6 Paige, 204; *Pritchell v. Murray*, Saxton, 571.

² With regard to personal estate, the statutes of various of the States have

already taken effect at the time of the testator's death, will not be revived by such a direction.(z)¹

The principle of these decisions is, that the Statute of Limitations does not run against a trust, and it applies equally to a trust created *by deed* for the payment of debts, and whether the property subjected to the trust consist of real or personal estate. Upon principle, therefore, it may unquestionably be laid down (although the point does not appear to have been directly decided), that a trust, created *by deed* for the payment of debts generally, will prevent the operation of the Statute of Limitations upon all debts, which are not barred at the time of the execution of the *deed; although such a trust will not revive any debt, the right to recover which [*342] may have been previously lost by the effluxion of time.(a)²

An assignment or conveyance in trust for the payment of debts usually specifies the mode of raising the money for the purposes of

(z) *Burke v. Jones*, 2 V. & B. 275.

(a) See *Burke v. Jones*, 2 V. & B. 281, 2.

fixed a certain period within which claim must be made by creditors, after which the debts are barred, without reference to the principle that the executor is a trustee by implication. *Agnew v. Fetterman*, 4 Barr, 56; *Man v. Warner*, 4 Whart. 455; *Carrington v. Manning*, 13 Alab. 611; *Mills v. Bunstead*, 20 Pickering, 2. Real estate, moreover, being equally a fund for the payment of debts with personalty, and the distinction between specialty and other creditors being generally obsolete, the rule as to real estate stated in the text is not regarded with favor. *Ibid*; *Smith v. Porter*, 1 Binn. 209; *Hines v. Spruill*, 2 Dev. & Batt. Eq. 93. But the general principle was recognised in *Lewis v. Bacon*, 3 Henn. & M. 89; *Man v. Warren*, 4 Wharton, 477; *Agnew v. Fetterman*, 4 Barr, 56; *Roosevelt v. Mark*, 6 John. C. R. 264; *Rogers v. Rogers*, 3 Wend. 503. A devise in trust for the payment of debts will prevent the lien of a judgment from expiring by lapse of time. *Baldy v. Brady*, 15 Penn. St. R. 111; *Alexander v. McMurry*, 8 Watts, 513. So in *Bank U. S. v. Beverly*, 1 How. U. S. 134, it was held that where there was an unexecuted trust to pay debts which had by a previous decision of the court, been decided to be unpaid in point of fact, lapse of time was no bar. But there must be a clear express trust for the payment of the debts, in such case, *Agnew v. Fetterman*, 4 Barr, 56; *Carrington v. Manning*, 13 Alab. 611. Therefore, where a testator directed his debts to be paid, and devised his wife all his estate, and appointed her executrix, no trust was created which took debts out of the statute. *Agnew v. Fetterman*.

¹ *Pratt v. Northam*, 5 Mass. 113; *Agnew v. Fetterman*, 4 Barr, 56; *Roosevelt v. Mark*, 6 John. C. R. 264; *Walker v. Campbell*, 1 Hawks, 304; *Smith v. Porter*, 1 Binn. 209; *Carrington v. Manning*, 13 Alab. 611; *Murray v. Mechanics' Bank*, 4 Edw. Ch. 567; *Rogers v. Rogers*, 3 Wend. 503; but see *Lewis v. Bacon*, 3 Henn. & M. 89.

² It has been held, however, in the United States, that an assignment for the benefit of creditors (*Reed v. Johnson*, 1 Rhode Island, 81), or an insolvent assignment (*Christy v. Flemington*, 10 Barr, 128), will not prevent the running of the statute as against the assignor, though the debts be expressly named therein. But though the debt may be barred at law, the creditors may nevertheless enforce the trust deed in equity. *Gary v. May*, 16 Ohio, 66.

the trust, by directing the sale or mortgage of the property by the trustees for that purpose. However, in the absence of any such express direction, if the amount of the sum to be raised, and the whole scope of the deed, show that the parties must have intended a sale, a sale will be properly made; for in expounding trusts, though created by deed, the intention of the parties is to be pursued, as much as in cases of wills.^(b)¹ Thus on one occasion it was held, that a conveyance of lands to the use of trustees and their heirs, until they had raised *by sales and profits* sufficient to pay the scheduled debts, authorized a *mortgage* by the trustees.^(c)

Where property is conveyed to trustees for the payment of debts *generally*, they are enabled to make a good title to a purchaser, or mortgagee, who is not bound to ascertain the necessity of the sale, or to inquire as to the existence of any unpaid debts,^(d) or to see to the application of the purchase-money; and in case of any misap-

(b) *Sheldon v. Dormer*, 2 Vern. 310; *Stroughill v. Anstey*, 12 Eng. Law & Eq. 337.; and see *Ivy v. Gilbert*, 2 P. Wms. 13;

Mills v. Banks, 3 P. Wms. 1; *Shrewsbury v. Shrewsbury*, 1 Ves. jun. 234; see *Allan v. Backhouse*, 2 V. & B. 65; *Wilson v. Halliley*, 1 R. & M. 590; 1 Sugd. Pow. 116, et seq. 6th ed.; et vide post, next section.

(c) *Spalding v. Shalmer*, 1 Vern. 301; and see *Ball v. Harris*, 8 Sim. 485. [See

(d) *Johnson v. Kennett*, 3 M. & K. 631; *Shaw v. Borrer*, 1 Keen, 559; *Eland v. Eland*, 4 M. & Cr. 428; *Forbes v. Peacock*, 11 Sim. 152, 160. [See *Doe v. Hughes*, 3 Eng. Law & Eq. 354.] *Page v. Adam*, 4 Beav. 269; vide post, [p. 342, 363, 506, and note.]

¹ A power to sell and convey is necessarily implied on a conveyance for the payment of debts, *Williams v. Otey*, 8 Humph. 563. In a deed of trust for payment of debts, a power to sell can only be exercised under the circumstances pointed out by the deed. *Walker v. Brungard*, 13 Sm. & M. 723. Lands were conveyed in trust, first, that the debts of the grantor should be paid out of the rents and profits; second, for the support of the grantor, his wife and children; and third, at his death, to be divided among his children: it was held that the trustee had no power to sell for the payment of debts or for any other purpose. *Mundy v. Vattier*, 3 Grattan, 518. In *Linton v. Boly*, 12 Missouri, 567, it was ruled that an unsealed instrument of writing conveying land in trust, to secure the payment of a debt, was not sufficient of itself to authorize a sale by the trustee, but created only an equitable lien, to be enforced by a court of equity. Where, however, a trustee for the payment of debts sells without authority, but in his capacity of trustee, and in the presence and with the acquiescence of the *cestui que trust*, the purchaser will take a good title in equity. *Spencer v. Hawkins*, 4 Ired. Eq. 288. It seems that a general assignment for creditors of "goods, chattels, book accounts, stock, and all other estate and effects," does not give the assignee a power of sale over real estate, without express words. *Baker v. Crookshank*, 1 Whart. Dig., 6th ed., Debtor and Creditor, pl. 370; see post, 355, and 371, and notes.

In *Plank v. Schermerhorn*, 3 Barb. Ch. 644; it was held that a clause in an assignment empowering the assignee to mortgage or lease the assigned estate, is void as to creditors.

appropriation of the trust fund, the creditors must seek their remedy against the trustees.^(e)(1)¹

But the law was otherwise prior to the late act 7 & 8 Vict. c. 76, where the trust was for the payment of *some particular debt* mentioned in the deed,^(f) or of the debts *specified in a schedule.*^(g) Although, if the nature of the trust rendered it necessary that the trustees should retain the purchase-money under their management for any time, after the sale was effected, or if the deed gave them

(e) *Shaw v. Borrer*, 1 Keen, 559; ed.; *Jones v. Price*, 11 Sim. 558; *Glyn Culpepper v. Aston*, 2 Ch. Ca. 115; *v. Locke*, 3 Dr. & W. 11.

Anon. Salk. 153; *Dunch v. Kent*, 1 (f) *Doran v. Wiltshire*, 3 Sw. 701; Vern. 260; *Jenkins v. Hiles*, 6 Ves. *Elliot v. Merriman*, Barn. 78; and 1 654, n.; *Williamson v. Curtis*, 3 Bro. C. Keen, 573, stated; S. C. 2 Atk. 41.

C. 96; *Doran v. Wiltshire*, 3 Sw. 699, (g) *Spalding v. Shalmer*, 1 Vern. 701; 2 Sugd. V. & P. 32, et seq. 9th 301; *Lloyd v. Baldwin*, 1 Ves. 173.

(1) It was laid down on one occasion by Lord Hardwicke, that where there had been a decree in a creditor's suit for the payment of debts, which were charged generally on the estate, the purchaser could not safely pay over the money to the trustees; for the decree reduced it to as much certainty as a schedule of the debts, *Lloyd v. Baldwin*, 1 Ves. 173; and see *Walker v. Smallwood*, Amb. 677. However, it is stated by Sir Edward Sugden to be now the prevailing opinion, that the purchaser is not in such a case bound to see to the application of the money. The course is for him to apply to have the purchase-money paid into court, and then the court takes upon itself the application of the money. 2 Sugd. V. & P. 34, 9th ed. [*Wilson v. Davisson*, 2 Rob. Va. 385; *Coombs v. Jordan*, 3 Bland. 284.]

¹ *Williams v. Otey*, 8 Humph. 568; *Garrett v. Macon*, 2 Brocken. 185; 6 Call. 388; *Grant v. Hook*, 13 S. & R. 259; *Bruch v. Lantz*, 2 Rawle, 392; *Hannum v. Spear*, 1 Yeates, 553; 2 Dall. 291; *Cadbury v. Duval*, 10 Barr, 267; *Dalzell v. Crawford*, 1 Pars. Eq. 57; *Hauser v. Shore*, 5 Ired. Eq. 357; *Gardner v. Gardner*, 13 Pick. 393; see *Lining v. Peyton*, 2 Desaus. 378; *Redheimer v. Pyron*, 1 Spear's Eq. 141; *Lock v. Lomas*, 11 Eng. L. & Eq. 154. When, however, the trust is for the payment of scheduled or specified debts, it seems the purchaser is bound to see to the application of the purchase-money. *Gardner v. Gardner*; *Cadbury v. Duval*; *Dalzell v. Crawford*, ut supr.; *Wormley v. Wormley*, 8 Wheat. 422; though see the remarks of the American editor in notes to *Elliott v. Merryman*, 1 Lead. Cas. Eq. 75, as to devises for payment of debts. If there be collusion, or the purchaser has notice that the sale is unnecessary, or out of the line of the trust, he is liable in all cases. *Potter v. Gardner*, 12 Wheat. 498; *Garrett v. Macon*, ut supr.; see *Redheimer v. Pyron*, ut supr. As to the effect of the knowledge of a purchaser from trustees for payment of debts under a devise, that the debts are satisfied, see post, 506, note. But failure to see to the application of the purchase-money, where the power to sell has been properly exercised, will not affect the purchaser's title at law, *D'Oyley v. Loveland*, 1 Strobl. Eq. 46; it would only make him a constructive trustee. The English doctrine on this subject is not favored in this country. See *Dalzell v. Crawford*, 1 Pars. Eq. 57; *Redheimer v. Pyron*, 1 Spear's Eq. 141; notes to *Elliott v. Merryman*, ut supr.; and see *Stroughill v. Anstey*, 12 Eng. L. & Eq. 357; see also post, 363, and note; and as to purchasers from executors, of personalty, ante, 166, and note.

the power of giving discharges for the purchase-money, the purchaser would not have been bound to see to its application in payment of the debts, *though they were scheduled.*(*h*) And in the case alluded [*343] to, Sir Wm. Grant on general grounds expressed *his strong disapprobation of the doctrine, that a purchaser was bound to see to the application of the money, because the debts were scheduled.(*i*)

So an express clause, giving the trustees power to give receipts, and declaring that the purchaser shall not be bound to see to the application of the money, would clearly exonerate him from that liability even with regard to scheduled debts.(*k*)(1)

Whether the trust be for the payment of debts generally, or of such as are scheduled, a purchaser from the trustees will not be affected by the circumstance that more of the estate was sold than was required for the purposes of the trust.(*l*)

It was laid down on one occasion by Lord Eldon, that if the purchase were not from the original trustees, but from others, to whom they had conveyed the estate, the purchaser would be bound to see to the application of the money, though the trust were for the payment of debts generally.(*m*) And this follows from the principle discussed in a preceding chapter, as to the effect of a unauthorized conveyance of the trust estate by a trustee.(*n*)

It is no objection to a deed of trust for the payment of debts, that the trustees are themselves creditors, who are to benefit by the execution of the trust.(*o*) However, in such a case the trustees have no power, analogous to that of executors, of preferring their own debts, but they must apply the trust fund in discharge of all the debts

(*h*) *Balfour v. Welland*, 17 Ves. 151; and see *Doran v. Wiltshire*, 3 Sw. 699. [See *Dalzell v. Crawford*, 1 Pars. Eq. 57.]

(*i*) 16 Ves. 156.

(*k*) *Binks v. Lord Rokeby*, 2 Mad. 227, 339; and see *Roper v. Halifax*, 2 Sugd. Pow. 501, App. 3; *Jones v. Price*, 11 Sim. 557.

(*l*) *Culpepper v. Aston*, 2 Ch. Ca. 115; *Spalding v. Shalmer*, 1 Vern. 301. [See post, 480, and note.]

(*m*) *Braybroke v. Inskip*, 1 Ves. 417.

(*n*) Ante, p. 175.

(*o*) See *Balfour v. Welland*, 16 Ves. 151; *Boazman v. Johnston*, 3 Sim. 377; *Acton v. Woodgate*, 2 M & K. 492.

(1) The recent act (7 & 8 Vict. c. 76) has made a material alteration in the law respecting the liability of purchasers paying money to trustees. The 10th section of that act provides, "That the bona fide payment to, and the receipt of, any person, to whom any money shall be payable upon any express or implied trust, or for any limited purpose, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust." However, the 13th section declares, that the act shall not extend to any deed, act, or thing executed or done, or (except as to contingent remainders) to any estate, right, or interest created before the 1st of January, 1845. But see this subject further considered, post, Ch. III. of this Division.

equally without distinction, (p) unless indeed by the terms of the deed itself a priority is given to their own or any other debt. (q)¹

A trust deed for the payment of debts is favorably regarded in equity, and it will be supported, if possible, notwithstanding any technical informality which may invalidate it at law. (r) For instance, where a party, with power of leasing *in possession*, granted a lease to commence *in futuro*, in trust for the payment of his debts, the lease was supported by the court, owing to the nature of the trust. (s) And so a covenant to stand seised of lands to the use of a person, in consideration of his paying the debts of the covenantor out of the profits of the lands, does not import such a consideration, as will be sufficient at law to raise a use in the *trustee; (t) but, on the principle that has just been stated, this doubtless [*344] would be established in equity as a good equitable conveyance.

It may also be observed here, that a trust for the payment of debts is expressly exempted from the operation of the Thellusson Act (39 & 40 Geo. III. c. 98), which restricts the period for which the income of property may be accumulated.

If there be any residue of the trust estate after payment of the debts, the surplus will remain vested in the trustees for the benefit of the grantor. (u)²

Trustees of a creditor's deed have no power to compromise suits respecting the estate without an express authority, which must be

(p) *Boazman v. Johnston*, 3 Sim. [But see in the United States, notes to 382; *Anon.* 2 Ch. Ca. 54; *Child v. Stephens*, 1 Eq. Ca. Abr. 141; S. C. 1 78, &c.]

Vern. 102; see 65, n. (2) [post, 359]. (s) *Pollard v. Greenville*, 1 Ch. Ca. 10.

(q) *Garrard v. Lord Lauderdale*, 3 (t) *Lord Paget's Case*, 1 Leon. 194; Sim. 1. 4 Cruis. Dig. Tit. 32, ch. 9, s. 25, 6.

(r) See *Dunch v. Kent*, 1 Vern. 260; (u) 3 P. Wms. 251, n. (A.); *Poole v. Spottiswoode v. Stockdale*, Coop. 102. Pass, 1 Beav. 600.

¹ *Harrison v. Mock*, 10 Alab. 185; *Miles v. Bacon*, 4 J. J. Marsh. 468. By accepting the trust, a creditor trustee waives a specific lien by execution. 10 Alab. 185. But in *Prevost v. Gratz*, Peters' C. C. R. 373, it was held that the rule which prohibits a trustee from acquiring an interest opposed to his *cestui que trust*, or principal, did not apply to the case of a *bonâ fide* creditor who became so prior to the assumption of his fiduciary character; and, therefore, that such a trustee might purchase a judgment against his *cestui que trust*.

² *Dubose v. Dubose*, 7 Alab. 235; *Hall v. Denison*, 17 Vern. 311; *Rahn v. McElrath*, 6 Watts, 151. As to whether an express reservation of the surplus will avoid an assignment, the cases in the United States are at variance. See ante, note to page 336, and notes to *Thomas v. Jenks*, 1 Am. Lead. Cases, 2d ed. 93. The surplus in the hands of the trustee, after payment of debts, may be reached by non-assenting creditors, by attachment; *Hearn v. Crutcher*, 4 Yerg. 461; *Todd v. Buckman*, 2 Fairf. Maine, 41; *Dubose v. Dubose*, 7 Alab. 235; by the trustee process; *Hastings v. Baldwin*, 17 Mass. 558; or by bill in equity, *Vernon v. Morton*, 8 Dana, 247; *Wright v. Henderson*, 7 How. Miss. 539.

either contained in the deed, or conferred upon them at a meeting of the creditors. And if they enter into any compromise without that authority, they will be held responsible to the creditors, if it should be found to have been an improper arrangement.(x)¹

And the trustees will not be justified in committing the entire management of the property to an agent, although they are empowered by the deed to employ a person to make out the accounts and collect the debts.² And it will not be a sufficient answer to a suit against them by the creditors for an account, to say, that the accounts and vouchers are in the possession of the agent, who had gone abroad.(y)

2d. *Of Trustees for the Payment of Debts under a Devise.*

Upon the death of an individual the law vests his personal estate in his personal representatives, as a fund for the payment of his debts; and it is not in the power of a testator to create a special trust of his personal estate for that purpose, so as to withdraw it from the administration of his executors.(z) This doctrine was denied by Lord Brougham, Ch., in the case of *Jones v. Scott*, when it came before him on appeal;(a) but his Lordship's decision in that case was afterwards reversed by the House of Lords;(b) and the doctrine, as thus finally decided, has been recognised and acted upon in

(x) *Shepherd v. Towgood*, 1 T. & R. 379, 390.

(y) *Turner v. Corney*, 5 Beav. 515.

(z) *Jones v. Scott*, 1 R. & M. 255, 261.

(a) *Ibid.* 267.

(b) *Jones v. Scott*, 4 Cl. & Fin. 398.

¹ A power given to the assignees to compound with creditors makes an assignment void. *Wakeman v. Grover*, 4 Paige, 24; 11 Wend. 187; *Hudson v. Maze*, 3 Scamm. 579. Otherwise, of a power to compromise with debtors. *Robins v. Embry*, 1 Sm. & M. Ch. 207; see *Meacham v. Sterns*, 9 Paige, 398. Trustees in general have no power to sell on credit, *Swoyer's Appeal*, 5 Barr, 379; *Nicholson v. Leavitt*, Court of Appeals, New York, 1 Am. Law Reg. 181; *Estate of Davis*, 5 Wharton, 530; and a provision in an assignment authorizing them to do so would invalidate it. *Nicholson v. Leavitt*; *contra* in Massachusetts, *Hopkins v. Ray*, 1 Metcalf, 79. So of any other provision tending to delay creditors. Notes to *Thomas v. Jenks*, 1 Am. Lead. Cas. 89. Thus a clause empowering the trustees to mortgage or lease the assigned estate, *Plank v. Schermerhorn*, 3 Barb. Ch. 644; or to sell or encumber, *Barnum v. Hempstead*, 7 Paige, 568, is void.

² But the employment of agents in the management of the trust estate is not objectionable, whether expressly stipulated or not; *Hennessey v. Western Bank*, 6 W. & S. 300; *Pearson v. Rockhill*, 4 B. Monr. 296; *Kelly v. Lank*, 7 B. Monr. 220; and though such agent be the assignor of the estate. *Filer v. Maitland*, 5 W. & S. 307; *Pearson v. Rockhill*, 4 B. Monr. 296; *Shattuck v. Hexman*, 1 Metcalf, 10; *Planters' Bank v. Clarke*, 7 Alab. 765; *Jones v. Whitbread*, 5 Engl. L. & Eq. 431. The assignees may, it seems, convey by attorney, *Blight v. Schenck*, 10 Barr, 285.

subsequent cases.(c) It is therefore now conclusively established, that a trust by *will* for the payment of the testator's debts out of his *personal* estate has no legal operation.¹

A trust, therefore, for the payment of debts (so far as it forms the subject of discussion in the present work) can be created by will only with regard to the *real estate of the testator*. And a trust of this description is unaffected by the statute 3 & 4 Will. IV. c. 104, which makes freehold and copyhold estates assets for the payment of simple contract and other debts. For the operation of that act is expressly confined to those estates, which the person dying "shall not by his last will have charged with, or devised subject to the payment of his debts."(d)

At common law the real estates of a deceased person were not liable to the payment of his simple contract debts, unless made so liable by his **will*. This rule of law was partially altered in the case of traders by the statute of 47 Geo. III. c. 74, which [*345] was repealed and amended by 1 Will. IV. c. 47. And as has been already seen, it is now wholly done away with by the recent act of 3 & 4 Will. IV. c. 104.

However, the courts from an early period endeavored to give effect to a general direction by a testator for the payment of all his debts, by construing it into a trust for their discharge out of his real estate, in case of the deficiency of the personalty for that purpose.(e)²

(c) *Freak v. Cranefeldt*, 4 M. & Cr. 499; *Evans v. Tweedy*, 1 Beav. 55. (e) 2 Jarm. Pow. Dev. 644, et seq.; [2 Jarm. Wills, Perkins' Ed., § 512,

(d) See *Charlton v. Wright*, 12 Sim. 274, [and *Collins v. Robbins*, 11 Jur. 364, 1 De Gex & Sm. 139]. &c.]; 1 Rop. Legs. 573, et seq.; 6 Cruis. Dig. Tit. 31, ch. 16, s. 7, et seq. [See *Moore's v. Whittle*, 15 Eng. L. & Eq. 434.]

¹ See *Carrington v. Manning*, 13 Alab. 628; *Lewis v. Bacon*, 3 Henn. & M. 106; *Hines v. Spruill*, 2 Dev. & Batt. Eq. 93; *Agnew v. Fetterman*, 4 Barr, 62. As in most of the United States, real estate is assets for the payment of debts, many of the principles stated in the text are less applicable than in England. *Ibid.* *Hoover v. Hoover*, 5 Barr, 357; *Walker, Est.*, 3 Rawle, 241; Mr. Sumner's note to *Kidney v. Cousmaker*, 1 Ves. Jur. 436; and see the remarks on the act of Will. IV. in *Collins v. Robbins*, 11 Jur. 364, 1 De G. & S. 139. But trusts for the payment of debts created by will, have been recognised in various cases (see *Gardner v. Gardner*, 3 Mass. 178), and given a special effect. Thus, a sale by the trustee under such circumstances, will discharge the land in Pennsylvania from the statutory lien of the testator's debts. *Cadbury v. Duval*, 10 Barr, 267. So, such a trust will prevent the lien of judgments from expiring for want of revival. *Baldy v. Brady*, 15 Penn. St. Rep. 111; *Alexander v. McMurrey*, 8 Watts, 504; see ante, note 2 to page 341. But in *Bull v. Bull*, 8 B. Monr. 332, it was held that, under the act of 1839, of Kentucky, providing for the rateable payment of debts out of the real estate, on the deficiency of the personalty, a testator could not, by a trust in his will, prefer one set of creditors to another; and see *Sperry's Est.*, 1 Ashm. 347.

² *Story's Eq.*, § 1245, &c. But see *Carrington v. Manning*, 13 Alab. 628; *Hines v. Spruill*, 2 Dev. & Batt. Eq. 93; *Sears v. Lewis*, 14 Mass. 83.

And as the statute 3 & 4 Will. IV. c. 104, does not alter the operation of a devise or charge for the payment of debts, the decisions upon the effect of expressions in creating such a charge, continue binding authorities at the present day.^(f) It has been settled by a series of cases, commencing from a very early period, and continuing down to the present time, that a general introductory or prefatory direction by a testator for the payment of debts, followed by a disposition of the *real and personal estate*, will amount to a trust for the discharge of the debts, if necessary, out of the real estate.—For instance, if the testator direct—“that all his debts shall, *first*, or *in the first place*, be paid and satisfied,” or uses words to that effect;^(g) or if a similar payment be directed, (without expressing, that it is to be made *in the first place*;^(h)) and these directions are followed by a general devise of real and personal estate; or if he make a general devise of his estate “*his debts and legacies being first deducted*,”⁽ⁱ⁾ or “*being first satisfied*,”^(k) or “*after payment of his debts*,” &c.;^(l) in all these cases it has been held, that a trust was created for the payment of the debts out of the real estate in aid of the personality. And if the will be confined *exclusively* to the disposition of *real estate*, it has been held that a simple direction by the testator, that his debts should be paid, will operate as a charge on the realty.^(m)¹

(f) See Lord Cottenham’s observations in *Mirehouse v. Scaife*, 2 M. & Cr. 708, as corrected in *Ball v. Harris*, 4 M. & Cr. 269.

(g) *Bowdler v. Smith*, Prec. Ch. 264; *Torth v. Vernon*, Prec. Ch. 430; S. C. 1 Vern. 708; *Beachcroft v. Beachcroft*, 2 Vern. 690; *Hatton v. Nicholl*, Ca. Temp. Talb. 110; *Strangor v. Tryon*, 2 Vern. 709, n.; *Leigh v. Earl of Warrington*, 1 Bro. P. C. 511; *Earl of Godolphin v. Penneck*, 2 Ves. 271; *Coombes v. Gibson*, 1 Bro. C. C. 273; *Kentish v. Kentish*, 3 Bro. C. C. 157; *Knightley v. Knightley*, 2 Ves. jun. 328; *Williams v. Chitty*, 3 Ves. jun. 545; *Clifford v. Lewis*, 6 Mad. 33; *Ronalds v. Feltham*, T. & R. 418; *Mirehouse v. Scaife*, 2 M. & Cr. 695; *Price v. North*, 1 Phill. 85; *Shaw v. Borrer*, 1 Keen, 559, 573; *Ball v. Harris*, 8 Sim. 485, and 4 M. & Cr. 266. [*Pointdexter v. Green*, 6 Leigh, 504; see *Story’s Eq.*, § 1245, &c.]

(h) *Jones v. Williams*, 1 Coll. 156; *Clifford v. Lewis*, 6 Mad. 33, 38; *Finch v. Hattersley*, 3 Russ. 345, n.; *Walker v. Hardwick*, 1 M. & K. 396, 402; *Graves*

v. Graves, 8 Sim. 43, 55, 6; overruling a dictum of Sir J. Leach, M. R., to the contrary in *Douce v. Torrington*, 2 M. & K. 606; [see *Gardner v. Gardner*, 3 Mason, 178; *Trent v. Trent*, Gilm. 174; *Sands v. Champlin*, 1 Story R. 376.]

(i) *Newman v. Johnson*, 1 Vern. 45. [*Story’s Equity*, § 1245, &c.]

(k) *Harris v. Ingledew*, 3 P. Wms. 91. [*Darrington v. Borland*, 3 Port. 9.]

(l) *Tompkins v. Tompkins*, Prec. Ch. 397; *Smallercross v. Finden*, 3 Ves. 739; *Withers v. Kennedy*, 2 M. & K. 607; see *Batson v. Lindegreen*, 2 Bro. C. C. 94; *Clark v. Sewell*, 3 Atk. 100; *Kidney v. Coussmaker*, 1 Ves. jun. 440; *Bridgman v. Dove*, 3 Atk. 201; *King v. King*, 3 P. Wms. 359. [*Lupton v. Lupton*, 2 J. C. R. 614; *Lewis v. Bacon*, 3 Henn. & M. 89; *White v. Olden*, 3 Green Ch. 343; *Fenwick v. Chapman*, 9 Peters, 461; *Peter v. Beverly*, 10 Peters, 562; *Hudgen v. Hudgen*, 6 Gratt. 320; *Dunn v. Keeling*, 2 Dev. 285; *Moore v. Whittle*, 15 Eng. L. & Eq. 433.]

(m) *Harding v. Grady*, 1 Dr. & W. 430.

¹ Where real and personal estates are blended, the former is equally charge-

In these cases, however, the trust for the payment of debts arises only by implication, as being necessarily intended by the testator; it may therefore be rebutted, provided anything can be found in other parts of the will inconsistent with the intention to create such a trust.(n)

Thus in *Thomas v. Britnell*,(o) a testator first ordered all his debts *and funeral charges to be honorably paid immediately after his decease. In a subsequent clause he devised particular [*346] premises, enumerating them, and *excepting H. and R.*, to trustees in the first place to pay and discharge his debts, funeral expenses, and legacies; he then directed, *that H. and R. should in the first place be for payment of the legacies mentioned in his will.* Sir John Strange, M. R., said, that though on the first part the court might take the whole real estate to be charged with debts, yet as the testator afterwards distributed *part* of his real estate for debts, and *part* for legacies, it was too much to lay hold on the general words to say, *the whole* should be charged with payment of debts: and he accordingly held that the creditors were entitled to an account only of the personal estate, and the other parts of the real estate *except H. and R.*

So in *Douce v. Lady Torrington*,(p) the testator began his will by directing that all his just debts, &c., should be paid with all convenient speed after his decease. By a codicil he devised *a particular property called "The Lotes" estate*, upon trust in the first place to pay an annuity and make other payments, and to apply the surplus in discharge of his simple contract debts. Sir John Leach, M. R., held it to be clear from the codicil, that the testator did not intend a general charge of debts upon the *whole* real estate, and that the charge was therefore limited to *the particular estate* devised by the codicil.(q)

Again, in *Palmer v. Graves*,(r) the testator, after commencing his will by directing his just debts, &c., in the first place to be duly paid, subsequently charged a *particular portion* of the rents and profits with a similar payment, and Lord Langdale, M. R., considered, that the general charge by implication was controlled by the specific charge made in the subsequent part of the will.(r) And the decision of the same learned Judge in the case of *Braithwaite v. Brittain*,(s)

(n) *Palmer v. Graves*, 1 Keen, 550; *Brackett*, 5 Metcalf, 280; but see *Trent Price v. North*, 1 Phill. 86, 7. *v. Trent*, Gilmer Va. Cas. 174.]

(o) *Thomas v. Britnell*, 2 Ves. 313. (q) *Douce v. Torrington*, 2 M. & K. [See *Bank U. S. v. Beverly*, 1 How. 600. U. S. 134.]

(r) *Palmer v. Graves*, 1 Keen, 545; (p) 2 M. & K. 600. [See *Lewis v. sed vide*, 1 Phill. 87.

Bacon, 3 Henn. & M. 89; *Adams v.* (s) 1 Keen, 206.

able with the latter. *Adams v. Brackett*, 5 Metcalf, 280; *Hassanclever v. Tucker*, 2 Binn. 525; *Ford v. Garthen*, 2 Rich. Eq. 270.

is in one of its points to a similar effect. But in the later case of *Graves v. Graves*,^(t) a testator began his will by directing that all his debts, &c., should be paid as soon as conveniently might be after his decease. He afterwards devised a *particular landed estate* to trustees, in trust to sell and apply the proceeds in payment of his debts, &c., so far as his personal estate should be insufficient for that purpose; and there was a residuary devise of the rest of his real estates upon certain trust. It was held, nevertheless, by Sir L. Shadwell, V. C., upon the construction of the whole will, that the charge of the debts *was not confined to the particular estate* devised to be sold, but extended to all the testator's real estates.^(t) In this case the Vice-Chancellor appears to have founded his judgment principally upon the anxious desire of the testator, appearing upon the whole will, that all his debts should be paid: although it seems somewhat difficult to reconcile the principle of the decision with that of *Thomas v. Britnell*, and the other cases of that class.

Again, in the still more recent case of *Jones v. Williams*,^(u) before V. C. Knight Bruce, a testator began his will by a general direction for the payment of his debts, in words which, according to the general rule, amounted to a charge of the debts on the realty; there was [*347] a subsequent devise of a **particular estate* to his wife, in trust to sell and apply the proceeds *in further aid and discharge* of his debts. His Honor held that there was not a sufficient expression of an intention to do away with the preliminary general charge of debts, and that the *whole* real estate consequently remained so charged.^(u)

However, it is clear, that where a general direction in a will for the payment of debts is followed by a particular direction for their payment out of the *personal* estate, the subsequent direction is not inconsistent with an intention to charge the real estate also as an auxiliary fund; and therefore such a direction will not control the operation of the general charge.^(x)

Upon the same principle, where the general direction for the payment of debts is, that they shall be paid *by the testator's executors*, or by *his executors thereafter named*; that will not usually amount to a charge of the debts upon the real estate, *unless there is also a devise of real estate to the persons who are appointed executors*. For it will be presumed, that the payment is to be made exclusively out of the fund, which by law devolves upon the executors by virtue of their appointment.^(y)

(t) *Graves v. Graves*, 8 Sim. 43.

(u) *Jones v. Williams*, 8 Jur. 373; 1 Coll. 156.

(x) *Price v. North*, 1 Phill. 35.

(y) *Brigden v. Lander*, 3 Russ. 343, n.; *Keeling v. Brown*, 5 Ves. 359;

Powell v. Robins, 7 Ves. 209; *Willan v. Lancaster*, 3 Russ. 108; *Warren v. Davies*, 2 M. & K. 49; *Wasse v. Hesselington*, 3 M. & K. 499, 500; 2 Jarm. Pow. Dev. 654. [See *Ford v. Garthen*, 2 Rich. Eq. 270.]

Where, however, the executors *are also devisees of the real estate*, a general direction that all debts shall be paid by them, though describing them as executors, will create a charge upon the realty.^(z)¹ And it is immaterial that the real estate is first devised *by name* to the individuals who afterwards are appointed executors, and are directed to pay the debts; for that direction will be held to override the whole interest which the persons, who are named executors, take under the will.^(a)

But this last rule of construction depends entirely upon the intention of the testator to be gathered from the will;^(b) and it will not be applied unless *all* of the executors take an immediate equal and certain interest under the devise of the real estate. Therefore, in *Keeling v. Brown*,^(c) where the testator directed his debts, &c., *to be paid by his executrix and executors thereafter named*, and then amongst other devises gave to his wife an estate for life in part of his real estate, and appointed her *and two other persons, who took no interest in the realty*, executrix and executors; Lord Alvanley, M. R., held that there was no charge of the debts on the real estate.^(c) And so in *Warren v. Davies*,^(d) a testator after directing payment of all his debts and legacies, &c., by his executors thereafter named, devised part of his real estate to his son in fee, to whom he also gave his residuary real and personal estate, and he appointed his son *and another person* his executors: Sir John Leach, M. R., held, that the estate devised to the son, who happened to be one of the executors, was not for that reason to be considered as given to the executors, and charged with the payment of the debts and legacies within the intention of the testator.^(d)

*And in *Wasse v. Hesslington*^(e) there was a similar general direction for the payment of debts, &c., *by the executors after* [*348] *named*, and the testator then proceeded to make some specific devises of his real estates, under which G. P., *one* of the two persons afterwards named to be executors, took an estate in fee simple in part of the real estates *in remainder* after the death of the testator's wife, *and charged with the payment of a gross sum to T. H. the other ex-*

(z) *Aubrey v. Middleton*, 2 Eq. Ca. Abr. 497; *Finch v. Hattersley*, 3 Russ. 345, note; *Henvell v. Whitaker*, 3 Russ. 343; *Dover v. Gregory*, 10 Sim. 393.

(a) *Cloudsley v. Pelham*, 1 Vern. 411; *Barker v. Duke of Devonshire*, 3 Mer. 310.

(b) *Symons v. James*, 2 N. C. C. 311.

(c) *Keeling v. Brown*, 5 Ves. 359.

(d) *Warren v. Davies*, 2 M. & K. 49.

(e) *Wasse v. Hesslington*, 3 M. & K. 495; and see *Symons v. James*, 2 N. C. C. 301, 310.

¹ But in *Agnew v. Fetterman*, 4 Barr, 56, where a testator directed his debts to be paid, and then devised all his estate to his wife, and appointed her executrix, it was held that no trust for debts was created which would take them out of the Statute of Limitations.

ecutor, and the residuary real and personal estate was given absolutely to T. H., subject to the several annuities and legacies charged thereon: upon this will the same learned Judge held it to be manifest, that the testator did not intend to subject the real estate given to his executors with the payment of his debts.(e)

And where the real estate or any part of it is devised to the executors, merely *as trustees for other persons*, a similar direction for the payment of debts by *the executors* will not charge the devised estate as against the parties beneficially entitled under the trusts.(f) Although if the trust so declared, of the devised estate, be consistent with the intention that the debts should be paid thereout, it will be liable to the debts: as where the trust was "by sale or mortgage to pay whatsoever the testator should thereafter by will or codicil direct."(g)

Where a testator directs his real estates to be sold in such terms as to convert it absolutely into personal estate, and then bequeaths his personal estate *after payment of his debts*, the produce of the sale of the real estates will be liable to the payment of the debts.(h)

It is to be observed, that although the trust for the payment of debts out of real estate has thus frequently been controlled and rebutted, in accordance with the apparent intention of the testator, where the trust has been implied from a mere general direction for the payment of debts; yet the same circumstances will not be allowed to have that operation, where there is a devise *expressly in trust to pay* debts, or (what in equity amounts to the same thing)(i) an *express charge* of the debts upon the real estate;(1) for the terms of the will itself must then be followed out, and they cannot be modified or altered to suit the supposed intention.

In *Ellison v. Airey* a testator *expressly charged* his *whole real estate* in aid of the personalty with the payment of debts and legacies, and by a subsequent clause gave a *particular farm* to be sold for the payment of his debts and legacies, and then by another clause devised all his real estate to trustees *to receive the two first years' profits*

(e) *Wasse v. Hessington*, 3 M. & K. 495; and see *Symons v. James*, 2 N. C. C. 301, 310. (h) *Kidney v. Coussmaker*, 1 Ves. jun. 436; S. C. 7 Bro. P. C. 573; 2 Ves. jun. 267; 12 Ves. 136. [See *Robards v. Wortham*, 2 Dev. Eq. 173.]

(f) *Powell v. Robins*, 7 Ves. 209; *Wasse v. Hessington*, 3 M. & K. 496. (i) *Bailey v. Ekins*, 7 Ves. 323.

(g) *Barker v. Duke of Devonshire* 3 Mer. 310.

(1) Under a charge of debts upon real estate, not passing the legal interest to a devisee, or otherwise breaking the descent, the heir will take as a trustee for the payment of the debts. *Bailey v. Ekins*, 7 Ves. 323. [So, where there is a refusal of a devise, *Owens v. Cowan*, 7 B. Monr. 152. But in Pennsylvania, since the acts of 1792, and 1834, a naked direction to sell for the payment of debts, breaks the descent, and vests the legal estate in the executors. *Miller v. Meetch*, 8 Barr, 425.]

for the payment of his debts and legacies. It was insisted, that only the particular farm, and the two years' profits were charged, and that the generality of the first charge was controlled and restrained by the subsequent directions, but it was *held by Lord Hardwicke, that the general charge still subsisted, and that he [*349] could not make any other construction.(k) And the decision of the Master of the Rolls, in *Coxe v. Bassett*,(l) is to the same effect. However, in these cases the particular estate pointed out by the testator, must be resorted to for the payment of the debts *in the first place* before the rest of the real estate.(m)

The doctrine of election does not apply to creditors, and although a particular fund be expressly provided by the will for their payment, they may notwithstanding have recourse likewise to the testator's general estate to the disappointment of other parties, for whom provision is made by the will.(n)¹

A devise for the payment of debts is favored in equity; and a general devise or charge for that purpose will be held to include copyholds if required, although they may not have been surrendered to the use of the testator's will:(o) though this was doubted by the Lord Chancellor in an early case.(p) And equity in favor of the creditors will supply the want of such a surrender.(q) And the same construction will obtain, though the charge of debts upon the real estate be only implied from a general preliminary direction for the payment of the debts.(r)

(k) *Ellison v. Airey*, 2 Ves. 568.

(l) 3 Ves. jun. 155.

(m) *Coxe v. Basset*, 3 Ves. 161.

(n) *Kidney v. Coussmaker*, 12 Ves. 136, 154.

(o) *Drake v. Robinson*, 1 P. Wms. 443; *Harris v. Ingledew*, 3 P. Wms. 96; *Haslewood v. Pope*, Id. 323; *Ithell v. Beane*, 1 Ves. sen. 265; *Lindropp v. Eborall*, 3 Bro. C. C. 189; *Kidney v. Coussmaker*, 12 Ves. 136, 156; *Noel v. Weston*, 2 V. & B. 269.

(p) *Challis v. Casborn*, Prec. Ch. 408; and see *Haslewood v. Pope*, 3 P. Wms. 322.

(q) *Drake v. Robinson*, 1 P. Wms. 443; *Kidney v. Coussmaker*, 12 Ves. 156; *Holmes v. Coghill*, id. 216.

(r) *Godolphin v. Penneck*, 2 Ves. 271; *Coombes v. Gibson*, 1 Bro. C. C. 273; *Kentish v. Kentish*, 3 Bro. C. C. 257; *Ronalds v. Feltham*, T. & R. 418.

¹ The actual decision in *Kidney v. Coussmaker*, 12 Ves. 136, was approved by Gibson, C. J., in *Adlum v. Yard*, 1 Rawle, 163. But the principle, in the broad terms as there stated, that "the doctrine of election does not apply to creditors," was denied by him. It was accordingly held that a creditor who had accepted a dividend under an assignment void in law, was thereby estopped from afterwards impeaching it. But in the subsequent case of *Hayes v. Heidleberg*, 9 Barr, 207, it was said that Judge Gibson concurred with the majority of the court, in saying that *Adlum v. Yard*, pushed "the doctrine of election by creditors as far as it can be safely carried," and the court refused to apply it to the case of a judgment creditor, who had accepted a dividend under an assignment void for *fraud in fact*. See also *Codwise v. Golsten*, 10 John. 507 and the able note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. pt. i. 230, &c., 1st edition.

So we have already seen, that a devise to trustees for the payment of debts will give them an estate in fee simple without any words of limitation, as being necessary for the discharge of their trust.(s) Although where the devise is to the *executors*, they have been held to take only a chattel interest for the satisfaction of the debts.(t)

Where it is doubtful from the terms of the will, whether a trust has been created for the payment of debts, equity, without doing violence to the words, will endeavor to put such a construction on them as is most favorable to the creditors.(u)

Devises for the payment of debts were expressly exempted from the operation of the Statute of Fraudulent Devises (3 W. & M. c. 14):(x) and the 4th section of the recent act 1 Will. IV. c. 47, by which the former act was repealed, contains a similar provision. It has been observed in consequence by Mr. Fonblanque, that bond and other specialty creditors, whose demands in their nature affect the land, are still liable to be prejudiced by the right of their debtor to devise his land subject to the payment of his debts, as the simple contract creditors will in that case be entitled to be paid *pari passu* with the bond and other specialty creditors.(y) *And for [*350] the same reason, notwithstanding the act 3 & 4 Will. IV. c. 104, it may still be frequently of importance to determine whether a will operates as a devise or charge for the payment of debts.(z) For that act, as has been already seen, does not affect lands devised or charged for the payment of debts; consequently, lands so devised will, as heretofore, be administered as equitable assets, and will be applicable in discharge of all debts equally without distinction. Although the act expressly provides, that, in the administration of assets *under that act*, all creditors by specialty shall be paid in full, before any of the simple contract creditors shall receive anything.

Although a trust is clearly created for the payment of debts out of real estate, it may not be the duty of the trustees at once to have recourse to the realty for that purpose. The personal estate is by the law the *primary* fund for the payment of debts, and must be first wholly applied by the executors for that purpose; unless it be

(s) *Dover v. Gregory*, 10 Sim. 393; 4 Ves. 550; *Miller v. Horton*, Coop. 45; ante, p. 243, et seq. *Bailey v. Ekins*, 7 Ves. 323; *Marshall v. M'Avary*, 3 Dr. & W. 235.

(t) Ante, ubi supra.

(u) *Noel v. Weston*, 2 V. & B. 273, 4.

(x) *Earl of Bath v. Earl of Bradford*, 2 Ves. 590; *Lingard v. Earl of Derby*, 3 J. & Lat. 90.]

1 Bro. C. C. 312; *Howse v. Chapman*,

(y) 1 Fonbl. Eq. Tr. B. 1, Ch. 4, s. 14, n. (i). [See *Cummins v. Cummins*,

(z) See *Price v. North*, 1 Phill. 58.

clearly the intention of the testator, not only to onerate the realty, but also to *exonerate the personalty* from its legal liability.(a)¹

Thus it is settled, that a charge of debts upon the real estate generally, whether created by a general preliminary direction for their payment,(b) as by an express charge,(c) is *prima facie* merely auxiliary to the personal estate. And a general devise of real estate, in trust to make a similar payment, will not be held to have any other operation;(d) though there be a specific direction for raising the debts by sale or mortgage;(e) or a term be created for that purpose;(f) or though the proportions and mode in which the charge is to be distributed over and borne by the real estate, be otherwise anxiously prescribed by the testator.(g) And it is immaterial, that a specific part of the real estate is subjected to and set apart for the payment of the debts;(h) or that the trust is expressed in the form of a *condition* for the payment by the devisee.(i) And although the *particular portion of the real estate*, which is expressly charged with the payment of debts, be made primarily applicable for that purpose, yet if it prove insufficient, the personal estate, and not *the*

(a) 2 Jarm. Pow. Dev. 681, et seq.; 1 Rob. Legs. 3d ed. 595, et seq. [As to the effect of the act of Will. IV., on this rule, see *Collins v. Robins*, 11 Jur. 364; 1 De G. & Sm. 139.]

(b) *Hartley v. Hurle*, 5 Ves. 540; *Walker v. Hardwick*, 1 M. & K. 396.

(c) *Dolman v. Smith*, Prec. Ch. 456; *Samwell v. Wake*, 1 Bro. C. C. 144; *Tower v. Lord Rous*, 18 Ves. 132; *Aldridge v. Lord Wallscourt*, 1 Ball & B. 312. [Keysey's case, 9 S. & R. 72; *Stevens v. Grigg*, 10 G. & J. 143; *Garnett v. Macon*, 6 Call. 308; *Robards v. Wortham*, 2 Dev. Eq. 173; *Palmer v. Armstrong*, Id. 268; *Hoes v. Van Hoesen*, 1 Comst. 123.]

(d) *Brummel v. Prothero*, 3 Ves. 111.

(e) *Haslewood v. Pope*, 3 P. Wms. 324; *Lord Inchiquin v. French*, Ambl. 33; S. C. 1 Cox, 2; *Tait v. Lord North-*

wick, 4 Ves. 816; *Brydges v. Phillips*, 6 Ves. 570; *Hancox v. Abbey*, 11 Ves. 186; *Noke v. Darby*, 1 Bro. P. C. 506. [See *Hoes v. Van Hoesen*, 1 Comstock, 120.]

(f) *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Tower v. Lord Rous*, 18 Ves. 132.

(g) *Watson v. Brickwood*, 9 Ves. 447; See *Rhodes v. Rudge*, 1 Sim. 79.

(h) *Gray v. Minnethorpe*, 3 Ves. 103; *Coxe v. Bassett*, 3 Ves. 155; *M'Leland v. Shaw*, 2 Sch. & Lef. 538; *French v. Chichester*, 2 Vern. 568; *Colville v. Middleton*, 3 Beav. 570. [But see *Pinckney v. Pinckney*, 2 Rich. Eq. 218.]

(i) *Bridgman v. Dove*, 3 Atk. 201; *Mead v. Hide*, 2 Vern. 120; *Watson v. Brickwood*, 9 Ves. 447. [But see *M'Fait's Appeal*, 8 Barr, 290.]

¹ *Lupton v. Lupton*, 2 J. C. R. 614; *Ruston v. Ruston*, 2 Yeates, 54; 2 Dall. 245; *Helsey v. Western*, 2 Comstock, 500; *Hancock v. Minot*, 8 Pick. 29; *Walker's Est.*, 3 Rawle, 229; *Martin v. Fry*, 17 S. & R. 453; *Waring v. Waring*, 2 Bland, 673; *Wyse v. Smith*, 4 G. & J. 296; *Hayes v. Jackson*, 6 Mass. 249; *Marsh v. Marsh*, 10 B. Monr. 360; *Foster v. Crenshaw*, 3 Munf. 514; and cases collected in Mr. Perkins' notes to 2 Jarmyn on Wills, 545, and in the notes to *Ancaster v. Mayer*, 1 Lead. Cas. Eq. 450; *Aldrick v. Cooper*, 2 Lead. Cas. Eq. pt. i, 215; and *Silk v. Prime*, Id. 252, where the subjects of this section are fully discussed.

other parts of the realty, must first be resorted to for the discharge of the deficiency.^(k)

So it is settled, that the personalty will not necessarily be exonerated, though the land be charged with *funeral* and *testamentary* expenses, as well as with debts, notwithstanding the apparent improbability, that the testator should mean to create an *auxiliary* fund [*351] for the payment of expenses *which must be satisfied before any other claims. It was said indeed by Lord Alvanley, in *Burton v. Knowlton*,^(l) that a direction for the payment of funeral expenses out of the realty afforded a considerable argument for the exemption of the personal estate, where the trust fund is given to trustees *who are not the executors*. But this decision appears to have been questioned both by Lord Rosslyn in the case of *Tait v. Lord Hardwicke*,^(m) and by Lord Eldon in that of *Bootle v. Blundell*.⁽ⁿ⁾ And in several cases both before and since that of *Burton v. Knowlton*, the personal estate has been held to be primarily liable notwithstanding a charge of funeral and testamentary expenses on the realty, not only where the trustees have been also executors,^(o) but where the executors and trustees have been different persons.^(p) And although a charge of funeral or testamentary expenses, when supported by additional circumstances, will materially assist the court to the conclusion that the testator meant to exempt his personal estate,^(q) yet it must now be considered as settled that such a direction will not *of itself* be sufficient to support that inference.^(r)

And so a direction for the payment of *all* the testator's debts out of his real estate,^(s) or that they may be *fully* paid,^(t) will not be sufficient to exempt the personalty.

And although the personal estate may be *expressly* subject to cer-

(k) *Colville v. Middleton*, 3 Beav. 570.

(l) 3 Ves. 108.

(m) 4 Ves. 823.

(n) 1 Mer. 229.

(o) *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Dolman v. Smith*, Prec. Ch. 456; *Stephenson v. Heathcote*, 1 Ed. 37; *M'Leland v. Shaw*, 12 Sch. & Lef. 538; *Walker v. Hardwick*, 1 M. & K. 396.

(p) *French v. Chichester*, 2 Vern. 568; 3 Bro. P. C. 16; *Lovel v. Lancaster*, Id. 183; *Gray v. Minnethorpe*, 3 Ves. 103; *Aldridge v. Lord Wallscourt*, 1 Ball & B. 312; *Stapleton v. Stapleton*, 2 Ball & B. 523; *Hartley v. Hurle*, 5 Ves. 540.

(q) See *Kynaston v. Kynaston*, 1 Bro.

C. C. 457, n.; *Williams v. Bishop of Landaff*, 1 Cox, 254; *Gaskell v. Gough*, 3 Ves. 111, cited; *Tower v. Lord Rous*, 18 Ves. 159; *Bootle v. Blundell*, 1 Mer. 239; *Greene v. Greene*, 4 Mad. 148; *Mitchell v. Mitchell*, 5 Mad. 69; *Driver v. Ferrand*, 1 R. & M. 681, 685; *Blount v. Hipkins*, 7 Sim. 43.

(r) See 2 Jarm. Pow. Dev. 688. [*Paterson v. Scott*, 9 Eng. L. & Eq. 261; *Ouseley v. Anstruther*, 10 Beav. 413.]

(s) *Brummel v. Prothero*, 3 Ves. 111; *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurle*, 5 Ves. 540; *Walker v. Hardwick*, 1 M. & K. 396.

(t) *Hartley v. Hurle*, 5 Ves. 540; *Stephenson v. Heathcote*, 1 Ed. 37; see 1 Mer. 224.

tain *particular charges*, as to the payment of "legacies,"(u) or of "funeral expenses and simple contract debts", (x) yet the principle, that *expressio unius est exclusio alterius*, will not apply in that case, so as to throw on the real estate those charges, to which the personalty is not expressly subjected.

So, although the testator direct that the real estate shall be chargeable with a *particular specified debt*, the personalty will notwithstanding be liable in the first place to the payment. The mere circumstance of the testator having provided an *additional* fund for the payment of that debt, will not of *itself* exempt the personalty from its liability.(y) Sir Wm. Grant, indeed, in his judgment in *Hancox v. Abbey*,(z) makes a distinction between the effect of a general and a particular charge in this respect, but those observations, so far as regards the general principle, have been *overruled by the subsequent decisions, and especially by that of Lord Cottenham in the recent case of *Bickham v. Cruttwell*.(a) [*352]

Where there is an *express bequest* of *all* the testator's personal estate (with or without an enumeration of particular articles), and the will also contains a charge of debts upon the real estate, it is doubtful, from the authorities, whether or not this will of *itself* operate as a specific bequest of the whole personal estate, so as to throw the debts exclusively upon the realty. There are not wanting cases, in which a gift of this nature has been decided to have that effect, not only where the trustees of the real fund and the executors have been different persons,(b) (which is doubtless a strong circumstance in favor of the exemption of the personalty),(c) but also where the same persons have been trustees and executors;(d) and there are *dicta* both of Sir Wm. Grant(e) and Lord Eldon(f) in favor of the affirmative of this position.

But on the other hand, a series of authorities are to be cited, in

(u) *Brydges v. Phillips*, 6 Ves. 567.

(x) *Watson v. Brickwood*, 9 Ves. 447. [See *Paterson v. Scott*, 9 Engl. L. & Eq. 261.]

(y) *Noel v. Lord Henly*, 7 Pri. 241; S. C. 1 Dan. 211; *Bickham v. Cruttwell*, 3 M. & Cr. 763. [*Collins v. Robins*, 1 De Gex & Sm. 131; *Paterson v. Scott*, 9 Engl. L. & Eq. 261.]

(z) 11 Ves. 179, 186.

(a) 3 M. & Cr. 770. [See also *Collins v. Robins*, 1 De G. & Sm. 131; *Quennell v. Turner*, 4 Engl. L. & Eq. 90; *Paterson v. Scott*, 9 Engl. L. & Eq. 262.]

(b) *Kynaston v. Kynaston*, 1 Bro. C. C. 457, n.; *Holliday v. Bowman*, Id.

145, cited; *Bamfield v. Wyndham* Prec. Ch. 101; *Greene v. Greene*, 4 Mad. 148, 156; *Blount v. Hipkins*, 7 Sim. 43.

(c) See *Stephenson v. Heathcote*, 1 Ed. 38; *Burton v. Knowlton*, 3 Ves. 108; *Duke of Ancaster v. Mayer*, as stated by Lord Eldon, 1 Mer. 223, 4; *M'Leland v. Shaw*, 2 Sch. & Lef. 546, 7.

(d) *Stapleton v. Colville*, *Forrest*, 202; *Mitchell v. Mitchell*, 5 Mad. 69; *Walker v. Jackson*, 2 Atk. 624; *Driver v. Ferrand*, 1 R. & M. 671, 685.

(e) In *Tower v. Lord Rous*, 18 Ves. 138, 9. [See 15 Eng. L. & Eq. 291.]

(f) In *Bootle v. Blundell*, 1 Mer. 228.

which it has been held, that such a bequest will *not* exonerate the personal estate, even though the trustees and the executors were *different persons*; (g) and those decisions are *à fortiori* authorities against the exoneration of the personalty, where the trustees and executors are *the same persons*. (h) It certainly appears to be scarcely consistent with the usual principles of equitable construction to hold, that the mere addition of the word "all," or "the whole," or any similar expression, to a gift of the personalty, should of itself give an operation to the bequest which it would not otherwise have: although it may be admitted that such expressions, *when supported by other circumstances*, would doubtless have weight with the court as evidence of the testator's intention.

However, it is clear, that the mere nomination of a person to be executor (which is at law a gift to him of the whole of the personal estate), followed by a charge of debts on the real estate, will not exonerate the personalty, whatever might be the effect of a *specific gift* of the personalty to an individual. (i) *And where there was a general gift of all the testator's real and personal estate to trustees (who were afterwards appointed executors), upon trust to raise and pay debts and legacies first out of a particular part of the real estate, and then if necessary out of the rest, but no trust was declared of the personal estate, the personalty was held to be primarily liable to the payment of the debts.* (k)

[*353] *So it is also settled, that a *general residuary bequest* of the personal estate, (l) or of all the personal estate not otherwise disposed of, (m) will not exempt the personalty from its primary liability to the payment of debts; for such a gift will be construed to apply only to so much of the personal estate as may remain after satisfying the charges thrown upon it by the law.

And though there is a preceding gift of several specific chattels, to which the residuary bequest of the personalty might reasonably be held to apply, yet that will not *of itself* vary the general rule as

(g) *Harewood v. Child*, Forr. 204, stated; *Haslewood v. Pope*, 3 P. Wms. 324; *French v. Chichester*, 2 Vern. 568, and 1 Bro. P. C. 16; *Watson v. Brickwood*, 9 Ves. 447; *Brummel v. Prothero*, 3 Ves. 111; *Aldridge v. Lord Wallscourt*, 1 Ball & B. 312; *Lovell v. Lancaster*, 2 Vern. 183; *Cutler v. Coxeter*, Id. 302; *Bromhall v. Wilbraham*, Forr. 274; *Lucy v. Bromley*, Fitzgibb. 41.

(h) See *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454.

(i) *Gray v. Minnethorpe*, 3 Ves. 106; *Stapleton v. Stapleton*, 2 Ball & B. 523; *Lord Grey v. Lady Grey*, 1 Ch. Ca. 296;

Meade v. Hide, 2 Vern. 120; S. C. Prec. Ch. 2.

(k) *Rhodes v. Rudge*, 1 Sim. 79; and see *Dolman v. Weston*, 1 Dick. 26.

(l) *Samwell v. Wake*, 1 Bro. C. C. 144; *Walker v. Hardwick*, 1 M. & K. 397, 8; see *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 466; *White v. White*, 2 Vern. 43.

(m) *Dolman v. Smith*, Prec. Ch. 456; *French v. Chichester*, 2 Vern. 568; *Hartley v. Hurle*, 5 Ves. 540; *Watson v. Brickwood*, 9 Ves. 447; *Noke v. Darby*, 1 Bro. P. C. 506.

to the liability of the personal estate;(*n*) although it might have that effect, when assisted by the context of the will.(*o*) There are several earlier cases, in which the personal estate has been held to have been exempted on this ground,(*p*) but they cannot now be considered as valid authorities.

However, it is undoubtedly in the power of every testator to change the legal order of administration, and to render his real estate primarily applicable to the discharge of his debts. The question to be considered by the trustee before he makes the application of the realty for this purpose is, whether this intention of the testator is sufficiently apparent upon the face of the will.

Originally it was the rule, that the personal estate could not be exempted from the payment of debts and legacies, without *express words*.(*q*) And it has been a subject of regret to several great judges, that this original rule was ever departed from.(*r*)

However, it has been long settled that express words are not necessary, but that the personal estate will be exonerated, if the intention of the testator to that effect appear by necessary implication upon the face of the will:(*s*) and for the purpose of collecting this intention, every part of the will must be considered.(*t*)¹

For any practical purpose, this principle of construction does little more than change the terms of the question; for, as was observed by Lord Eldon, "in any particular case, no man knows how it will apply."(*u*) Upon this point, little more can be done than to call the attention of the reader to the several cases, in which the testator's intention to exempt the personalty has been held sufficiently manifest.

In many of the earlier cases that occurred shortly after the relaxation of the original rule, according to which express words were

(*n*) *Tait v. Lord Northwick*, 4 Ves. 816; *Brydges v. Phillips*, 6 Ves. 567; *Tower v. Lord Rous*, 18 Ves. 132; *Stephenson v. Heathcote*, 1 Ed. 38.

(*o*) See *Bootle v. Blundell*, 1 Mer. 236, 7.

(*p*) *Adams v. Meyrick*, 1 Eq. Ca. Abr. 271; 2 Atk. 626, n.; *Wainwright v. Bendlowes*, 2 Vern. 718; *Prec. Ch.* 451; *Bicknell v. Page*, 2 Atk. 79; *Anderton v. Cook*, 1 Bro. C. C. 457, cited; *Walker v. Jackson*, 2 Atk. 624; *Hayford v. Benlons*, *Prec. Ch.* 451; *S. C. Ambl.* 581.

(*q*) *Fereges v. Robinson*, *Bunb.* 301;

Popham v. Bamfield, 9 Ves. 453, stated; *Howell v. Price*, *Prec. Ch.* 477; and see *Haslewood v. Pope*, 3 P. Wms. 325; *Phipps v. Annesley*, 2 Atk. 58.

(*r*) See *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 462; *Watson v. Brickwood*, 9 Ves. 453; *Gittins v. Steele*, 1 Sw. 28.

(*s*) *Bootle v. Blundell*, 1 Mer. 193, and cases cited; *Lamphier v. Despard*, 2 Dr. & W. 63.

(*t*) *Ibid*; and see *Gittins v. Steele*, 1 Sw. 28.

(*u*) 1 *Swanst.* 28.

¹ See *Walker's Case*, 3 *Rawle*, 229; *Marsh v. Marsh*, 10 B. Monr. 363; *Ruston v. Ruston*, 2 *Dall.* 243; *Roberts v. Wortham*, 2 *Dev. Eq.* 173; *McFait's Appeal*, 8 *Barr.* 290; *Hoes v. Van Hoesen*, 1 *Comstock*, 122; *Notes to Ancaster v. Mayer*, 1 *Lead. Cas Eq.* 450; and see *Plenty v. West*, 15 *Eng. L. & Eq.* 291.

[*354] requisite, the *implication was raised upon very slight and equivocal expressions, such as a mere residuary disposition of the personal estate.(x) These decisions, however, have been clearly overruled by the later authorities, which, without returning to the original rule, have settled that the implication must be such, as clearly and necessarily arises from the several provisions of the will.(y) .

The circumstance that the trustees for the payment of debts out of the real estate, and the executors are *different persons*, has always been considered as favorable to the exemption of the personalty;(z) although it is very far from being conclusive evidence for that purpose.(a) But with this single exception it seems scarcely possible to extract any general rule of construction from the cases that have been decided in favor of the exemption of the personal estate, and of which a list will be found in the note below.(b) It will be sufficient for our present purpose to remark, that the perusal of those cases, with the long series of counter-decisions, renders it sufficiently apparent, that no trustee of real estate devised for the payment of debts could be advised to apply the real fund in exoneration of the personalty, where there is no *express* direction for that purpose in the will, except under the immediate direction of the court.

It may be observed, that where the expressions used warrant such a construction, the debts may be payable *rateably* out of the real and personal estate.(d)¹

It is now settled (although at one time the practice seems to have been otherwise),(e) that parol or extrinsic evidence is inadmissible for

(x) *Waise v. Whitfield*, 8 Vin. Abr. 437, pl. 19; *Adams v. Meyrick*, 1 Eq. Cas. Abr. 271; *Wainwright v. Bendlowes*, 2 Vern. 718; *Bicknell v. Page*, 2 Atk. 79; *Walker v. Jackson*, 2 Atk. 624; *Anderton v. Cooke*, 1 Bro. C. C. 457, cited; *Kynaston v. Kynaston*, Ib. note; *Gaskill v. Hough*, 3 Ves. 110, cited.

(y) *Brummel v. Prothero*, 3 Ves. 110; *Hardley v. Hurle*, 5 Ves. 540; *Milnes v. Slater*, 8 Ves. 305; *Stapleton v. Stapleton*, 2 Ball & B. 523.

(z) *Stephenson v. Heathcote*, 1 Ed. 38; *D. of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Burton v. Knowlton*, 3 Ves. 108; *Gray v. Minnethorpe*, 3 Ves. 103; *Bootle v. Blundell*, 1 Mer. 227; *Brydges v. Phillips*, 6 Ves. 572. [15 Eng. L. & Eq. 291.]

(a) See *Bootle v. Blundell*, 1 Mer. 227.

(b) *Stapleton v. Colville*, Forr. 202;

Att.-Gen. v. Barkham, Id. 206, cited; *Kynaston v. Kynaston*, 1 Bro. C. C. 457, n.; *Holliday v. Bowman*, Id. 145, cited; *Williams v. Bp. of Llandaff*, 1 Cox, 254; *Webb v. Jones*, 2 Cox, 245; S. C. 2 Bro. C. C. 60; *Hancox v. Abbey*, 11 Ves. 179; *Burton v. Knowlton*, 3 Ves. 107; *Bootle v. Blundell*, 1 Mer. 193; *Greene v. Greene*, 4 Mad. 148; *Mitchell v. Mitchell*, 5 Mad. 69; *Driver v. Ferrand*, 1 R. & M. 681; *Clutterbuck v. Clutterbuck*, 1 M. & K. 15; *Blount v. Hipkins*, 7 Sim. 43; *Lamphier v. Despard*, 2 Dr. & W. 59. [See 15 Eng. L. & Eq. 291.]

(d) *Boughton v. James*, [1 Coll. 26]; see *Stocker v. Harbin*, 3 Beav. 479.

(e) *Bamfield v. Wyndham*, Prec. Ch. 101; *Gainsborough v. Gainsborough*, 2 Vern. 252; *Stapleton v. Colville*, Forr. 202, see 208; *Kynaston v. Kynaston*, 1 Bro. C. C. 457, n.

¹ See *Cryder's Appeal*, 11 Penn. St. R. 72; *Loomis' Appeal*, 10 Barr, 387.

the purpose of showing the testator's intention to exonerate his personal estate; and the court is at liberty to look only to the terms of the will itself in deciding that question.(f)

Where a trust for the payment of debts out of the real estate is clearly established, and there is no question as to the propriety of the immediate application of the trust estate for that purpose, it remains to consider the powers and duties of the trustee as to the raising of the requisite funds, and the application of those funds in payment of the debts.

Where the trustees are expressly authorized by the will to raise the *amount of the debts by sale or mortgage, no question can arise as to their power of making an effectual disposition of [*355] the estate, either by way of absolute sale or mortgage, for the purposes of the trust. And it seems that a trust to *sell* lands for the payment of debts, will authorize a *mortgage* for that purpose, which is a conditional sale,(g)¹ unless indeed it be the clear intention of

(f) *Inchiquin v. French*, Ambl. 40, Ball & B. 312, 15; *Parker v. Fearnley*, and 1 Cox, 9; *Stephenson v. Heathcote*, 2 S. & St. 593.
 1 Ed. 39, 43; *Brummel v. Prothero*, 3 (g) *Mills v. Banks*, 3 P. Wms. 9; Ves. 113; *Bootle v. Blundell*, 1 Mer. Ball v. Harris, 8 Sim. 485; S. C. 4 M. 220; *Aldridge v. Lord Wallscourt*, 1 & Cr. 264, 268.

¹ It has been said that a power of sale implies a power to mortgage. *Lancaster v. Dolan*, 1 Rawle, 231; *Gordon v. Preston*, 1 Watts, 385; *Williams v. Woodward*, 2 Wend. 492. But in *Bloomer v. Waldron*, 3 Hill, 368, this was denied as a general proposition; and even the more qualified statement of the text was dissented from. "The mere raising of money for" the payment of portions, debts, &c., "is not enough. There must, I apprehend, as under a power to collect a sum from issues and profits, be some pressing exigency apparent on the face of the will or power." Cowen, J. *Accord*, *Fire Ins. Co. v. Bay*, 4 Comst. 69; *Cumming v. Williamson*, 1 Sandf. Ch. 17. In *Stroughill v. Anstey*, 12 Eng. L. & Eq. 356; 1 De Gex, Mac. & G. 635, this subject was very fully discussed by the Chancellor, Lord St. Leonards, and the distinction was taken between a devise to trustees upon trusts for certain persons, subject to debts, &c., and a devise to trustees, charged with debts, &c., with a direction for, or trusts which require, further, *an out and out conversion*. In the former case it was said that a mortgage might be a proper mode of raising the particular charges; in the latter it was held that it would not be. See, also, *Taylor v. Galloway*, 1 Hamm. 234; *Floyd v. Johnson*, 2 Litt. 115; and *Earl of Orford v. Earl of Albemarle*, 12 Jur. 811. The case of *Stroughill v. Anstey*, above cited, does not appear to have met with entire approbation in England. A writer in a recent number of the *Jurist* (vol. 17, part ii. page 243), considers the true ground of the decision there, to have been, "first, that the property was leasehold, and, therefore, the trust for conversion, &c., . . . was more material than it would have been if the property had been permanent. . . . And, secondly, that the transaction did not appear on the face of it, or to the mortgagees, as a transaction which could possibly be necessary or proper for a due administration of the trusts;" and he argues, that, notwithstanding *Stroughill v. Anstey*, in the case of *freeholds of inheritance* charged with debts and legacies, and subjected to an imperative trust for conversion, the trustees would be authorized to mortgage, if the money were needed at once, and a sale at the particular time would be disadvantageous and inexpedient.

the testator in directing the sale, that his real estate should be absolutely converted; for in that case a mortgage will not be a proper execution of the trust, as the testator's intention would thus be frustrated.^(h)

But although there may be no specific direction for the sale of the estate, but only a trust to raise,⁽ⁱ⁾ or to pay the debts;^(k) or a devise subject to or charged with debts;^(l) (1) or the debts and legacies being first deducted;^(m)—in all these cases the trustees may properly raise the required amount by sale or mortgage, without waiting for a decree.¹ For such a disposition of the estate is necessary to the due

(h) *Haldenby v. Spofforth*, 1 Beav. 390; 1 Sugd. Pow. 538, 6th edition. & Eq. 557; 6 Exch. 222; *Stroughill v. Anstey*, 12 Engl. L. & Eq. 356.]

(i) *Wareham v. Brown*, 2 Vern. 154; (l) *Elliot v. Meryman*, 2 Atk. 41, and *Bateman v. Bateman*, 1 Atk. 421. Barn. 78, stated; 1 Keen, 573; *Walker v. Smallwood*, Ambl. 676; *Bailey v. Ekins*, 7 Ves. 323; *Dalton v. Hewen*, 6 Mad. 9; *Inchiquin v. French*, Ambl. 38; 1 Cox, 1. [*Doe v. Hughes*, 6 Exch. 231; 3 Engl. L. & Eq. 356.]

(k) *E. of Bath v. E. of Bradford*, 2 Ves. 590; *Ball v. Harris*, 8 Sim. 485; 4 M. & Cr. 266; *Barker v. D. of Devonshire*, 3 Mer. 310; *Shaw v. Borrer*, 1 Keen, 559; *Forbes v. Peacock*, 11 Sim. 152. [See the remarks on *Forbes v. Peacock*, in *Doe v. Hughes*, 3 Engl. L. (m) *Lewman v. Johnson*, 1 Vern. 45.

(1) A distinction appears to have been taken at one time between the effect of a *devise* in trust to pay debts, and a mere *charge* of the debts on the estate, with regard to the powers of the trustee to sell the property for the discharge of the debts. *Anon. Mosely*, 96; and see *Newell v. Ward*, Nels. 38, and *Freemoult v. Dedire*, 1 P. Wms. 430. This distinction, however, has been long since overturned. *Elliot v. Meryman*, 2 Atk. 41; *Walker v. Smallwood*, Ambl. 676; *Bailey v. Ekins*, 7 Ves. 323; see 2 Sugd. V. & P. 38, 9th edit. [*Mather v. Norton*, 8 Engl. L. & Eq. 255; but see *Doe v. Hughes*, 3 Engl. L. & Eq. 557; 6 Exch. 222.]

¹ As to when a power of sale will be implied on a trust for the payment of debts by deed, see ante, page 342. Where the purposes of the will cannot be accomplished without turning the estate into money, such power will be authorized. *Going v. Emory*, 16 Pick. 257; *Putnam Free School v. Fisher*, 30 Maine, 527. In *Conrad v. Conrad*, 6 Ohio, 114, a power of sale was implied on a devise of all the estate subject to legacies. So in *Schermerhorne v. Schermerhorne*, 6 J. C. R. 70, it was held that where executors were empowered to take possession of land devised, subject to a charge for maintenance, on failure of the devisee, &c., and to lease, or by any other means *out of the profits therefrom arising*, to support and maintain, &c., a sale to raise the sum was authorized. In *Mather v. Norton*, 16 Jurist, 309; 8 Engl. L. & Eq. 255, a testator, by his will, appointed, A., B. and C. to be his executors in trust to dispose of his property in the following way: He directed that all his just debts and funeral expenses be discharged by his executors, and the residue of his property, both real and personal, to be held for the sole benefit and use of maintaining and educating his children, until his youngest child arrived at the age of 21, when it was to be disposed of by his executors, and divided among his children, except his estate at M., which he gave to A. for life, and at A.'s death to be disposed of among his children. It was held that the executors had a power of sale over the whole estate, including M., and that it was not necessary to show that the debts were unpaid. The Vice-

execution of the trust. And in the case of a will, a sale, if intended, will be supported, however obscurely the intention may be expressed.(n)

But it seems, that if the testator expressly direct that the debts shall be raised by *the perception of the rents and profits*, this will restrain it to a payment out of the rents and profits only, and the court cannot decree a sale.(o) Although in an early case this distinction appears to have been disregarded, and a sale was directed, notwithstanding a very similar direction.(p) And a distinction has been taken where the trust is to raise by *annual* rents and profits, in which case *alone* it has been held that a sale is not authorized.(q)

The heir-at-law of the testator will be compelled to join in a sale by a devisee in trust for the payment of debts, if the trustee cannot pass the legal estate.(r) And we have seen that in the case of a *devise*, the heir ought to be made a party to a suit for the payment of the debts, though it is otherwise where the trust is created by *deed*.(s)¹

Where the real estate is devised to trustees for the payment of debts, *upon the insufficiency of the personal estate*, it is the established opinion of the profession, that a purchaser or mortgagee is not bound to inquire *whether the real estate is wanted or not,(t) although it may be otherwise where the estate is not *devised to* [*356] *the trustees*, but a mere *power of sale* is given to them upon the deficiency of the personalty.(u) If, however, the real estate be devised

(n) Warnford v. Thompson, 3 Ves. 513; 1 Sugd. Pow. 538. [Williams v. Otey, 8 Humph. 563.]

(o) Ridout v. E. of Plymouth, 2 Atk. 105; Carter v. Barnadiston, 1 P. Wms. 518; Lingard v. E. of Derby, 1 Bro. C. C. 311. [Munday v. Vawtier, 3 Gratt. 578; but see Schermerhorne v. Schermerhorne, 6 J. C. R. 73; Conkling v. Washington University, 2 Maryl. Ch. Dec. 505.]

(p) Berry v. Askham, 2 Vern. 26.

(q) Anon. 1 Vern. 104; and see this subject further considered, *post* [Trustees for Raising Portions, p. 364.]

(r) Fowle v. Green, 1 Ch. Ca. 262. [See the remarks on this case in 2 Spence's Eq. Jur. 368, note (b), and see Gosling v. Carter, 1 Coll. 651.]

(s) Haslewood v. Pope, 3 P. Wms. 323.

(t) Langley v. E. of Oxford, Amb. 797; Co. Litt. 290, b. Butl. note XIV.; 2 Sugd. V. & P. 47. [See, however, 14 Mass. 496; and *post*, 478, note.]

(u) Dike v. Ricks, Cro. Car. 335; Culpepper v. Aston, 2 Ch. Ca. 221; 2 Sugd. Pow. 497, 6th edition; 2 Sugd. V. & P. 48, 9th edition. [See Minott v. Prescott, 14 Mass. 496.]

Chancellor (Parker) remarked: "There was a charge of debts on the whole real estate, with a devise to them of the whole real estate, and the trustees had the power to dispose of it for the payment of debts." A mere implied charge of debts, &c., on land devised away or descended, will not authorize a sale by the executor. Dunn v. Keeling, 2 Dev. 284; Clark v. Riddle, 11 S. & R. 312; Den v. Allen, 1 Pennington, 45; Doe v. Hughes, 6 Exch. 222; 3 Engl. L. & Eq. 557; see the remarks in this case, on the *dictum* in Forbes v. Peacock, 12 Sim. 541.

¹ Story, Eq. Pl. §§ 163, 172, 176, 205. But see, now, the Rules in Equity of the Supreme Court of U. S. (XLIX., L.), and Pennsylvania (XLVII., VIII.)

to an *infant*, subject to the payment of debts in case of the deficiency of the personal estate, the court will not direct a sale of the devised estate without the Master's report, stating the existence of such a deficiency, although the deficiency may be admitted at the hearing of the cause.(x) The general liability of a purchaser to see to the application of the money in discharge of the debts, has been already considered, and for this purpose it is immaterial whether the trust be created by deed or will.(y) (1)¹

Where an express power of sale is conferred on the trustees for the purpose of raising the funds requisite for paying the debts, they are usually authorized to sell either by public auction or private contract. But in the absence of any such express authority, it is not essential that the sale should be made by public auction (although such will be the more advisable, as well as the more usual course), but a *bona fide* disposition by private contract will be equally proper.(z)² The decisions already alluded to, which establish the validity of a *mortgage* in lieu of an absolute sale, are impliedly authorities for this position. However, trustees who sell by private contract, will not be justified in insisting on any special or unusual conditions, which would be calculated to reduce the selling value of the estate.(a)

A will ordinarily speaks from the death of the testator; therefore, all the creditors of the testator at the time of his decease, will be entitled under a general devise in trust for payment of debts.(b) Although, if the testator have shown a clear intention to confine the trust to his creditors *at the time of making the will*, that intention will prevail, and no subsequent creditors will be suffered to take any benefit under the trust. For instance, where a testator devised his lands after debts paid, adding, "*my debts are only those contained*

(x) *Birch v. Glover*, 4 Mad. 376.

(a) *Wilkins v. Fry*, 1 Mer. 244, 268.

(y) *Ante*, Pl. I. of this Section; see *Shaw v. Borrer*, 1 Keen, 559; and *post*, Chap. III. of this Division, p. 363.

(b) *Brudenell v. Boughton*, 2 Atk. 274; *Sheddon v. Goodrich*, 8 Ves. 481; *Bridgman v. Dove*, 2 Atk. 201.

(z) *Vide post* [Powers of Sale], 480.

(1) It may be remarked, that after a bill filed by creditors for the administration of a testator's estate, a devisee in trust for the payment of debts cannot sell, except under the direction of the court. *Walker v. Smallwood*, Amb. 676; *vide post*, p. 548 [Effect of Suits by or against Trustees.]

¹ See *ante*, page 342, note; and *post*, 363, note. As to the liability of purchasers from executors of personalty, see *ante*, 166, note; and 11 Jur. pt. ii. 110, 124.

² See *post*, 480, and notes. In the case of a devise for the payment of debts, the trustee may, by his acknowledgment, extend the period of limitation of a debt, *Lord St. John v. Boughton*, 9 Sim. 219; *Toft v. Stephenson*, 9 Engl. L. & Eq. 86; and this applies as well to a substituted trustee, as to those named in the will. *Toft v. Stephenson*, *ut supra*.

in the schedule," and he afterwards contracted *fresh debts*; the lands were held to be liable only to the debts mentioned in the will.(c)

It has been already stated, that a devise or charge by will for the payment of debts out of real estate, will prevent the Statute of Limitations from running against such debts as are not barred by effluxion of time at the death of the testator.(d) It appears to have been once considered that a debt which had been *actually barred* by the statute, would be *revived* by a general devise or charge for payment of debts.(e) But this *doctrine has been long since [*357] exploded; and it is now settled that such a trust will only have the limited operation already stated.(f) It has been seen, that a trust by *will* for the payment of debts out of *personal* estate, has no legal operation. Such a trust, therefore, cannot prevent the operation of the statute on any debt.(g)

If an infant borrow money, and apply it in the purchase of necessities, and die after attaining his full age, having devised his real estate in trust for the payment of his debts, this is a debt which will be recognised in equity, so as to come within the operation of the trust.(h)

But where an estate is devised or descends to a testator, charged with an existing mortgage or other incumbrance, and by his will he charges his estate with the payment of his debts generally, the charge or incumbrance on the devised or descended estate is not the testator's debt in the contemplation of law, unless it has been expressly and personally adopted by him; and therefore it will not come within the operation of the trust.(i) The same rule also applies to a certain extent, where the testator has *purchased* an estate, subject to a mortgage or other incumbrance;(k) unless indeed an express personal contract was entered into by the testator, by which he rendered him-

(c) Loddington v. Kime, 3 Lev. 433.

(d) Ante, Pl. I. of this Section [341, and notes]; Fergus v. Gore, 1 Sch. & Lef. 107; Hargreaves v. Mitchell, 6 Mad. 326; Hughes v. Wynne, T. & R. 307; Crallan v. Oughton, 3 Beav. 1.

(e) Anon. 1 Salk. 154; Andrews v. Brown, Prec. Ch. 385; Gofton v. Mill, 2 Vern. 141; Vaughan v. Guy, Mose. 245.

(f) Burke v. Jones, 2 V. & B. 275; Piggott v. Jefferson, 12 Sim. 26 [p 341, and note; see 366, note 2.]

(g) Jones v. Scott, 4 Cl. & Fin. 398; Freake v. Cranefeldt, 3 M. & Cr. 499; Evans v. Tweedie, 1 Beav. 55 [ante, p. 344, note].

(h) Marlow v. Pitfield, 1 P. Wms. 559.

(i) Lawson v. Lawson, 3 Bro. P. C. 424; Lawson v. Hudson, 1 Bro. C. C. 58; Hamilton v. Woley, 2 Ves. Jun. 62; Earl of Tankerville v. Fawcett, 2 Bro. C. C. 57. [See notes to Ancaster v. Mayer, 1 Lead. Cas. Eq. 453, and cases cited; *contra* in New York, Rev. St. 749.]

(k) Woods v. Huntingford, 3 Ves. 128; Cornish v. Shaw, 1 Ch. Ca. 271; Pockley v. Pockley, 1 Vern. 36; Duke of Ancaster v. Mayer, 1 Bro. C. C. 454; [1 Lead. Cas. Eq. 455, and American notes; and see Mansell's Est., 1 Pars. Eq. 367.]

self personally liable for the debt.(l) Again, the trust for payment of debts will extend only to such debts *as are actually due and payable* at the time of the testator's death. For instance, where a testator had covenanted to pay a sum *six months after his death*, it was held by Sir J. Leach, that as no debt was actually incurred until the breach of the covenant, it did not actually come within a general trust for the payment of debts.(m)

And it seems, that debts not arising by contract, but by a misfeasance—as for an escape or breach of trust, or such as are contracted *mala fide*—do not come within a general provision for the payment of debts.(n)

A general charge of debts is the *primary* charge on the estate, in preference to other voluntary charges, unless there is something to indicate a contrary intention.(o)

With regard to the order of payment of debts under a trust created by will—it was never disputed, but that under a *devise* of lands to trustees for the payment of debts, the fund so raised was *equitable* assets,¹ consequently it is applicable in discharge of all the debts equally without priority, as well those by simple contract, as those by bond, or other specialty.(p) On this point, however, a distinction appears once to have obtained, between the effect of a *devise*, and a mere *charge* not breaking the descent; in which last case it was held, that the estate was applicable as *legal* assets in the hands [358] of the heir, and that the specialty *creditors were therefore entitled to a preference.(q) But this doctrine has been long since overruled, and it is now clearly settled that there is no difference between the operation of a devise and a charge; and in either case the fund so created will be equitable assets.(r) It has been already stated, that the recent statute (3 & 4 Will. IV. c. 104) does not affect the law on this subject.(s)

The earlier cases likewise established another distinction. For if the devisee in trust for the payment of debts were also made *exe-*

(l) *Earl of Oxford v. Rodney*, 14 Ves. 417; 2 Jarm. Pow. Dev. 675, 6.

(m) *Wathen v. Smith*, 4 Mad. 325. [*Contra*, *McFait's Appeal*, 8 Barr, 290.]

(n) *Lord Hollis v. Lady Carr*, 1 Vern. 431.

(o) *Harding v. Gray*, 1 Dr. & W. 430.

(p) *Woolstoncroft v. Long*, 1 Ch. Ca. 32; *Haslewood v. Pope*, 3 P. Wms. 323.

(q) *Freemoult v. Dedire*, 1 P. Wms. 430; see *Plunket v. Peunson*, 2 Atk. 293.

(r) *Hargrave v. Tindal*, 1 Bro. C. C. 136, n.; *Batson v. Lindegreen*, 2 Bro. C. C. 94; *Bailey v. Ekins*, 7 Ves. 322; *Shepherd v. Lutwidge*, 8 Ves. 26; *Inchiquin v. French*, 1 Cox, 1; *Price v. North*, 1 Phill. 85.

(s) *Supra*, 344, and see *Charlton v. Wright*, 12 Sim. 274.

¹ As to doctrine of Equitable Assets in the United States, see the able notes to *Silk v. Prime*, 2 Lead. Cases Eq. p. i, 252; *Sperry's Estate*, 1 Ashm. 347; *Benson v. Le Roy*, 4 J. C. R. 651; and other cases there cited.

utor, it was considered that the lands so devised then became *legal* assets in the hands of the executor, and that the debts were therefore to be paid according to their legal priorities.(t) However, this distinction also was very soon exploded as untenable, and has been expressly overruled by several of the more modern cases.(u)

In order to give full effect to this equitable doctrine the assets will be marshalled, if necessary, as between the different classes of creditors, in favor of those by simple contract.¹ And if the specialty creditors, availing themselves of their legal rights, have obtained partial satisfaction of their debts out of the personal estate, to the exclusion of the simple contract creditors, the former class of creditors will not be suffered to come upon the equitable fund, and receive further payment out of the real estate, until the simple contract creditors have been paid a similar proportion of their debts out of that fund.(x)

With regard to the order, in which the real estate is applicable in discharge of the debts—where any specific portion of the estate is expressly subjected to the payment of debts by the will, that part must first bear the burden, thrown upon it by the testator.(y) And where the debts are charged *generally* on the real estate, and a certain part of the estate is then *specifically devised* by the will, while the residue is unnoticed, and is suffered to descend to the heir, the debts must be raised *first* out of that portion, which is so suffered to descend,(z) whether it was acquired before or after the date of the will.(a) For the specific gift showed it to be the intention of the testator, that the devised estate should go undiminished to the devisee. Where lands are devised *subject to debts*, the whole of the devised estates will be liable to contribute equally towards their payment; and it is immaterial, whether the devise be specific, or con-

(t) Walker v. Meager, 2 P. Wms. 550; Girling v. Lee, 1 Vern. 63; Hawker v. Buckland, 2 Vern. 106; Greaves v. Powell, Id. 248; Clutterback v. Smith, Prec. Ch. 127; Bickham v. Freeman, Id. 136; Hixton v. Witham, 1 Ch. Ca. 248.

(u) Lewin v. Oakley, 2 Atk. 50; Silk v. Prime, 1 Bro. C. C. 138, n.; Newton v. Bennet, Id. 134.

(x) Haslewood v. Pope, 3 P. Wms. 323.

(y) Powis v. Corbet, 3 Atk. 556; 3 Ves. 116, n.; Tweedale v. Coventry, 1 Bro. C. C. 260; Donne v. Lewis, 2 Bro. C. C. 257; Cox v. Basset, 3 Ves. 155; Colville v. Middleton, 3 Beav. 570; Milnes v. Slater, 8 Ves. 295.

(z) Davies v. Topp, 2 Bro. C. C. 259, n.; Wride v. Clark. Id. 261, n.; Manning v. Spooner, 3 Ves. 117; Barnwell v. Cawdor, 3 Mad. 457.

(a) Milnes v. Slater, 8 Ves. 295.

¹ On the subject of the Marshalling of Assets, and of Contribution, see notes to Duke of Ancaster v. Mayer, 1 Lead. Cas. Eq. 455; to Aldrich v. Cooper, 2 Lead. Cases Eq. p. i. 193; and to Silk v. Prime, Id. 252, where the authorities are collected.

tained in a general and residuary clause; for every devise of land is in its nature specific.(b)

[*359] *A devisee in trust to pay debts, though himself a creditor of the testator, cannot give any preference to his own claim, but must come in *pari passu* with the other creditors.(c)¹

A trust by will for the payment of debts will not make simple contract debts bear interest.(d) Indeed it has been already seen that a similar trust, though by *deed*, will not have that effect.(e) Although at one time a contrary doctrine seems to have prevailed.(f) And though the direction be for the payment of the debts generally *and all interest thereof*, yet if there are debts bearing interest, to which that direction may be held to apply, it will be held to be confined to them.(g) The effect of such a direction, however, might be doubtful, if there were no debts, to which the direction as to interest could properly apply.

Where real estate is devised to trustees in trust to pay debts, any surplus of the estate, which may not be required for the purposes of the trust, will belong to the heir-at-law, if not otherwise specifically disposed of.(h) And an express direction for the sale of the lands for the payment of the debts will not operate as a conversion, so as to entitle the residuary legatee or next of kin to the exclusion of the heir.(i)

In this respect, however, an important distinction has been established between a devise *in trust to pay debts*, and a devise *charged with debts*. In the former case the devise is for a particular purpose, and nothing more, and as we have seen, a resulting trust arises

(b) Manning v. Spooner, 3 Ves. 117; see Hamilton v. Houghton, 2 Bligh, Harmood v. Oglander, 8 Ves. 125; Milnes v. Slater, 8 Ves. 303; see Spong v. Spong, 1 Y. & J. 300. 169.

(c) Child v. Stephens, 1 Eq. Ca. Abr. 141; S. C. 1 Vern. 102; Anon. 2 Ch. Ca. 54. (f) Carr v. Burlington, 1 P. Wms. 228.

(d) Lloyd v. Williams, 2 Atk. 110; Barwell v. Parker, 2 Ves. 343; Earl of Bath v. Earl of Bradford, Id. 587; Shirley v. Earl Ferrers, 1 Bro. C. C. 41; Stewart v. Noble, Vern. & Scriv. 528; Tait v. Lord Northwick, 4 Ves. 816. (g) Tait v. Lord Northwick, 4 Ves. 816; and see Hamilton v. Houghton, 2 Bligh, 187.

(h) Culpepper v. Aston, 3 Ch. Ca. 115; Maugham v. Mason, 1 V. & B. 410; King v. Denison, Id. 272; Halliday v. Hudson, 3 Ves. 210. [Ante, p. 119.]

(i) Culpepper v. Aston, 2 Ch. Ca. 115; Maugham v. Mason, 1 V. & B. 410.

¹ See ante, note 1 to page 343. But in Hosack v. Rogers, 6 Paige, 415, it was held that where a trustee for payment of debts was also executor, he was entitled, before the Revised Statutes, to retain for his own debt; and so in Hall v. Macdonald, 14 Sim. 1, the Vice Chancellor ruled in a similar case, that the trustee was entitled to retain out of the proceeds, and that his right was not prejudiced by the proceeds having been paid into court.

for the heir upon the satisfaction of that purpose. But the latter devise is held to pass the beneficial interest to the donee, subject to the particular purpose; and upon the satisfaction of that purpose the devisee will hold for his own benefit.^(k) This subject, however, has been already fully discussed in a previous part of this treatise.^(l)

III.—OF TRUSTEES FOR THE PAYMENT OF LEGACIES.

Where a testator has subjected his real estate to the payment of the legacies given by his will, the devisee or heir becomes a trustee for the payment of those charges.⁽¹⁾ And if the trust be created by express words, no question as to the liability of the real estate can arise. But where the trust depends upon an implication, arising from introductory or other general expressions, it is still to a certain extent an unsettled question, whether the same expressions, which we have seen to be sufficient *to charge the real estate with *debts*, will also be adequate to charge it with *legacies*. The [*360] distinction between debts and legacies appears to have been first taken by Lord Macclesfield in the case of *Davis v. Gardiner*.^(m) In that case a testator commenced his will thus, “as to all my worldly estate, I dispose of the same as follows, *after my debts and legacies paid*,” and having given several legacies, he gave the residue of his *personal* estate to his son *after all his legacies paid*, and then devised his real estate: and his Lordship held that the *legacies* were not charged on the real estate, although it seems, that *debts* would have been so charged, if the personalty had proved deficient.⁽ⁿ⁾ So, in *Kightley v. Kightley*,^(o) Lord Alvanley, M. R., considered that *legacies* were not charged on the real estate by a will, in which the testator commenced by directing all his legal debts, legacies, and funeral expenses to be fully paid; and after giving several legacies concluded with a general residuary gift of real and personal estate; although his Lordship had no doubt as to the *debts* being so charged. And the same learned judge on a subsequent occasion^(p) stated, that he still adhered to the opinion expressed in *Kightley v. Kightley*, notwithstanding the doubt as to its correctness, which had been thrown out by Lord Rosslyn in the case of *Williams v. Chitty*.^(q)

(k) *King v. Dennison*, 1 V. & B. 272.

(o) 2 Ves. jun. 328.

(l) Ante, p. 118, et seq.

(p) *Kneeling v. Brown*, 5 Ves. 362.

(m) 2 P. Wms. 187.

(q) 3 Ves. 551.

(n) See 2 P. Wms. 190.

(1) It is to be observed, that the payment of legacies out of *personal* estate is a duty cast by the law upon the executor, as we have already seen to be the case with regard to *debts*. Therefore a *trust* for the payment of legacies as of debts, within the scope of the present work, can only exist, where the payment is to be made out of *real estate*. See Pl. II. (2) of this Section.

The grounds of Lord Alvanley's opinion were, that the payment of debts is a duty morally obligatory on a testator, and that the court will consequently strive to give the fullest effect to any expressed intention of discharging that obligation; while the same principle does not apply to legacies, which are purely voluntary.^(r) However, the soundness of this distinction was expressly denied by Lord Rosslyn in the case of *Williams v. Chitty*;^(s) and in *Trot v. Vernon*,^(t) and in several other cases,^(u) no such distinction was observed. Moreover, the tendency of the observations of Lord Cottenham, C., in the recent case of *Mirehouse v. Scaife*,^(x) appears to be strongly against its validity.¹

But be this as it may, it is clearly settled that where a testator gives several legacies, and then without creating any express trust for their payment makes a general residuary disposition of the whole estate, *blending the realty and personalty together in one fund*, the real estate will be charged with the legacies; for in such a case the "residue" can only mean, what remains after satisfying the previous gifts.^(y)²

In some cases the use of the term "devise" in the gift of the legacies has been relied upon as evidence of the testator's intention, that they should be a charge on the real estate.^(z) And some stress has also been laid upon the fact of the *heir-at-law* being appointed

(r) See *Kightley v. Kightley*, 2 Ves. jun. 331.

(s) 3 Ves. 551.

(t) Prec. Ch. 430; S. C. 1 Vern. 708.

(u) *Tompkins v. Tompkins*, Prec. Ch. 397; *Elliot v. Hancock*, 2 Vern. 143; *Lypet v. Carter*, 1 Ves. 499; *Ellison v. Airey*, 2 Ves. 568.

(x) 2 M. & Cr. 708. [See *Paterson v. Scott*, 9 Eng. L. & Eq. 264.]

(y) *Ambrey v. Middleton*, 2 Eq. C. Abr. 479; *Hassel v. Hassel*, 2 Dick. 526; *Brudenell v. Boughton*, 2 Atk. 268; *Bench v. Belis*, 4 Mad. 187; *Cole v. Turner*, 4 Russ. 376; *Mirehouse v. Scaife*, 2 M. & Cr. 695, 707, 8; see *Edgell v. Haywood*, 3 Atk. 358; *Kidney v. Coussmaker*, 1 Ves. jun. 436.

(z) *Trott v. Vernon*, 1 Vern. 708; *Hassel v. Hassel*, 2 Dick. 526.

¹ Whether legacies are charged on lands, depends on the intention of the testator, to be gathered from the will. *Lupton v. Lupton*, 2 J. C. R. 618; *Paxton v. Potts*, 2 Green's Ch. 313; *Harris v. Fly*, 7 Paige, 421; *Logan v. Deshay*, 1 Clark, 209; *Gridley v. Andrews*, 8 Conn. 1; *Brandt's Appeal*, 8 Watts. 198; *Montgomery v. McElroy*, 3 W. & S. 378; *Wright's Appeal*, 14 Penn. St. R. 258; *Simmons v. Drury*, 2 G. & J. 32; *Stevens v. Gregg*, 10 G. & J. 143; *Hoes v. Van Hoesen*, 1 Comst. 122; see the notes to *Duke of Ancaster v. Mayer*, 1 Lead. Cas. Eq. 452; *Ripple v. Ripple*, 1 Rawle, 386.

² *Nichols v. Postlethwaite*, 2 Dall. 131; *Hasenclever v. Tucker*, 2 Binn. 525; *Whitman v. Norton*, 6 Binn. 395; *McLanahan v. Wyant*, 1 Penn. R. 111; *Adams v. Brackett*, 5 Metc. 280; *Van Winkle v. Van Houten*, 2 Green Ch. 172; *Downman v. Rust*, 6 Rand. 587; but see contra, *Lupton v. Lupton*, 2 J. C. R. 618; *Stevens v. Gregg*, 10 G. & J. 143; *Gridley v. Andrews*, 8 Conn. 1. In *Paxson v. Potts' Admin'rs*, 2 Green, Ch. 320, it was said that this rule only applied where there was no previous specific devise of the real estate.

residuary legatee and *devisee and executor,(a) and the legacy being a provision for a child of the testator has also [*361] been taken into consideration.(b)

Indeed, the question whether the legacies are or are not charged on the real estate, is always one of intention, to be gathered from the whole will.(c) But the intention of the testator must be collected solely from the will itself; and although extrinsic evidence appears to have been formerly admitted for this purpose,(d) that practice is now altered.(e)

Where a testator has charged his real estate *generally* with legacies, it has been held that legacies given by an unattested codicil, will be included in the charge;(f) and the legacies so charged may also be altered or revoked by an unattested codicil.(g) However, this doctrine, though clearly established to this extent, has not been regarded with favor by the courts, which have evinced a disposition not to extend it any farther;(h) and in endeavoring to escape from its application, they appear to have drawn some very nice and refined distinctions.

Thus it is settled that a testator cannot by his will reserve a power to charge his real estates with legacies by an unattested codicil, although, if the charge be well created by the will itself, the gift of the legacies by such a codicil will be supported.(i) And where the charge is not *general*, but only of some *particular* legacies, as of such legacies as are "*hereby*" or "*hereinafter*" given or "*above mentioned*;" those given by an unattested codicil will not be included.(k) And if the land form the *primary fund* for the payment of the legacies, they cannot be altered or revoked, except by a tes-

(a) *Awbrey v. Middleton*, 2 Eq. Ca. Abr. 497; *Alcock v. Sparhawk*, 2 Vern. 228. [See *Downman v. Rees*, 6 Rand. 587; *Van Winkle v. Van Houten*, 2 Green, Ch. 191; but see *Paxson v. Potts' Adm. Id.* 322.]

(b) *Lypet v. Carter*, 1 Ves. 499. [See *Van Winkle v. Van Houten*, 2 Green, Ch. 172.]

(c) *Jones v. Selby*, Prec. Ch. 288; *Miles v. Leigh*, 1 Atk. 574; see *Webb v. Webb*, Barn. 86; *Austen v. Halsey*, 6 Ves. 475; *Minor v. Wicksteed*, 3 Bro. C. C. 627; *Trent v. Trent*, 1 Dow. 102; [ante, 360, note 1.]

(d) *Pawlet v. Parry*, Prec. Ch. 450, 1; *Minor v. Wicksteed*, 3 Bro. C. C. 627.

(e) See 1 *Rop. Legs.* 579, 3d edition. [See, however, *Van Winkle v. Van Houten*, 2 Green, Ch. 191.]

(f) *Hide v. Hide*, 1 Eq. Cas. Abr. 409; *Masters v. Masters*, 1 P. Wms. 421; *Harris v. Packer*, Ambl. 556; *Harbergham v. Vincent*, 4 Bro. C. C. 353; S. C. 2 Ves. jun. 204; *Swift v. Nash*, 2 Keen, 20.

(g) *Brudenell v. Boughton*, 2 Atk. 168; *Att.-Gen. v. Ward*, 3 Ves. 327; but see *Mortimer v. West*, 2 Sim. 274.

(h) See *Wilkinson v. Adam*, 1 V. & B. 446; *Hooper v. Goodwin*, 13 Ves. 167; *Whytall v. Kay*, 2 M. & K. 769; [ante, 64, and note.]

(i) *Rose v. Cunninghame*, 12 Ves. 29; *Whytall v. Kay*, 2 M. & K. 765.

(k) *Masters v. Masters*, 1 P. Wms. 421; *Bonner v. Bonner*, 13 Ves. 379; *Hooper v. Goodwin*, 18 Ves. 156; *Strong v. Ingram*, 6 Sim. 197; *Radburn v. Jervis*, 3 Beav. 450.

tamentary instrument duly executed according to the statute;(l) still less can any new charges be created by any other means.(m) And it was held in a recent case(n) by Lord Langdale, M. R., that where a testator had given a legacy out of a mixed fund, constituted of both real and personal estate, so that the personalty would not have been *primarily* applicable to its payment, but each fund would have borne its proportion of the amount, a revocation of the legacy by an unattested codicil, though good as to the proportion payable out of the personal estate, was invalid as to so much as was payable out of the produce of the realty.(n)

Even where the legacies are charged on the land only *in aid of the personal estate*, it has been decided, that a subsequent testamentary paper, insufficiently attested, will not operate as an implied [*362] revocation of the **charge on the real estate.*(o) And it will be immaterial that the paper contains an express clause revoking the previous disposition, if the legacy itself be not specifically revoked.(p) It is to be observed, that the present question is wholly independent of those cases, in which a testator, by referring in his will to an unattested paper, has been held to have incorporated the informal instrument into his will.(q) The provisions of the recent Will Act (1 Vict. c. 26), have not affected the law on this question.

A codicil, duly attested, is considered as part of the will; and where legacies are charged generally by the *will* on the real estate, legacies given by such a *codicil* will be included in the charge, unless a contrary intention appear by the will.(r)

Where there is a general direction for the payment of *legacies*, by the *executor*, the same rule of construction obtains, as in the case of a similar charge of debts:(s) and the presumption is, that the payment was intended to be made by the executor out of the *personal assets only.*(t) But where the executor is *also made devisee of the real estate*, the same reasoning, which has been held to support a charge of *debts* upon the devised estate, would apply with equal force in favor of the charge of *legacies*;(u) although this distinction appears

(l) *Brudenell v. Boughton*, 2 Atk. 272; *Att.-Gen. v. Ward*, 3 Ves. 331; *Hooper v. Goodwin*, 18 Ves. 167.

(m) 1 Rep. Legs. 590, 3d ed.

(n) *Stocker v. Harbin*, 3 Beav. 479.

(o) *Buckeridge v. Ingram*, 2 Ves. jun. 652; *Hooper v. Goodwin*, 18 Ves. 156.

(p) *Sheddon v. Goodrich*, 8 Ves. 500; *Gallini v. Noble*, 3 Mer. 691; *Francis v. Collier*, 4 Russ. 331; and see *Mortimer v. West*, 2 Sim. 264, where an express revocation of the legacy was held to be inoperative as to the real estate.

(q) See *Habergham v. Vincent*, 2

Ves. jun. 228, 232; *Smart v. Prujean*, 6 Ves. 560; *Wilkinson v. Adam*, 1 V. & B. 460.

(r) *Rooke v. Worrall*, 11 Sim. 216; see *Strong v. Ingram*, 6 Sim. 197.

(s) Ante, Pl. II. (2) of this Section.

(t) *Parker v. Fearnley*, 2 S. & St. 592; *Warren v. Davies*, 2 M. & K. 49.

(u) *Elliot v. Hancock*, 2 Vern. 143; *Alcock v. Sparhawk*, 2 Vern. 228. [See *Downman v. Rust*, 6 Rand. 587; *Van Winkle v. Van Houten*, 2 Green Ch. 172; but see *Paxson v. Potts*, Id. 313.

to have been disregarded by Sir John Leach, V. C., in a modern case.^(x)

It may be observed, that legacies and *annuities* given by a will, have been universally treated as on the same footing.^(y)

The legal effect of a general charge of legacies on the real estate is merely to create a fund in aid of the personalty:^(z) therefore, as in the case of debts, the personal estate must first be applied, unless a contrary intention be declared, or sufficiently appear upon the face of the will; and the authorities that have been already cited and discussed on this subject with regard to the payment of *debts*, apply with equal force to *legacies*, and to them the reader is referred.^(a)

However, a general charge of *legacies*, as such must be carefully distinguished from a devise of land subjected to the payment of a *specific sum of money*: for in this last case, the only gift of the sum is contained in the direction that it should come out of the land.

Consequently the produce of the real estate will be the fund, to which recourse must be had *exclusively* for its payment.^(b) And in this respect, *debts and legacies are on a very different footing, for, as has been already seen, a trust to pay a particular [*363] specified debt out of the real estate, will not of itself exonerate the personalty from its liability.^(c) The difference between them is, that the liability to the *legacy* is created only by the will, while the *debt* is a charge on the personal estate, independently of any direction in the will.^(d)

It occasionally happens, that some legacies are charged on the land to the exclusion of the others. Thus in *Home v. Medcraft*,^(e) the testator devised lands subject to debts, and all legacies *thereafter mentioned*; and he then proceeded to give several legacies, all of which he directed to be paid by the devisee. He then devised the

(x) *Parker v. Fearnley*, 2 S. & St. 592.

(y) *Alcock v. Sparhawk*, 2 Vern. 228; *Buckeridge v. Ingram*, 2 Ves. jun. 351; *Nannock v. Horton*, 7 Ves. 391; *Swift v. Nash*, 2 Keen, 20; *Page v. Adam*, 4 Beav. 269; *Creed v. Creed*, 1 Dr. & W. 416, 424. [*Paterson v. Scott*, 9 Engl. L. & Eq. 261; *Hawley v. James*, 5 Paige, 618; *Trent v. Trent*, Gilmer, 174.]

(z) *Amesbury v. Brown*, 1 Ves. 482; *Holford v. Wood*, 4 Ves. 76, 89.

(a) Ante, Pl. II. (2) of this Section; [notes to *Ancaster v. Mayer*, ut supra.]

(b) *Whaley v. Cox*, 2 Eq. Ca. Abr. 549; *Phipps v. Annesley*, 2 Atk. 57; *Amesbury v. Brown*, 1 Ves. 482; *Wood v. Dudley*, 2 Bro. C. C. 316; *Read v.*

Lichfield, 3 Ves. 479; *Spurway v. Glyn*, 9 Ves. 483; *Noel v. Lord Henley*, 7 Price, 241; sed vide *Holford v. Wood*, 4 Ves. 89, and *Fowler v. Willoughby*, 2 S. & St. 354; see *Gittins v. Steel*, 1 Swanst. 24. [See *Hoover v. Hoover*, 5 Barr, 351; *Holliday v. Sommerville*, 3 Penna. R. 533.]

(c) Ante, Pl. II. (2) of this Section; *Bickham v. Cruttwell*, 3 M. & Cr. 763.

(d) See *Noel v. Lord Henley*, 7 Pri. 241; 2 Jarm. Pow. Dev. 708.

(e) *Home v. Medcraft*, 1 Bro. C. C. 261; and see *Masters v. Masters*, 1 P. Wms. 421; *Strong v. Ingram*, 6 Sim. 197; *Radburn v. Jervis*, 3 Beav. 450; but see *Rooke v. Worrall*, 11 Sim. 216.

same lands to another person, subject to all the legacies *before mentioned*; and finally disposed of the residue of his real estate, and he then gave some *other* legacies. It was held by Lord Thurlow, that these last legacies were not payable out of the real estate.(e)

Where legacies are charged on the land, the trustees will take the same powers of raising the required amount by sale or mortgage, as where the trust is for the payment of debts; and it is unnecessary to add anything here, to what has been already said on that subject.(f) It is to be observed, however, that a charge of legacies being certain in its amount, a purchaser from a trustee for their payment prior to the late act 7 & 8 Vict. c. 76,(g) would have been bound to see to the due application of the purchase-money to the purposes of the trust;(h) unless he were expressly exempted from that liability by the terms of the will.(i) But if the estate were charged generally with *debts*, as well as with *legacies*, then he would not have been bound to see to the application; for that would involve him in the account of the debts, which must be first paid.(k) And the same rule prevailed where the land was subjected to *annuities*, after a general charge of debts.(l)(1)¹

(e) *Home v. Medcraft*, 1 Bro. C. C. 261; and see *Masters v. Masters*, 1 P. Wms. 421; *Strong v. Ingram*, 6 Sim. 197; *Radburn v. Jervis*, 3 Beav. 450; but see *Rooke v. Worrall*, 11 Sim. 216.

(i) See *Binks v. Lord Rokeby*, 2 Mad. 239.

(f) Ante, Pl. II. (2) of this Section.

(g) The 10th section of that act, and the extent to which it has altered the law on this subject, has been already stated, ante, Pl. II. (1) of this Section; and see post, Ch. III. of this Division.

(h) *Smith v. Gwyon*, 1 Bro. C. C. 186; *Horn v. Horn*, 2 S. & St. 448; 2 Sugd.V.

(k) *Rogers v. Skillicome*, Aml. 188; *Williamson v. Curtis*, 3 Bro. C. C. 96; *Barker v. Duke of Devonshire*, 3 Mer. 310; *Johnson v. Kennett*, 3 M. & K. 630; *Eland v. Eland*, 1 Beav. 235, and 4 M. & Cr. 421. [*Andrews v. Sparhawk*, 13 Pick. 393; *Strowghill v. Anstey*, 12 Eng. L. & Eq. 365.]

(l) *Page v. Adam*, 4 Beav. 269; [see 12 Eng. L. & Eq. 367.]

(1) But where the nature of the transaction between the trustee for the payment of debts and legacies and the purchaser, afforded in itself sufficient evidence that the purchaser was aware that the sale was not made for the payment of the debts, it has been held, that he would take subject to the charge of legacies. *Watkin v. Cheek*, 2 S. & St. 199; *Johnson v. Kennett*, 6 Sim. 384; S. C. 3 M. & K. 631; and see *Eland v. Eland*, 4 M. & Cr. 427; *Forbes v. Peacock*, 12 Sim. 528 [overruled in 1 Phill. 721]; see vide *Page v. Adam*, 4 Beav. 269; vide post, Ch. III. of this Division. [See *Stroughill v. Anstey*, 12 Eng. L. & Eq. 365, upon these cases, and that it is immaterial whether there were debts in fact or not; and *Mather v. Norton*, 8 Eng. L. & Eq. 255. See post, 506, and note.]

¹ See ante, note to page 342. In *Downman v. Rust*, 6 Rand. 587, it was held, that a purchaser from assignees for creditors of a devisee of land charged with legacies, was bound to see to the application of the money. It has been doubted whether, under a devise for the payment of legacies simply, in this country, where debts are always on a lien on the land, the purchaser would be held liable. Note to *Elliott v. Merryman*, 1 Lead. Cas. Eq. 75. But on a devise charged

As the legatees all take as volunteers by the bounty of the testator, it is of course competent for him to direct, that any one or more of them shall have a priority in payment over the others. In the absence of any such *direction, the real fund must be applied [*364] equally and proportionably in or towards the satisfaction of all the legacies charged on it.

If, however, the testator have expressly exempted any part of his estate from the effect of a general charge of legacies, that direction must be observed, and the donee of that part of the estate will take it relieved from the charge.(*n*)

(*m*) *Birmingham v. Kirwin*, 2 Sch. & Lef. 448.

with a specific sum, the purchaser undoubtedly takes subject to the legacy; *Bugbee v. Sargent*, 23 Maine, 269; *Kemp v. McPherson*, 7 H. & J. 320; *Leavitt v. Wooster*, 14 N. H. 550; *Long v. Long*, 1 Watts, 267; *Mohler's Appeal*, 8 Barr, 28; see *Swazey v. Little*, 7 Pick. 296; and yet lands so devised are subject to the general lien of the testator's debts. *Hoover v. Hoover*, 5 Barr, 351. Where the purchase-money is expressly to remain in the hands of the trustees, as for the purpose of applying the income for the benefit of legatees, or the like, the purchaser is plainly not liable; for otherwise, he would be compelled to guarantee the trustees' solvency. *Hauser v. Shore*, 5 Ired. Eq. 357. In *Stroughill v. Anstey*, 12 Eng. L. & Eq. 357, it was said by the Chancellor, that the rule that a purchaser was not liable to see to the application of the purchase-money where a trustee is selling an estate charged by will with debts and legacies, does not depend on the existence of debts, but upon an implied declaration of the testator, that he means to intrust his trustees with the exclusive power of receiving the money, and of absolving the purchaser or mortgagee from seeing to the application of it; and this power does not cease from there being no debts. It was also held in this case, in which the authorities were fully discussed, that persons dealing with trustees, at a considerable distance of time, without an apparent reason for raising money, are under some obligation to inquire into the *bona fides* of the trustees, where the latter are merely trustees, and not entitled to the estate. See, also, *Mather v. Norton*, 8 Eng. L. & Eq. 255.

In a recent number of the *Jurist* (17 Jur. pt. ii. 251), however, the positions of Lord St. Leonards in *Stroughill v. Anstey*, were disapproved of by an able writer, who asserts, that prior to that case, and *Forbes v. Peacock*, 1 Phill. 717, the rule that where there is a charge of debts the purchaser is absolved from seeing to the application of the money, was considered to be founded, not on the supposed intention of the testator, but on the necessity of the case, "because it would be impossible to satisfy a purchaser, if he had the right to be satisfied, on that point."

A purchaser is not liable, also, where there is a trust for reinvestment, or the application is to be at a distant time. *Coonrod v. Coonrod*, 6 Hamm. 114; *Wormley v. Wormley*, 8 Wheat. 421. See upon this subject the articles in 11 *Jurist*. pt. ii. pages 110, 124; and as to the liability of purchasers of personalty from executors, ante, p. 166, and note.

In Pennsylvania, under the Act of 1834, on sale by an executor or administrator under a power in the will, for any purpose, the purchaser may pay the money into the Orphans' Court, &c., and be thereby discharged from responsibility for its application. (*Dunlop*, Dig. 520.) See *Cadbury v. Duval*, 10 Barr, 265.

Where some legacies are charged on the land, and others are not, the legatees, who have the two funds to resort to, will not be suffered to exhaust the personal estate to the disappointment of those who have only that fund; but equity will marshal the assets in favor of the last class of legatees.⁽ⁿ⁾¹ There is an exception to this rule, indeed, in the case of legacies to charities, in whose favor the assets cannot be marshalled; as that would, in effect, be creating an interest in land in violation of the Statute of Mortmain.^(o)⁽¹⁾

Where an executor, who is also appointed the trustee for the investment and application of legacies, has set apart and invested the legacies, he will be considered to have divested himself of the character of executor *quoad* those legacies, and to have assumed that of trustee. Consequently, if the trust fund be afterwards lost, the legatees will have no further claim on the testator's estate; and as between themselves the loss must be borne in equal proportions by all the legatees, whether they take by particular or residuary gift.^(p)

(n) *Hanby v. Roberts*, Ambl. 127; [see *Wright v. Trustees, &c.* 1 Hoffm. Masters v. Masters, 1 P. Wms. 421; Ch. 202].
Bligh v. Earl of Darnley, 2 P. Wms. 619;
Bonner v. Bonner, 13 Ves. 379.

(o) *Mogg v. Hodges*, 2 Ves. 52; *Hobson v. Blackburn*, 1 Keen, 273; *Williams v. Kershaw*, Id. 274, n.; *Philanthropic Society v. Kemp*, 4 Beav. 581
 (p) *Page v. Leapingwell*, 18 Ves. 463; *Ex parte Chadwin*, 3 Sw. 380; *Byrchall v. Bradford*, 6 Mad. 13, 235; *Philippo v. Munnings*, 2 M. & Cr. 309; *Wilmot v. Jenkins*, 1 Beav. 401; *Newman v. Williams*, 10 Law Journ. N. S., Chanc. 106; [ante, 237.]

(1) It has been decided, that where a testator creates a general mixed fund of real and personal estate, and then gives several legacies, some of which are for charitable purposes, but adds a declaration, that the charity legacies are to be charged exclusively on the personal estate, this direction will not of itself operate to throw the charity legacies exclusively on the personal assets, but the real fund will still remain liable to its proportion of those legacies, and there will consequently be a lapse to that extent. *Sturge v. Dimsdale*, 6 Beav. 462; see *Philanthropic Society v. Kemp*, 4 Beav. 581.

¹ Though in general there is no marshalling in favor of legatees and annuitants, as against devisees, yet where the lands devised are expressly made subject to all debts, or are devised to be sold therefor, the former are entitled to stand in the place of the creditors as against the devisee. *Paterson v. Scott*, 9 Eng. L. & Eq. 261, before Lord Justices of Appeal, overruling *Morehouse v. Scaife*, 2 Myl. & Cr. 695; see *Smith v. Wyckoff*, 11 Paige, 39; *Mollan v. Griffith*, 3 Paige, 402; *Loomis's Appeal*, 10 Barr, 390; *Bardwall v. Bardwall*, 10 Pick. 19; but see *Milner v. Haswell*, 3 Murph. 194; and *vide* on this subject notes to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 222, &c., and the cases there cited; and 14 Jur. pt. ii. 234. But the general charge of debts implied by law in this country, will not entitle legatees to contribution from devisees. *Hoover v. Hoover*, 5 Barr, 351. The doctrine in England now is, that legatees, and devisees, being equally objects of the testator's bounty, are entitled to equal consideration. See *Tombs v. Roch*, 2 Coll. 494.

As a general rule, legacies charged on land will bear interest from the time of payment fixed by the testator. And if no time of payment be fixed, then the interest will commence from the expiration of a twelvemonth after the testator's death.¹ The interest allowed by the court is usually at the rate of four per cent. It is almost needless to add, however, that the general rules on these points may be varied or controlled by the intention of the testator, expressed or necessarily implied from the will.(q)

IV.—OF TRUSTEES FOR RAISING PORTIONS.

In settlements of property, whether by deed or will, provisions are very generally contained for raising portions for the children; and a term of years is usually carved out of the estate, and limited to trustees to secure the payment of these charges.²

Charges of this description are in their nature real, and although there *be a covenant in the settlement on the part of the settlor to pay the amount, yet that will usually be considered [*365] as *auxiliary* only, and the land will, notwithstanding, be *primarily* liable.(r) It follows, therefore, that where the trust is created by will, or where there is no covenant in the settlement for the payment of the portion, no debt will be created which can be enforced against the settlor or his personal assets.(s)

In these cases the term for securing the portions is usually limited to the trustees, in remainder expectant upon the determination of the parent's life estate, while the period fixed for the payment of the portions may, and frequently does, happen in the lifetime of the parent. Under those circumstances a doubt has very frequently arisen in practice (where the event is not expressly provided for in declaring the trust), whether the portions are to be raised *immediately* on the arrival of the period of payment by the sale or mortgage of the *expectant* term, or whether the raising of the money should be postponed until the term takes effect *in possession* by the determination of the previous life-estate. The decisions on this subject are by no means uniform. In some of them the portions have been held to

(q) See 2 Rop. Legs. 222, et seq. 3d ed.

(s) Edwards v. Freeman, 2 P. Wms. 437; Burgoyne v. Fox, 1 Atk. 576.

(r) Lanoy v. Duke of Athol, 2 Atk. 444; Lechmere v. Charlton, 15 Ves. 193.

¹ See as to the United States, 2 Kent Comm. 417, note (a); Glen v. Fisher, 6 J. C. R. 33; Birdsall v. Hewitt, 1 Paige, 32; Trippe v. Frazier, 4 H. & J. 446; Hite v. Hite, 2 Rand. 409; and post p. 376.

² See Hawley v. James, 5 Paige, 318; Morehouse v. Colvin, 9 Eng. L. & Eq. 136; S. C. 13 Id. 167; De Beil v. Thompson, 3 Beav. 469; 12 Cl. & F. 45; Sugd. Law of Prop. 53; Jones v. Maggs, 10 Eng. L. & Eq. 161; 2 Spence Eq. Jur. 390.

be raiseable in the parent's lifetime ;(t) whilst in others it has been decided, that the children are not entitled until the parent's death.(u) It was said by Lord Talbot, and the words were adopted by Lord Eldon, that "the raising or not raising must depend upon the particular penning of the trust, and the intention of the instrument."(x) And the court in construing the instrument will not be eager to lay hold of circumstances, but will hold an equal mind.(y) Although it was laid down in some earlier cases, that very small grounds would be sufficient to induce the court to decide against the raising of the money before the term vested in possession.(z)

As a general rule, where portions secured by a term of years are made payable at a particular time, or on a particular event, as at twenty-one, or marriage, and the contingencies have happened, and there is nothing in the instrument to indicate a contrary intention, the portions must be raised by the immediate mortgage or sale of the term, though it be reversionary.(a)

But it is scarcely necessary to add, that if there be any expressions tantamount to a direction, that the portions shall be raised only when the term takes effect in possession, such an expression of the intention will prevail ; and where the trust was to raise the portions *from and after the commencement* of the term, that has been held [*366] sufficient for this purpose.(b) *And so if the parents have a general power of appointing the portions amongst the children by deed or will in such portions and manner and at such times as they may choose ; that will be considered plain evidence of an intention, that the money should not be raised in the lifetime of the parents.(c)

The intention must be collected solely from the context of the instrument itself, and any extraneous evidence is inadmissible.(d)

To prevent any question on this point, a direction is now usually

(t) *Hillier v. Jones*, 1 Eq. Ca. Abr. 337 ; *Gerrard v. Gerrard*, 2 Vern. 458 ; *Staniforth v. Staniforth*, Id. 460 ; *Sandys v. Sandys*, 1 P. Wms. 707 ; *Hall v. Carter*, 2 Atk. 354 ; *Hebblethwaite v. Cartwright*, Forr. 30 ; *Smith v. Evans*, Ambl. 533 ; *Codrington v. Foley*, 6 Ves. 364 ; *Smith v. Foley*, 3 Y. & C. 142 ; *Michell v. Michell*, 4 Beav. 549.

(u) *Reresby v. Newland*, 2 P. Wms. 94 ; S. C. 6 Bro. P. C. 75 ; *Brome v. Berkely*, Id. 484 ; *Stanley v. Stanley*, 1 Atk. 549 ; *Corbet v. Maydwell*, 2 Vern. 640 ; sed vide S. C. P. 656 ; *Stevens v. Dethick*, 3 Atk. 39 ; *Conway v. Conway*, 3 Bro. C. C. 267 ; sed vide Lord Eldon's observations, 6 Ves. 379 ; *Clinton v. Sey-*

mour, 4 Ves. 440 ; *Wynter v. Bold*, 1 S. & St. 507 ; *Verney v. Verney*, 2 Ed. 25.

(x) *Hebblethwaite v. Cartwright*, Forr. 32 ; *Codrington v. Foley*, 6 Ves. 379.

(y) 6 Ves. 380.

(z) *Stanley v. Stanley*, 1 Atk. 549 ; *Clinton v. Seymour*, 4 Ves. 460.

(a) *Codrington v. Foley*, 6 Ves. 380.

(b) *Butler v. Duncomb*, 1 P. Wms. 448.

(c) *Wynter v. Bold*, 1 S. & St. 507 ; but see *Gough v. Andrews*, 1 Coll. 69, where the existence of such a power in the parents was held by V. C. K. Bruce not to have the effect stated in the text.

(d) *Corbet v. Maydwell*, 2 Vern. 641.

inserted, that the portions shall not be raised in the lifetime of the parents: (e) and in all well-drawn instruments, this direction should go on to specify, whether the portions shall be raised in case any of the children should die after the happening of the contingency on which the portion is given, but before the time when it is made payable: as, for instance, where the trust of portions is for younger children at twenty-one or marriage, but not to be raised or paid until after the death of the parents; and a child attains twenty-one or marries, *but dies afterwards in the parents' lifetime*. Unless this event is provided for, when the time arrives for the payment of the portions, a question will undoubtedly arise, whether the representatives of the deceased child are entitled, and this question has been a very fruitful source of litigation from an early period. In such cases, however, the usual construction, and the one which the court will strive to adopt (f) is, that the child took a *vested* interest in the portion, and that the period of payment only was postponed; and the personal representatives of the child will therefore be entitled when the time for raising the money has arrived. (g)

But the court, in favor of such a construction will not go the length of doing violence to the express words of the instrument; and if it be manifest on the face of the settlement, that no child was intended to take except in the event of its surviving the parents, the intention so expressed will prevail. (h)

Where portions are effectually charged on the land, the trustees will usually take a power of selling or mortgaging for the purpose of raising them; although that power is not expressly given them by the terms of the instrument. For this is the most convenient mode of carrying out the intentions of the parties, to which the court will always strive to give effect. (i)

And though the trust is to raise the portions by means of the *rents and profits*; yet, if a *particular time* be fixed for the payment of the whole amount, that will be considered inconsistent with the intention

(e) See *Hall v. Carter*, 2 Atk. 356.

(f) *Howgrave v. Cartier*, 3 V. & B. 86; *Whatford v. Moore*, 2 M. & Cr. 291; *Clayton v. Earl of Glengall*, 1 Dr. & W. 1, 15.

(g) *Emperor v. Rolfe*, 1 Ves. 208; *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569; *Hope v. Lord Clifden*, 6 Ves. 499; *Powis v. Burdett*, 9 Ves. 428; *King v. Hake*, 9 Ves. 438; *Howgrave v. Cartier*, 3 V. & B. 79; *S. C. Coop.* 66; *Fry v. Lord Shelbourne*, 3 Sim. 243; *Combe v. Combe*, 2 Atk. 185; *Clayton*

v. Earl of Glengall, 1 Dr. & W. 15. [See *Evans v. Scott*, 11 Jur. 292; 1 Cl. & F. (N.S.) 57; *Jones v. Jones*, 13 Sim. 568; *Henderson v. Kennicott*, 12 Jur. 848.]

(h) *Hotchkin v. Humfrey*, 2 Mad. 65; *Fitzgerald v. Field*, 1 Russ. 430; *Whatford v. Moore*, 7 Sim. 574; *S. C.* 3 M. & Cr. 274.

(i) *Backhouse v. Middleton*, 1 Ch. Ca. 175; *Meynel v. Massey*, 2 Vern. 1; *Sheldon v. Dormer*, Id. 310; *Ashton v.* —, 10 Mod. 401.

[*367] that the *sum should be raised only by the gradual perception of the *annual* income, and a sale will be directed.(k) And the same doctrine will prevail, where the trust is, to raise the portions "as soon as conveniently may be," or, "as soon as possible."(l) Indeed, in several cases, a trust, to raise a gross sum by "*rents and profits*," without anything more, has been held to authorize a sale or mortgage by the trustees;(m) if there be no further indication of an intention to restrict the meaning of the term to the "*annual*" rents and profits.(n)

However, it is clearly competent for the settlor to prescribe that the portions shall be raised out of the yearly income only, and not out of the *corpus* of the estate. And therefore, if the direction be to raise the sum out of the "*annual*" rents and profits,(o) or if the intention, so to confine the trust, be otherwise sufficiently manifest, a sale or mortgage by the trustees cannot be supported.(p)¹

Where the *rents and profits* are expressly subjected to the payment of the portions, although the trust might authorize a *sale or mortgage* if required, it is notwithstanding the duty of the trustees, *in the first place*, to apply any of the rents which may have accrued towards the satisfaction of the portions;(q) and it is immaterial that an alternative is given them to raise the amount by the rents or profits, *or* by sale or mortgage.(r)

If the term limited for securing the portions be insufficient for raising them by ordinary means, recourse may be had to the timber,

(k) *Sheldon v. Dormer*, 2 Vern. 310; *Backhouse v. Middleton*, 1 Ch. Ca. 175; *Okeden v. Okeden*, 1 Atk. 551; see *Alan v. Backhouse*, 2 V. & B. 65, 75.

(l) *Trafford v. Ashton*, 1 P. Wms. 416; *Ashton v. —*, 10 Mod. 401.

(m) *Anon.* 1 Vern. 104; *Warburton v. Warburton*, 2 Vern. 420; *Green v. Belcher*, 1 Atk. 505; *Hall v. Carter*, 2 Atk. 358; *Baines v. Dixon*, 1 Ves. 42; *Lord Shrewsbury v. Shrewsbury*, 1 Ves. jun. 234. [See *Schermerhorne v. Schermerhorne*, 6 J. C. R. 70; *Story's Eq.* § 1063, &c. Ante, p. 342, n. (c.)]

(n) See *Ivy v. Gilbert*, 2 P. Wms. 19; *Evelyn v. Evelyn*, Id. 669; *Mills v. Banks*, 3 P. Wms. 7, 8.

(o) *Anon.* 1 Vern. 104; and see *Garmstone v. Gaunt*, 9 Jurist, 78.

(p) *Rivers v. Derby*, 2 Vern. 72; *Ivy v. Gilbert*, 2 P. Wms. 13; *Prec. Ch.* 583; *Evelyn v. Evelyn*, 2 P. Wms. 669; *Mills v. Banks*, 3 P. Wms. 1; *Okeden v. Okeden*, 1 Atk. 550; see *Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121.

(q) *Okeden v. Okeden*, 1 Atk. 552.

(r) *Warter v. Hutchinson*, 1 S. & St. 276; see *Hall v. Carter*, 2 Atk. 358.

¹ Where a testator directs the rents and profits of an estate to be applied for a limited period to the maintenance and education of certain individuals, this is a charge on the land in the hands of the devisees. *Fox v. Phelps*, 17 Wend. 393; 20 Wend. 437, in error; see *Robinson v. Townshend*, 3 G. & J. 413. In *Hawley v. James*, 5 Paige, 318, it was held that where trustees were directed by a will to raise portions out of the rents and profits of an estate, and they suffered the trust to expire without raising the portion, the court might direct the portion to be raised out of the rents and profits on hand; and if they had been distributed, the distributees to refund.

which may be sold, or to mines, which may be worked for that purpose.^(s)

Where *one gross sum* is directed to be raised for the portions of several younger children, to be paid to them at twenty-one, or any other specific period, in such a way that the whole of the shares are vested, and some of them have become payable, the whole sum should be raised at once by the trustees, and the shares not then payable, invested in the three per cents. For it will not be proper to incumber the estate with as many different sales or mortgages as there are shares to be paid.^(t) But it is otherwise where *several distinct sums* are directed to be raised and paid to the children at particular times; for there, the land will not be discharged by the raising and investment of any of those sums before the actual time of their respective payment has arrived: and it is immaterial that *some* of the sums so charged may have become payable.^(u)

Where a sum of money is charged on land, it will carry interest from the time when it is declared to be payable, although nothing be expressly *said* respecting interest,^(x) and the interest allowed by the court is usually four per cent.^(y) If there be an intention expressed or implied in the instrument to give interest or any payment in lieu of interest from a *particular period*, that direction will of course be followed in place of the general rule.^(z) [*368]

A trust for raising portions for children is expressly exempted from the operation of the Thellusson Act (39 & 40 Geo. III. c. 98), by which the period for accumulation of the income of property is restrained within certain limits.¹

The expenses of raising portions must, as a general rule, be borne by the trust estate, and not by the portions themselves.^(a) Although

(s) Offley v. Offley, Prec. Ch. 27.

(t) Gillbrand v. Goold, 5 Sim. 149.

(u) Dickenson v. Dickenson, 3 Bro. C. C. 19.

(x) Beal v. Beal, Prec. Ch. 405; Roseberry v. Taylor, 6 Bro. P. C. 43; Bagenal v. Bagenal, Id. 81; Boycot v. Cotton, 1 Atk. 552; Earl of Pomfret v. Lord Windsor, 2 Ves. 472; Hall v. Car-

ter, 2 Atk. 358; Leech v. Leech, 2 Dr. & W. 568, overruling Hays v. Bayley,

3 Sugd. V. & P. 10th edition.

(y) Gullam v. Holland, 2 Atk. 343;

Lord Trimlestown v. Colt, 1 Ves. 277.

(z) Boycot v. Cotton, 1 Atk. 553; Mitchell v. Bower, 3 Ves. 286; Clayton v. Earl of Glengall, 1 Dr. & W. 1.

(a) Michell v. Michell, 4 Beav. 549.

¹ As to what are portions within this Act, see Jones v. Maggs, 11 Engl. L. & Eq. 159; Morgan v. Morgan, 2 Id. 35; Halford v. Staives, 16 Sim. 488; 13 Jur. 70; Beech v. Lord St. Vincent, 14 Jur. 731; 19 L. J. Ch. 131; Evans v. Hellier, 5 Cl. & F. 114, and particularly Lord Barrington v. Siddell, 17 Jurist, 241, and Burt v. Sturt, Id. 729, where the authorities are fully discussed. The 9th section of the Act of April 18th, 1853, of Pennsylvania, (P. L. 507), copied from the Thellusson Act, omits the proviso with regard to portions; so with the Revised Statutes of New York, Part II. Tit. 2, Chap. I. Art. I. § 37.

this rule will be subject to any direction to the contrary by the creator of the trusts.

V.—OF INVESTMENT BY TRUSTEES.¹

The investment of the trust funds is one of the most important duties of a trustee, both as respects the interests of the *cestui que trusts*, and his own security. Any direction in the trust instrument as to the particular mode and nature of the investment, must be carried out as far as possible, and the trustees will not be answerable for any loss arising from that course.

But where the direction for investing is in the usual general terms,

¹In many of the United States there are statutes which authorize the investment, by fiduciaries, in particular stocks, so as to discharge themselves from further liability. Thus, in Pennsylvania, by the act relating to Orphans' Courts (29 March, 1832, Dunlop, 471), Sect. 14, it is provided in substance, that where an executor, guardian, or trustee, shall have in his hands trust-moneys in any way needing investment, as therein specified, he may present a petition to the Orphans' Court of the proper county, stating the circumstances of the case, &c.; when it shall be lawful for the court, on due proof, to make an order directing the investment of such moneys in the stocks or public debt of the United States, in the public debt of the Commonwealth, or of the city of Philadelphia, or on real securities, at such prices or on such rates of interest and terms of payment, respectively, as the court shall think fit: and on such investment, the executor, guardian, or trustee, shall be fully exempted from liability. It is provided, however, that the court shall not make any order contrary to the direction of the will or other instrument, in regard to the investment of the moneys. By the subsequent Acts of 13 April, 1838, 15 April, 1850, and 8 April, 1851, the provisions of the Act of 1832 are extended to the stock of the incorporated townships and districts of Philadelphia County, of Pittsburg and Alleghany, and of the water-works of Kensington, Philadelphia County. It has been held, however, that these acts were intended for the benefit of the trustee, and that he might, if he choose, invest as before; Twaddell's App., 5 Barr, 15; Worrell's App., 9 Barr, 508; Barton's Estate, 1 Pars. Eq. 24; the expense and delay of a petition being a useless burden in the case of small sums, as accruing interest. See Twaddell's App., ut supr. In Maine, Rev. St.; tit. Testamentary Trustees, ch. III. § 11, the Court of Probate and Supreme Court may authorize the investment of trust-moneys in real estate, or in any *manner most for the interest of all concerned*. The provisions of New Hampshire, Rev. St. 1842, page 335, and Vermont, Rev. St. 1839, tit. xii. ch. 55, are similar. In Georgia, Cobb's New Dig. 333, trustees are authorized to invest in stocks, bonds, or other securities, issued by the State, which will relieve them from liability. And see Rev. Code Va. 552, 624; Rev. Code New Jersey, 209, &c.; Rev. St. Missouri, 551; Rev. St. Michigan, 301.

In New York, it was said in *Ackerman v. Emott*, 4 Barb. S. C. 626, that by analogy to the English rule, trustees would be authorized to invest in real securities, in the public stocks of the United States, or of the State of New York, or in the N. Y. Life Insurance and Trust Company. It seems that in Maryland, however, there is no favored stock. *Murray v. Feinour*, 2 Maryl. Ch. 419; *Evans v. Inglehart*, 6 Gill & J. 192. So in Massachusetts, it was said in *Lovell v. Minott*, 20 Pick. 119, that the English rule "is inapplicable in this country, and untenable. In fact, there are no public securities in this country which would answer the requisitions of an English Court of Equity."

as, "to invest in government or real securities," the trustees must be governed by the construction which the court has put upon a trust so expressed. Therefore, a trust to invest on real securities will be properly executed by lending the trust-money on mortgage of freehold lands or copyholds of inheritance to the extent of two-thirds of the then value.(b) But an advance to that extent will be improper upon the security of houses or buildings, or leasehold hereditaments, which are necessarily of a perishable nature; or, still more, if the value depend on the occupation of the premises for any purpose of trade. And the trustees would be held personally responsible for any loss occasioned by such an investment.(c) So it has been held, that a power to lend trust-money on real *or personal* security, does not enable the trustees to *accommodate a trader* with a loan upon his bond.(d) However, where there is a discretionary power for executors and trustees to invest in the *alternative* on real *or personal* security, they will be justified as against *legatees* or other *volunteers*, where, in the exercise of a sound discretion, they lend the trust-money to an apparently responsible person at a reasonable interest.(e) But it seems that this rule would be different as against *creditors*.(f)¹

(b) *Stickney v. Sewell*, 1 M. & Cr. 15; and see *Wyatt v. Sharratt*, 3 Beav. 498. [See *Jones v. Lewis*, 13 Jur. 877.] Phillipson *v. Gatty*, 7 Hare, 516; but see *Jones v. Lewis*, ut supra.]

(d) *Langston v. Olivant*, Coop. 33.

(c) *Stickney v. Sewell*, 1 M. & Cr. 8; (e) *Forbes v. Ross*, 2 Cox, 116.

see *Wyatt v. Sharratt*, 3 Beav. 498. [See (f) *Doyle v. Blake*, 2 Sch. & Lef. 239, 40.]

¹ See *Ackerman v. Emott*, 4 Barb. S. C. 626; *Murray v. Feinour*, 2 Maryl. Ch. 419. The general rule is also in the United States, that either public securities or real securities are to be preferred. *Ibid.*, *Gray v. Fox*, Saxt. 259; *Worrell's App.*, 9 Barr, 508. What are real securities, has been a matter of question. It is clear that trustees cannot convert by *purchasing* land with the trust-moneys; the *cestui que trusts* having in such case the right to elect between the land, the principal money, and interest. *Ousely v. Anstruther*, 10 Beav. 456; *Bonsall's App.*, 1 Rawle, 273; *Billington's App.*, 3 Rawle, 55; *Kaufman v. Crawford*, 9 W. & S. 131; *Royers' App.*, 11 Penn. St. 36. Though a direction to *invest* in stocks or *productive real estate*, was held in *Parsons v. Winslow*, 16 Mass. 368, to authorize the purchase of land or dwelling-houses; or the purchase of the widow's right of dower on "such terms as to make the estate, when disencumbered, productive in proportion to its cost." In *Phillipson v. Gatty*, 7 Hare, 516, on the usual trust for government or real securities, it was held that a mortgage on town houses, whose value depended on their situation, and which was effected by covenants with neighboring houses, which mortgage was nearly to the value, was a breach of trust. But in *Jones v. Lewis*, 13 Jur. 877; 3 De Gex & Sm. 471, where trustees were directed by will to place the trust-moneys in the public funds, or in some good and approved freehold or leasehold securities at interest, the trustees, acting honestly and in good faith, upon the report of a surveyor (who had valued the property at £3500, and the annual rental at £175), lent £2600, on a mortgage, with powers of sale, of the valued property, which consisted of four freehold messuages, at the time in an unfinished state, the actual yearly rent of

Where the trust is in the alternative to invest in land *or* any other
 [*369] *security, the investment in land will be taken as the one primarily contemplated by the settlor; unless the nature of the

which being only £105. The mortgagor having become insolvent, the trustees sold the property in 1836, for less than the amount lent by about £350, which sum was lost to the estate. In a suit by the *cestui que trust*, the court declined to charge the trustees, and allowed them their costs of suit, expenses, &c. Under a power in a settlement to trustees to invest on real securities, in Ireland, it was held in a recent case by the Master of the Rolls, that the trustees were authorized in lending money upon leaseholds for lives, with a covenant for perpetual renewal, subject to a head rent; but that they ought not to lend more than one-half of the net value of the property. *Macleod v. Annesley*, 17 Jur. 608. In *Morris v. Wright*, 14 Beav. 291, it was questioned whether a trustee would be justified in lending on a second mortgage, without obtaining the legal estate. That the security is greater than is necessary, is not, however, objectionable, and, therefore, where, according to the terms of the trust, the fund provided to secure an annuity may be invested on real security, the security chosen will not be an improper one, because it produces annually somewhat more than the annuity requires. *Barnett v. Sheffield*, 1 De G., Mac. & G. 371; 12 Engl. L. & Eq. 150. In *Mant v. Leith*, 16 Jur. 302; 10 Engl. L. & Eq. 302, railway debentures, though nominally real security, were held not a proper investment under the general power above stated, as they "could not be enforced in the ordinary way in which real security ought to be enforced, and the repayment could not be enforced for eight years." The Master of the Rolls remarked, "It is not sufficient for a trustee to say in defence of an investment, that it is on real security. There are other things to be considered—the nature of the property, and other matters. It may be that the property, though sufficient, is involved in litigation." London Dock stock, sewer bonds, and turnpike bonds, secured by a mortgage on the tolls and toll house of a company, were held not to be real securities, in *Robinson v. Robinson*, 11 Beav. 371; 12 Jur. 967; but in the case on appeal, where the decision of the Master of the Rolls was reversed, the turnpike bonds were declared to be real security, and it was decided to be no breach of trust to have left funds remaining invested in them, as they had been by the testator; but at the same time, no opinion was expressed on the question as to whether the executors would have been authorized to have invested in them in the first instance; and a reference was directed to determine whether it would not be expedient to have them sold. In *Barry v. Marriott*, 12 Jur. 1043; 2 De G. & Sm. 491, the public funds were treated as preferable to mortgages, where the question of a change was submitted to the court. In *McCall v. Peachy*, 3 Munf. 288, under a direction to invest in "good and sufficient securities" in Virginia or Maryland, as the executors thought proper, it was held that they were authorized to invest in "town-office certificates," and other public securities. In *Twaddell's App.*, 5 Barr, 15, an investment in the loans of the Lehigh Navigation, a company owning coal lands, and a canal to a much greater value than its debts, the interest on the loan being a preferred claim on the income, was held to be substantially on real estate. Subsequently, however, in *Worrell's App.*, 9 Barr, 508, an investment in the stock of the Schuylkill Navigation Company, which was not preferred, was held a breach of trust, though the company at the time was in good standing, and frequently selected for investments by trustees. See, also, the remarks of Gibson, C. J., in *Twaddell's Appeal*, on investment in the stock of companies where there is a preferred loan. In *Worrell's Appeal*, *Twaddell's case* was thought to have gone to the limits of the doctrine; and the practice of investing in navigation and

trusts forbids the adoption of that construction.(g) If the trust be to invest on some "*good and sufficient security*," the court will put its own interpretation on those terms, and will sanction no investment which its own rules do not authorize.(h) And a trust to invest at the trustee's "*discretion*," will not authorize a loan of trust-money on personal security.(i)

A power to invest on personal, or any other unusual security, will be construed strictly, and the trustee will not be justified in exceeding the terms of the authority. Thus, where the trustees of a settlement were empowered to lend 3,000*l.* on personal security, and they lent 5,000*l.*, being nearly the whole of the fund, they were held liable for a breach of trust, as having exceeded their authority.(k) And so a power in a settlement to lend trust-money to the husband on the security of his *bond*, will not authorize a loan to him on his *promissory note*.(l) In a recent case, a trustee by the terms of the settlement, was "*empowered and required*" to lend the trust-money to the husband on his personal security upon the requisition of the wife. The husband became insolvent, and took the benefit of the

(g) *Earlom v. Saunders*, Ambl. 340; *Cowley v. Hartsonge*, 1 Dow. 361; *Cookson v. Reay*, 5 Beav. 22; see *Hereford v. Ravenhill*, 5 Beav. 51.

(h) *Booth v. Booth*, 1 Beav. 125; see *Trafford v. Boehm*, 3 Atk. 440; *Ryder v. Bickerton*, 3 Sw. 80, n.; *Wilkes v.*

Steward, Coop. 6; *De Manneville v. Crompton*, 1 V. & B. 359.

(i) *Pocock v. Reddington*, 5 Ves. 794. [*Wormeley v. Wormeley*, 1 Brockenb. 339, 8 Wheat. 421.]

(k) *Payne v. Collier*, 1 Ves. jun. 170.

(l) *Greenwood v. Wakeford*, 1 Beav. 576.

other companies, whose stability was uncertain, was strongly reprobated. In a subsequent case, however, *Rush's Estate*, 12 Penn. St. R. 375, where there was an express direction to invest in any loans of the United States, or of the State of Pennsylvania, or in any of the incorporated districts of the County of Philadelphia, "or in any *public stocks or securities*, bearing an interest," it was held that executors were authorized to invest in the same Lehigh Loan; it being in the popular sense in which the testator used the phrase, "a public stock." Whether, however, *Hemphill's Appeal*, 18 Penn. St. R. 303, does not interfere with the reasoning of the Chief Justice in the last case, may, perhaps, be doubted. In *Ex parte Huff*, 2 Barr, 227, under a power to invest in ground-rents, it was held that an investment in a redeemable ground-rent was authorized; such being a usual mode of creating ground-rents in Pennsylvania, and, indeed, the only one now allowed under the Act of 1850. "City stock," at the time depreciated, was held an improper investment, in *Trustees of Trans. Univ. v. Clay*, 2 B. Monr. 386. From *Rush's Appeal*, 12 Penn. St. R., it would appear that, under general terms, the court would not authorize an investment on real security in another state; but if the testator expressly directs such investment, the court will not change it. *Burrell v. Sheill*, 2 Barb. S. C. 457.

A direction to invest in "bank stocks, or freehold lands or lots," will not authorize investment in the United States loan. *Bannister v. McKensie*, 6 Munf. 447.

act, and the trustee then refused to lend him the money, though required to do so by the wife; and it was held by Sir K. Bruce, V. C., that the insolvency of the husband had created such an alteration of the circumstances as to justify that refusal.^(m) However, it does not follow that it would have been a breach of trust in this case, if the trustee had complied with the wife's requisition, and lent the money to the husband, notwithstanding his insolvency.⁽ⁿ⁾

If the power, authorizing an investment of the trust funds on personal security, require the observance of any formalities, those formalities must be duly observed. Thus, where the consent *in writing* of the wife is made requisite previously to such an investment, the trustees will be liable for investing with only her *verbal* consent;^(o) and so where attestation is required to the written consent, that formality cannot be dispensed with,^(p) and a *subsequent* consent to the investment will not be sufficient where a *previous* consent was made necessary.^(q)

A power for the trustees to invest "on good *private* security" does not warrant their retaining the fund in *their own possession*, and using it for the purposes of their business; and under such circumstances they would be charged with interest at five per cent.^(r)

A trust to invest on "good freehold security" can only be executed by an investment of that description.^(s) But if the existing securities be unsafe and improper, and an immediate conversion be [*370] required, it *seems to be the duty of the trustees to make an *interim* investment in the funds, until a proper purchase of freeholds can be found.^(t)

Where stock is settled in trust for a husband and wife for life with remainder to their children, with power for the trustees "to call in and lay out the money at greater interest, if they could," an investment in the purchase of an *annuity* for the life of one of the tenants for life is improper.^(u)

A trust to invest on "government securities" has been held not to authorize an investment in *Exchequer bills*.^(x)

Where trustees are directed by will to invest a sum of money "with all convenient speed" in the purchase of land, it has been

(m) *Boss v. Godsall*, 1 N. C. C. 617.
[See *Fowler v. Reynal*, 13 Jur. 654.]

(n) See *Burt v. Ingram*, Lewin, Trust, 277.

(o) *Cocker v. Quayle*, 1 R. & M. 535; see *Kellaway v. Johnson*, 5 Beav. 319.

(p) *Hopkins v. Miall*, 2 R. & M. 86.

(q) *Bateman v. Davis*, 3 Mad. 98; see *Adams v. Broke*, 1 N. C. C. 627.

(r) *Westover v. Chapman*, 1 Coll. 177.

(s) *Wyatt v. Willis*, 8 Jurist, 117. [1

Cooper, 154 (n.)]

(t) *Sowerby v. Clayton*, 8 Jurist, 597;

3 Hare, 430.

(u) *Fitzgeneral v. Pringle*, 2 Moll. 534.

(x) *Ex parte Chaplin*, 3 Y. & C. 396. [Knott v. Cottee, 13 Eng. L. & Eq. 311.]

held, that twelve months from the testator's death is to be considered a reasonable time for making the purchase.(y)

By the act 4 & 5 Will. IV. c. 29, which is also retrospective in its operation, where any will or settlement contains a power to invest on real securities in England, or Wales, or Great Britain, or on real securities generally, the power may be exercised by investing on real security in Ireland. But the 2d section provides, that where the interest of any infant, or person of unsound mind, is concerned, all investments under the act are to be made by the direction of the Court of Chancery in England. It has been decided, that the application to the court for this purpose may be made either in a cause, or by petition without suit in a summary way.(z) But where a trust fund, which is settled on a party for life, with remainders over, is already in court and invested in the three per cents., the court will not, on the petition of the equitable tenant for life presented under this act, order it to be sold out, and invested on Irish real securities, producing a larger income. For such a course, though for the advantage of the tenant for life, is not necessarily for the benefit of the parties entitled in remainder. And the court will not even direct a reference to the Master to inquire into the expediency of such a proceeding.(a) This case is therefore an authority for laying it down, that under similar circumstances a trustee, notwithstanding the act, would not be justified in disposing of the securities on which the trust funds may be properly invested, in order to lay out the money on Irish real securities, although a larger income might thus be realized.

A neglect to make proper investments is a breach of trust, the consequences of which will be visited on the trustees. And if they unnecessarily retain cash balances in their hands, or otherwise, without sufficient reason, allow any part of the trust funds to remain unproductive, they will be personally answerable to their *cestuis que trusts* for any loss of income or capital that may be traced to that source.¹

Thus, if a trustee, who is directed to invest a legacy *immediately* in stock, retain it for a considerable period in his own hands, and there is a subsequent rise in the price of the stock, the loss will fall upon him, and he will be decreed to purchase as much stock as might

(y) Parry v. Warrington, 6 Mad. 155. this Act, Kirkpatrick's Trust, 6 Eng. L.

(z) Ex parte French, 7 Sim. 510; see & Eq. 152.]

Stuart v. Stuart, 3 Beav. 430. [See on (a) Stuart v. Stuart, 3 Beav. 430.

¹ See post, 374, n. 1, where the American cases cited on the question of interest, are in general equal authorities for holding the trustee liable in case of a loss under the same circumstances. See also Harrison v. Mock, 10 Alab. 193.

[*371] have been bought *with the trust fund, at the time when it ought have been invested.(c) And the same rule applies to an executor, who by his conduct has become a trustee for the investment of a legacy.(d)

It was decided on one occasion by Sir J. Leach, V. C., that where the trustees are directed to invest in the alternative, either in stock or on real security, and the fund is lost through their neglect in making a proper investment, the trustees shall be answerable for the principal money only, and not for the value of the stock, that might have been purchased: for if real security had been taken, as it might have been, the principal money only would have been forthcoming to the trust.(e) But in a subsequent case where there was a similar trust, Lord Gifford, M. R., after some hesitation held the trustees liable for the amount of *stock*, which might have been purchased, notwithstanding the alternative discretion given to the trustees.(f) And this last decision was followed by Lord Langdale, M. R., in a very recent case.(g) So that the distinction taken by Sir J. Leach, in *Marsh v. Hunter*, must now be considered as overruled.(1)

(c) *Byrchall v. Bradford*, 6 Mad. 235, 240; and see *Pride v. Fooks*, 2 Beav. 430; *Watts v. Girdlestone*, 6 Beav. 188; *Clough v. Bond*, 3 M. & Cr. 496. [*Phillipson v. Gatty*, 7 Hare, 516; see *Bank of Virginia v. Craig*, 6 Leigh, 399; *Robinson v. Robinson*, 9 Eng. L. & Eq. 69.]

(d) *Ibid*.

(e) *Marsh v. Hunter*, 6 Mad. 295. [Affirmed *Robinson v. Robinson*, 9 Eng. L. & Eq. 67.]

(f) *Hockley v. Bantock*, 1 Russ. 141.

(g) *Watts v. Girdlestone*, 6 Beav. 188. [These cases, however, are now overruled, 9 Eng. L. & Eq. 69, see post.]

(1) But the doctrine of this case (*Marsh v. Hunter*) has been revived in England, in a case still more recent than any cited in the text. For, where trustees were directed to invest trust-money in such stocks, funds, or securities, as to them should seem reasonable, and they did not invest the money, but allowed it to remain in the hands, and upon the personal security, of one of themselves, who afterwards became bankrupt, it was held, that they were answerable for the money only, and not for the stock which might have been purchased therewith. (*Shepherd v. Moulds*, June 7, 1845, Jurist, No. 441, p. 506), [4 Hare, 580], before Vice Chancellor Wigram, whose opinion was delivered as follows:—Sir JAMES WIGRAM, V. C.—“In this case, certain property was given to trustees, upon trust to lay it out in the purchase of government or real securities. The trustees did not lay out the property in either, but kept the money in their hands; and the only question I have to consider is, whether the trustees are to be charged with the amount of money and interest, or whether the parties interested in the fund have a right to charge them with the amount of stock which might have been purchased at the time, when the money was in their hands for that purpose. Where trustees are bound by the terms of their trust to invest the money in the funds, and instead of doing so, retain the money in their hands, the *cestui que trusts* may elect to charge them either with the amount of money, or with the amount of stock which they might have purchased. If the trustees are not bound to invest in the funds or in any specific security, but, by the terms of the trust, have a discretion to invest it in various ways, and, instead of doing so, they re-

*In like manner if the principal be lost by the failure of the banker, or other person, in whose hands the trustees have [*372]

tain the money in their hands, if the *cestui que trusts* are desirous not to take the money, but to charge the trustees with the value of the security that might have been obtained, the court is placed in a difficulty. The discretion given to the trustees to elect between several securities makes it impossible to ascertain the amount of loss occasioned by the omission to invest, except in the possible case, which has not occurred here, of some one offering a security in conformity with the terms of the trust. Suppose the trust to have been to invest in the funds or in the purchase of lands, there would then be no better reason for saying that the trustees ought to have made the investment in the funds, than for saying that they ought to have invested in the purchase of lands. In the case before me, I see no more reason for saying that the trustees were bound to invest in the funds, unless a real security had presented itself, than for saying that they were bound to invest in real estate, unless a security in stock had offered itself. The breach of trust is not in having omitted to choose the one rather than the other, but in not having made an investment at all, either in the one or the other of those securities. That was the opinion of Sir John Leach, in the case of *Marsh v. Hunter*, 6 Madd. 295. Lord Gifford, however, in the case of *Hockley v. Bantock*, 1 Russ. 141, decided otherwise. In the latter of these cases, the former was not cited; and, judging from the great hesitation with which the court made the order, it appears probable, that, had the case of *Marsh v. Hunter* been cited, the decision would have been different. In *Watts v. Girdlestone*, 6 Beav. 188, the same question came before Lord Langdale, whose decision was in accordance with that in *Hockley v. Bantock*. My own strong impression is in favor of the view taken in *Marsh v. Hunter*. The trustee is to invest in a fair security only, and on what principle can the court charge the trustee with the accidental improvement in value of one of several securities, where he is not bound, in the execution of his trust to select that particular security rather than another? It is extremely to be regretted, that there should be a difference of opinion in the decisions upon a point like this, and I desired that the case might stand over, in order to see whether I could find a judge decidedly of opinion one way or the other upon the point. Having failed in doing so, I am compelled to exercise my own judgment, which is, that I cannot do otherwise than think, that the case of *Marsh v. Hunter* is right."

A writer in a subsequent number of the *Jurist* (No. 443, p. 227), in a review of the conflicting decisions existing upon the question discussed in the foregoing judgment, after stating the question at length, thus remarks:—Upon this the authority now stands thus:—

"That the trustees are liable at the option of the <i>cestui que trust</i> ,	{ <i>Hockley v. Bantock</i> , 1 Russ. 141. <i>Watts v. Girdlestone</i> , 6 Beav. 188.
"That they are not so liable, but only to pay principal and interest,	{ <i>Marsh v. Hunter</i> , 6 Madd. 295. <i>Shepherd v. Moulds</i> , <i>Jurist</i> , No. 441, p. 506. [4 Hare, 580.]"

The point is, as nearly as possible, the same in all these cases, so that it is as fair and decided a conflict of authority as could well be imagined, and a much more complete one than is to be desired. We are, therefore, in considering this question, thrown back upon principle.

Now, let us see what is the principle to be collected from the general stream of authorities bearing upon the liabilities of trustees. There is not, we submit, any such principle, as that trustees having done wrong, either by doing that

unnecessarily allowed it to remain, they will be liable to make good the amount.(h)

(h) *Anon. Lofft. 492*; *Challen v. Ship-* *v. Cockerell, ib. 339*; *Mathews v. Brise,*
pam, 4 Hare, 555; *Fletcher v. Walker,* 6 Beav. 239; *Macdonnell v. Harding, 7*
3 Mad. 73; *Massey v. Banner, 4 Mad. Sim. 178.* [*Drever v. Mawdesley, 13*
419; *Moyle v. Moyle, 2 R. & M. 701*; *Jur. 331.* But see *Johnston v. Newton,*
Lowry v. Fulton, 9 Sim. 115; *Munch 17 Jurist, 825.*]

which they ought not to have done, or omitting to do that which they ought to have done, are to be punished by the court, except by costs. The principle is, that trustees are to hold the trust fund for the benefit of the cestui que trust, dealing with it only as they are directed or permitted to deal with it by the instrument of trust; or, if there be no directions contained in such instrument, then according to certain known rules prescribed by the court. It follows as one consequence of this principle, that, if they waste the fund, they are to account to the cestui que trust, as if they had done with it what they ought to have done, or, if the result of such an account cannot be ascertained, then they are to account for the principal and interest, which is what, in the absence of information to the contrary, is the produce of the fund. It follows, as a second consequence of the principle above stated, that whatever trustees have actually made with the trust fund, they shall account for so much to the cestui que trust; for, as they hold the fund for him, they must also hold for him all its accretions, which are, in fact, part of itself. And it is their own folly, if they choose to employ their own labor in making the trust fund grow beyond the extent to which it was their mere duty to extend it.

There are cases upon cases which show that the court has not generally entertained any notion of punishing trustees for breach of trust, by exacting from them more than a full account of the trust fund, subject to, and consistent with, the powers and discretion confided to them. But we select one only as peculiarly supporting our proposition, because, in that case, it is quite obvious, from the strong language used by the judge, that he would have treated the trustees as fit subjects for punishment, if he had felt that, judicially, he was at liberty to punish them. The case to which we refer is *Pocock v. Reddington, 5 Ves. 794*, one of the early cases upon the question of what interest a trustee shall be charged with. The trustee in that case had most improperly lent the trust money upon personal security, and the Master of the Rolls disapproving in very strong language of his conduct, still in decreeing against him, did not put the decree on any ground of punishing the trustees, but simply treated him as liable to answer for what he might reasonably be supposed to have made; and if he had made more, for that also.¹

The innumerable cases, indeed, upon breaches of trust by executors and trustees, all appear to proceed upon the ground of the trustee's title being purely representative, so that he must, when called upon, produce the fund, with such accretions as it has actually acquired in his hands, or such accretions as it may reasonably be presumed to have acquired. And until *Hockley v. Bantock*, there is, we believe, no case in which an attempt has been made to punish a trustee, by depriving him of the discretionary powers reposed in him by the settlor, and holding him liable to account as if he had been specifically directed to do that

(1) This case may, perhaps, be referred to, as in some measure supporting *Shepherd v. Moulds*. The trust for investment was to place the funds out at interest at their (the trustees') discretion. The Master of the Rolls of course did not hold this language as justifying an investment on mere personal security. But he appears to have thought (*dubitando* it is true), that it might have justified an investment on real security; and, if so, the case was of the same class as those we are considering, as the power was, in that view of the case, in effect, to invest in the funds or on real security.

And it is no answer to a charge of this description to say, that the fund *has been retained or misapplied by one or more of [*373] the co-trustees, if the others have been cognizant of or in any

which, in the result, turns out most to the advantage of the *cestui que trust*; in fact, to vary the trusts of the instrument of trust, for the purpose of punishing the trustee. For that is the effect of the rule adopted in *Hockley v. Bantock* and *Watts v. Girdlestone*. The testator in the first case, and the settlor in the second, had given to the trustees a power of selection between two funds; the result of the decision in each of those cases is to determine that the trustee, by reason of his misconduct, should be held accountable not as if he had had a power of selection, but as if he had been specifically confined to a particular investment; it charged him not pursuant to the instrument, but in derogation of it. The cases of breach of trust by embarking the fund in unauthorized speculations, whether intended dishonestly for the personal advantage of the trustee, or honestly for the benefit of the *cestui que trust*, obviously afford no support to *Hockley v. Bantock*; those being invariably cases in which the question has not been, which of two modes of investment originally open to the trustee shall be taken as the groundwork on which to found the calculations of his accounts, the fund being in fact wasted; but, whether the trustee, having improperly employed, but fortunately increased, the fund, shall be caused to deliver up what the fund has actually produced, or to pay what it would have produced if treated according to the only course which was originally regular. The two classes of cases are totally and visibly distinct. The decisions in *Hockley v. Bantock* and *Watts v. Girdlestone* assert, in fact, not the old jurisdiction, of holding a trustee to produce the fund, such as it is, or such as if he had acted regularly, it would have been, but the much stronger one, of deciding for him, because of, and in punishment of, his misconduct, how he ought to have exercised that discretion, which it is clear, but for the misconduct, the court could not have interfered with. They do not pursue the rule of equity, of holding a man to have done that which he ought to have done, but determine for him what, in the exercise of a discretion unfettered by the terms of the instrument, he ought to have done. We confess, this does appear to us to be carrying the equitable control of the court a great way; it goes, in truth, the length of altering the trusts declared by the founder of the trust. And with this impression we certainly are glad to see the case of *Shepherd v. Moulds* bringing back the rule (so far as in the conflicting state of the specific authorities there can be said now to be a rule), to the doctrine of *Marsh v. Hunter*; a doctrine, consistent, as we humbly contend, with general principles, and not inconsistent with the reasonable protection of *cestuis que trustent*."—T.

[The conflict of authorities on this subject has been recently terminated in England by the case of *Robinson v. Robinson*, 9 Engl. L. & Eq. 69, before the Lords Justices of Appeal, where it was held, overruling S. C. 12 Jur. 969; 11 Beav. 374; *Ousley v. Anstruther*, 10 Beav. 456; *Watts v. Girdlestone*, and the other cases cited above, and on full consideration of the authorities, that, where trustees had an option to invest either in the three per cents. or on real security, which they neglected to do, the *cestui que trust* could only charge them with the principal and interest, and could not claim the amount of the three per cents.; and see *Phillipson v. Gattey*, 13 Jur. 318; *Rees v. Williams*, 1 De G. & Sm. 314. However, a writer in the *English Jurist* (17 Jur. p. ii. 199) argues very strenuously against the decision in this case. He insists that the reasoning on which it is founded is fallacious; and submits that "the doctrine of *Robinson v. Robinson*, cannot be safely relied upon, until it is affirmed in the House of Lords. It is contrary to the severe, but salutary rules by which the Court of Chancery determines the

way accessory to the exclusive possession of the trust fund by the trustees who have occasioned the loss.(i)

And where the money is paid by the trustee to a banker or broker for the purpose of being invested, it is the trustee's duty to ascertain [*374] that the *investment is duly made, and he will be answerable to the *cestui que trusts*, if the fund be lost through his neglect of that duty.(k)¹

And in these cases the trustees will in general be decreed to account for the principal, which has been retained unproductive, or lost, with interest.(l) And interest in these cases is generally given at four per cent. ;(m) but if there be also *crassa negligentia* on the part of the trustees, or they be guilty of an active breach of trust, as by employing the trust-moneys for their own benefit, or by other acts of misfeasance, interest at five per cent. will be charged.(n) But mere ordinary negligence will not be a sufficient reason for charging a trustee with the interest at five per cent.(o)²

(i) *Lincoln v. Wright*, 4 Beav. 427; *Meyer v. Montriou*, 5 Beav. 146; *Overton v. Banister*, V. C. Wigram, [3 Hare, 503]; *Hewett v. Foster*, 6 Beav. 259; *Chambers v. Minchin*, 7 Ves. 186; *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; *Brice v. Stokes*, Id. 319; *Walker v. Symonds*, 3 Sw. 1; *Langford v. Gascoigne*, Id. 333; *Underwood v. Stephens*, 1 Mer. 712; *Booth v. Booth*, 1 Beav. 125; *Williams v. Nixon*, 2 Beav. 472; *Broadhurst v. Balguy*, 1 N. C. C. 16; Ante, Ch. 1. Sect. 2 of this Division, page 309 and notes.

(k) *Challen v. Shipham* [4 Hare, 555.]

(l) *Fletcher v. Walker*, 3 Mad. 73; *Underwood v. Stevens*, 1 Mer. 712; *Munch v. Cockerell*, 9 Sim. 339, 351.

(m) *Lincoln v. Allen*, 4 Bro. P. C. 553; *Hicks v. Hicks*, 3 Atk. 274; *Perkins v. Baynton*, 1 Bro. C. C. 375; *Newton v. Bennett*, Id. 359; *Littleales v. Gascoigne*, 3 Bro. C. C. 73; *Franklin v.*

Firth, Id. 433; *Younge v. Combe*, 4 Ves. 101; *Longmore v. Broom*, 7 Ves. 124; *Roche v. Hart*, 11 Ves. 58; *Dawson v. Massey*, 1 Ball & B. 231; *Trimleston v. Hammil*, Id. 385; *Tebbs v. Carpenter*, 1 Mad. 290; *Mousley v. Carr*, 4 Beav. 49; *Hosking v. Nicholls*, 1 N. C. C. 478.

(n) *Treves v. Townshend*, 1 Bro. C. C. 384; *Forbes v. Ross*, 2 Bro. C. C. 430; *Piety v. Stace*, 4 Ves. 620; *Pocock v. Reddington*, 5 Ves. 794; *Roche v. Hart*, 11 Ves. 60; *Dornford v. Dornford*, 12 Ves. 127; *Ashburnham v. Thompson*, 13 Ves. 402; *Bate v. Scales*, 12 Ves. 402; *Crockelt v. Bethune*, 1 J. & W. 586; *Heathcote v. Hulme*, Id. 122; *Att-Gen. v. Solly*, 2 Sim. 518; *Brown v. Sansome*, 1 M'Clel. & Y. 427; *Sutton v. Sharp*, 1 Russ. 146; *Mousley v. Carr*, 4 Beav. 49; *Westover v. Chapman*, 1 Coll. 177.

(o) *Roche v. Hart*, 11 Ves. 58.

responsibility of trustees; and it is contrary, we submit, also, to the established principles of Equity.”]

¹ So where trustees sold out stock, and handed over the proceeds to their solicitor for reinvestment, who misapplied the money, they were held liable. *Rowland v. Witherden*, 11 Engl. L. & Eq. 131; see, also, to the same effect, *Ghost v. Waller*, 9 Beav. 497.

² In *Robinson v. Robinson*, 9 Engl. L. & Eq. 70, where this subject was fully discussed, the following propositions were laid down, on a review of the authori-

Where a very strong case of corruption or improper conduct is established against the trustees, and there is an express direction in

ties: "First, where trustees improperly retain balances, or cause or permit trust-money to be lost, they are chargeable with the same, with interest at four per cent. (See, also, *Jones v. Foxhall*, 13 Engl. L. & Eq. 144; *Knott v. Cottee*, Id. 311.) Secondly, where trustees have money in their hands which they are bound permanently to invest for the benefit of their *cestui que trust*, the rule of the court is generally, that they shall invest in three per cents.; therefore, if they neglect to do so, and there is no express direction not to do so, or there is an express trust that they shall do so, in the latter case, and it seems in the two former, it is in the option of the *cestui que trust* to charge them either with the principal sum retained, and interest, or with the amount of three per cents., which would have been purchased, had the investment been made. Thirdly, where trustees lend or use trust-money on trade, they are chargeable not only with the money and interest, but with the profits made in the trade, the interest generally being at five per cent." (See *Williams v. Powell*, 10 Engl. L. & Eq. 233; *Jones v. Foxhall*, 13 Id. 144.) This case is understood to have settled the law of the Court of Chancery on the subject, see *Knott v. Cottee*, 13 Engl. L. & Eq. 311. See, also, with regard to interest on balances, *Jones v. Morrall*, 2 Sim. N. S. 241.

On the subject of compound interest, or annual rests, nothing is said in *Robinson v. Robinson*, but it is to be presumed that the usual rule was not intended to be affected. In *Jones v. Foxhall*, 13 Engl. L. & Eq. 142, the Master of the Rolls uses the following language: "Generally, it may be stated, that if an executor has retained balances in his hands which he ought to have invested, the court will charge him with simple interest at four per cent. on these balances. If, in addition to this, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment, in which it was producing five per cent., he will be charged with interest after the rate of five per cent. per annum. If, in addition to this, he has employed the money so obtained by him in trade or speculation, for his own benefit and advantage, he will be charged either with the profits actually obtained by him from the use of the money, or with interest at five per cent. per annum, and also with yearly rests, that is, with compound interest." . . . "The principle upon which executors and trustees, when charged with interest on balances, are made to account with yearly or half-yearly rests, is not so clearly defined, nor are the decided cases by any means free from obscurity or contradiction. In some cases the court has charged the trustee with annual rests, because the trusts under which he acted, in distinct terms required him to accumulate the fund with compound interest. In other cases the principle seems to have been, that the court visits the trustee or the executor with an account in the nature of a penalty for his misconduct, where he has not merely committed a breach of trust, but where he has himself actually endeavored to derive, or has, in fact, derived some pecuniary advantage from the use of the money of which he has thus obtained possession. In all these cases, however, a large discretion seems to have been exercised by the court, which has regarded the facts and circumstances attending each particular case; and 'it is to the exercise of this discretion, that the difficulty of discovering the principle in some of the reported cases is to be attributed, and it is only upon this principle that the latter cases, in which the rule has been drawn more stringently against the trustee, can be reconciled with some of the earlier cases.'" Accordingly, in that case a trustee of a marriage settlement, whose duty it was to have got in a sum of £350 trust-money, invested in a trading firm of which he was a partner, and to reinvest it in consols on the death of the tenant for life, but which he

the trust instrument *to accumulate the income*, the account will be directed to be taken with annual or half-yearly rests, so as to charge

suffered to remain in the firm for a period exceeding fifteen years after that time, though he eventually paid the principal with five per cent. interest, was held liable to account with annual rests. It is to be remarked, that had the money been properly invested, it would have probably produced compound interest; as the dividends would have been reinvested. In *Williams v. Powell*, 10 Engl. L. & Eq. 225, it was held that where an executor having ample funds in his hands, and there being no excuse for retaining the money, instead of paying legacies (the time for distribution having arrived), and dividing the residue among the residuary legatees, retains the money in his own hands, he is guilty of a breach of trust, and will be charged five per cent. on the money retained; and if he pays the money into his banker's, and mixes it with his own money, he will be considered to have had the same benefit in respect of it, as if he had embarked it in trade, and will be charged with annual rests on the balance in his hands; and the burden lies on him to show that he has derived no benefit from the balance thus in his hands. But in *Knott v. Cottee*, 13 Engl. L. & Eq. 311, where it did not appear that a trustee, who had made improper investments, had benefited himself thereby, or used the money in trade, only four per cent. was given; but as there had been there an express direction to accumulate surplus income, which the trustee had neglected to do, annual rests were allowed.

It is well settled in the United States, that where an executor, guardian, or other trustee, mingles the trust fund with his own, (*Mumford v. Murray*, 6 J. C. R. 1; *Beverly v. Miller*, 6 Mumford, 99; *Diffenderfer v. Winder*, 3 G. & J. 341; *Jacott v. Emmett*, 11 Paige, 142; *Kellet v. Rathbun*, 4 Paige, 102; *De Peyster v. Clarkson*, 2 Wend. 77; *Garniss v. Gardner*, 1 Edw. Ch. 128; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Peyton v. Smith*, 2 Dev. & Batt. Eq. 325; *Jameson v. Shelly*, 2 Humph. 198; *Dyott's Est.*, 2 W. & S. 565; *Merrick's Est.*, 2 Ashm. 305; In re *Thorp, Daveis' Rep.* 290); or uses it in his private business (*Ibid.*; *Miller v. Beverly*, 4 Henn. & M. 415; *Manning v. Manning*, 1 J. C. R. 555; *Brown v. Ricketts*, 4 J. C. R. 303; In re *Thorp, Daveis*, 290); or neglects to invest, where it is his duty to do so (*Lomax v. Pendleton*, 3 Call, 538; *Schieffelin v. Stewart*, 1 J. C. R. 620; *Garniss v. Gardner*, 1 Edw. Ch. 128; *Williamson v. Williamson*, 6 Paige, 298; *Dunscombe v. Dunscombe*, 1 J. C. R. 588; *Chase v. Lockerman*, 11 G. & J. 185; *Armstrong v. Miller*, 6 Hammond, 118; *Aston's Est.*, 5 Wh. 228; *Handly v. Snodgrass*, 9 Leigh, 184; In re *Thorp, Daveis*, 290), though he is entitled to a reasonable time, at first, to seek investments (*Dillard v. Tomlinson*, 1 Munf. 183; *Minuse v. Cox*, 5 J. C. R. 448; *Carter v. Cutting*, 5 Munf. 223; *Ringgold v. Ringgold*, 1 H. & G. 11), for which purpose six months have been considered proper (*Dunscombe v. Dunscombe*, 1 J. C. R. 588; *Ringgold v. Ringgold*, 1 H. & G. 11; *Merrick's Est.*, 2 Ashm. 305; see *Arthur v. Master* in Eq., 1 Harp. Eq. 471; in *Cogswell v. Cogswell*, 2 Edw. Ch. 231, however, a year from testator's death was given to make an investment directed in U. S. Bank stock); or the trustee invests in unproductive property (*Ringgold v. Wilmer*, ut supra); or neglects to settle his account for a long period (*Lyle v. Hatton*, 6 G. & J. 122; *Turney v. Williams*, 7 Yerg. 172), or to distribute where necessary (*Gray v. Thompson*, 1 J. C. R. 82; *Williams v. Powell*, 10 Engl. L. & Eq. 224): he is liable to interest. In *Rapalje v. Nosworthy*, 1 Sandf. Ch. 399, however, it was held that the trustee is not thus liable, *merely* because he deposits trust-money in his own name, or uses it; there must be a breach of trust, or neglect to invest when required. In settling the account against a trustee, the general rule is to give interest on the annual balances in his hands, though not so as to compound it. *Rowland v.*

them with compound interest, (p) or an inquiry will be directed as to what would have been the amount of the accumulation, so as to charge them with that amount. (q)

It has been held, that if a trustee, being a trader, keep trust-moneys in his own name idle at his banker's, that is tantamount to

(p) *Stacpoole v. Stacpoole*, 4 Dow. Russ. 107; *Dornford v. Dornford*, 12 209. [See the remarks on this case of Ves. 127; *Brown v. Sansome*, 1 M'Clel. the M. R. in 13 Engl. L. & Eq. 310.] & Y. 427.
Brown v. Southouse, 3 Bro. C. C. 107; (q) *Brown v. Sansome*, 1 M'Clel. & *Raphael v. Boehm*, 11 Ves. 92, 13 Ves. Y. 427.
 407, 590; *Walker v. Woodward*, 1

Best, 2 McCord's Ch. 317; *Jordan v. Hunt*, 2 Hill's Eq. 145; *Walker v. Byrnam*, 4 Desaus. 555; *Campbell v. Williamson*, 3 Monr. 122; *Jones v. Ward*, 10 Yerg. 160; *Sheppard v. Stark*, 3 Munf. 29; *Barwell v. Anderson*, 3 Leigh, 348; *Garrett v. Carr*, Id. 407; though see *Powell v. Powell*, 10 Alab. 900. But there may be circumstances where interest will only be allowed on accumulated balances, as where the annual balances are too small to have been set at interest. *Rapalje v. Nosworthy*, 1 Sandf. Ch. 399; *Woods v. Garnett*, 6 Leigh, 271. Where the money is paid into court by the trustee, there interest ceases of course. *January v. Poyntz*, 2 B. Monr. 404. But during exceptions to an auditor's report on an executor's account, the latter is bound to keep the fund at interest, and is liable therefor. *Yundt's Appeal*, 15 Penn. St. R. 575.

In cases of gross misconduct, as the employment of the funds by the trustee in his own business, and a refusal to account for the profits, or of wilful omission to accumulate, according to several cases, or *dicta*, in this country, compound interest may be allowed. *Schieffelin v. Stewart*, 1 J. C. R. 620; *Garniss v. Gardner*, 1 Edw. Ch. 128; *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Ackerman v. Emott*, 4 Barb. S. C. 626; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Latimer v. Harrison*, 1 Bland, 58; *Diffenderfer v. Winder*, 3 G. & J. 341; *Wright v. Wright*, 2 McCord's Ch. 185; *Robbins v. Robbins*, 1 Pick. 528, note; *Hodge v. Hawkins*, 2 Dev. & Batt. 566; *Greening v. Fox*, 12 B. Monr. 190; *Karr v. Karr*, 6 Dana, 3, (where biennial rests were thought proper); *Clemens v. Caldwell*, 7 B. Monr. 171; *Harland's Accounts*, 5 Rawle, 329; *Lukens' App.*, 7 W. & S. 48; 2 Kent, 231, n. In *Utica Ins. Co. v. Lynch*, 11 Paige, 524, it was said that the principle was to allow the *cestui que trust* to elect between simple interest and the profits; and that rests in compound interest was only a convenient mode adopted by the court to charge the trustee with the profits supposed to have been made by him in the use of the money. In *Garrett v. Carr*, 1 Rob. Va. 196, it was held, that under the Virginia statute with regard to guardians, they were liable to compound interest; but as to executors, it is different. *Burrell v. Anderson*, 3 Leigh, 348. In *Ker's Adm. v. Snead*, 11 Bost. L. Rep. 217 (in the Circuit Superior Court of Accomac County, Virginia), this subject was very learnedly discussed, and the conclusion arrived at is, that except in cases of a provision for accumulation, a trustee will not be charged with compound interest, though he has mingled the trust fund with his own. The doctrine as laid down by Chancellor Kent, ut supra, and Judge Story, Eq. Jurisp. § 1277, was considered too broad. There are certainly strong reasons for hesitating in the application of a principle so stringent and dangerous; and even in Pennsylvania, notwithstanding its powerful vindication in the case of *Harland's Accounts*, the question was treated as a still open one in *Dietterich v. Heft*, 5 Barr, 91. See *McCall's Est.*, 1 Ashm. 357; and *Bryant v. Craig*, 12 Alab. 354.

employing it for his own benefit, as he must generally keep a balance to answer the purpose of his credit. Under such circumstances, therefore, he would be charged with five per cent. interest.(r)

Where the trust funds have been embarked by the trustees in any trade or speculation, it will be at the option of the *cestui que trust* to have them charged with interest at five per cent., or to take the profits actually made, to ascertain which an inquiry will be directed.(s) But in such case the *cestui que trust* must elect to take either the profits *for the whole period*, or interest *for the whole period*; and without special circumstances he cannot have the interest for one part of the time, and the profits for the other.(t)

However, trustees will not always be charged with interest on the amount of a trust fund, which has been lost through their neglect of investment. And interest has been refused, where the error has [*375] been through *ignorance and without any improper motive;(u) or where the amount of the principal sums has been comparatively small;(x) and the staleness of the demand is another reason for refusing interest.(y)

And so if a trustee retain a money balance in his hands, having reasonable grounds for supposing that he was entitled to do so, and if he fairly state that claim in bringing in his accounts, he will not be decreed to pay interest, although the court decide against his claim, and order the principal into court.(z) But the question of interest will be further considered in a future place.(a)

It is difficult to lay down any general rule as to the amount of the balances which a trustee cannot allow to remain unproductive without incurring the consequences of a breach of trust. Where any payments are to be made, or liabilities to be provided for, the trustees will unquestionably be justified in retaining a sufficient fund to answer those purposes. But otherwise the whole of the ready money ought doubtless to be invested.

In *Moyle v. Moyle*, the sum of 260*l.* was not considered too much for executors to retain within a year after the testator's death. But when it was urged, in argument, that such a sum was not too much to

(r) *Ex parte Hilliard*, 1 Ves. jun. 89; *Roche v. Hart*, 11 Ves. 61; and see this subject further considered, post, p. 518 [Remedies for Breach of Trust.]

(s) See *Docker v. Somes*, 2 M. & K. 655, where the authorities are collected and examined by Lord Brougham in his judgment; *Palmer v. Mitchell*, 2 M. & K. 672, n.

(t) *Heathcote v. Hulme*, 1 J. & W. 122.

(u) *Bruere v. Pemberton*, 12 Ves. 386; *Massey v. Banner*, 4 Mad. 419.

(x) *Bone v. Cooke*, 13 Price, 343; S. C. 1 M'Clel. 168.

(y) *Merry v. Ryves*, 1 Ed. 1.

(z) *Bruere v. Pemberton*, 12 Ves. 386; see *Parrott v. Treby*, Prec. Ch. 254; *Boddam v. Ryley*, 4 Bro. P. C. 561; *Hooker v. Goodwin*, 1 Swanst. 485.

(a) See post, p. 522, Div. II. Ch. 1, Sect. 2.

be retained in any event, the court refused to sanction that proposition, and held the executors responsible for the loss.(b)

The consequence of a breach of trust do not apply to such temporary deposits of sums in cash, as are necessarily required for the purposes of the trust, such as rents and dividends, or other periodical payments, which are made with reasonable prudence and precaution. Thus where money is deposited with a banker in good credit for remittance to the party entitled to receive it; or such a deposit is made for the purpose of temporary convenience, as pending a negotiation for the change of the trustee:(c) in such cases the trustee will not be liable for the failure of the party to whom the money has been thus committed.(d) And so where trustees, in performance of their trust, had contracted to purchase land, and they thereupon sold out stock, and deposited the proceeds at a banker's, the purchase appearing near completion, they were held not to be liable to make good the money in case of the banker's failure.(e) And if the trustees have no discretion as to the mode of investment, but are bound by the trust to lay it out on freehold security, they will not be charged with interest on sums retained and kept idle at a banker's, unless it can be shown that they might have invested it according to the trust. For it is not always possible to find a secure investment of that nature.(f) It was said by Lord Cottenham, in a recent case,(g) that when the loss arises from the dishonesty or failure of any one, to whom the possession of part of the estate has been intrusted, necessity, which includes the *regular course of business in administering the [*376] property, will in equity exonerate the trustee.

But where a trustee places money in the hands of a banker, he must take care to keep it separate, and not to mix it with his own money in one general account. For in that case, he would be considered to have treated the whole as his own, and would be held liable for interest;(h) as well as for any loss of the principal occasioned by the banker's insolvency.(i)¹

And if the deposit of the trust fund under such circumstances be

(b) *Moyle v. Moyle*, 2 R. & M. 715, 16. [See 17 Jur. 826.]

(c) *Addams v. Claxton*, 6 Ves. 226.

(d) *Knight v. Lord Plymouth*, 3 Atk. 480; *Jones v. Lewis*, 2 Ves. 240; *Routh v. Howell*, 3 Ves. 564; *Belchier v. Parsons*, Amb. 219. [See *Johnston v. Newton*, 17 Jur. 826.]

(e) *Freme v. Woods*, 1 Tam. 172; see *Matthews v. Brise*, 6 Beav. 239.

(f) *Wyatt v. Wallis*, 8 Jurist, 117; [1 Cooper, 154, n.]

(g) *Clough v. Bond*, 3 M. & Cr. 496.

(h) *Ex parte Hilliard*, 1 Ves. jun. 89; *Roche v. Hart*, 11 Ves. 61.

(i) *Wren v. Kirton*, 11 Ves. 377; *Massey v. Banner*, 4 Mad. 413; *Freeman v. Fairlee*, 3 Mer. 39; 2 Story, Eq. Jur. § 1270; *Macdonnell v. Harding*, 7 Sim. 178; *Fletcher v. Walker*, 3 Mad. 73.

¹ *Stanley's App.* 8 Barr, 431; *Royer's App.* 11 Penn. St. R. 36; *Lukens' App.* 7 W. & S. 48; *Jenkins v. Walter*, 8 G. & J. 218.

continued for a longer time than is absolutely necessary; or if it be left under the absolute power and control of the party with whom it is deposited, when the trustee with proper caution might have rendered it more secure, he will be held responsible for any loss.¹ As where a trustee with power to invest on real security, sold out a sum of trust stock, and, pending the preparation of a mortgage, purchased Exchequer bills, which he left for a twelvemonth in the hands of his broker, who made away with a part of them, and became bankrupt; it was held by Lord Langdale, M. R., that the trustee had omitted to take due and proper precaution for the protection of the fund, and was, therefore, personally answerable to the *cestui que trusts* for the loss. And he was accordingly charged with the value of the Exchequer bills at the time of the broker's bankruptcy, with interest at four per cent.(k)

So in a very late case, a mortgage security, on which trust-money had been invested, was paid off by the mortgagee, and the money was paid by the trustee into his bankers in a country town for the purpose of being invested in stock. The trustee took a note from the bankers' clerk, stating the receipt of the money and the purpose to which it was to be applied. The bankers at the time were in undoubted credit, but about five months afterwards they failed, and it was then discovered that the money had not been invested. The trustee was decreed to replace the amount of the money with interest at four per cent. (the *cestui que trusts* consented to waive their right to have so much stock as might have been purchased, if the money had been properly invested), and he was also charged with the costs of the suit; the Vice-Chancellor resting his decision mainly upon the neglect of the trustee in letting so long a period elapse after the payment without ascertaining that the fund had been properly invested.(l)

Questions of this nature have more usually occurred upon wills; however, the same equitable principles apply with equal force to trusts created by deed.(m) Although there are no directions in the instrument as to the investment of the fund by the trustees, it is equally their duty to invest it; and they will be personally liable for the neglect of that duty.(n) And the three per cents. are the only security which they can adopt with perfect safety to themselves.

(k) *Matthews v. Brise*, 6 Beav. 239.

(m) See *Trafford v. Boehm*, 3 Atk.

(l) *Challen v. Shipham*, V. C. Wigram, 20th Jan. 1845, MS. [4 Hare, 555. See remarks, 17 Jur. 826.]

440; *Ryder v. Bickerton*, 3 Swanst. 80;

Bate v. Scales, 12 Ves. 402.

(n) *Lyse v. Kingdom*, 1 Coll. 184, 188.

¹ *Aston's Est.*, 5 Wharton, 228; *Drever v. Mawdesley*, 13 Jur. 330. In this last case the trustees were held liable, as regards infant *cestuis que trust*, even though a receiver had been appointed, in a suit for an account.

The court itself invariably directs any *funds under its control to be invested in the three per cents., and what it would order with a suit, it will equally sanction if done without suit.^(o) Therefore, a trustee who has invested in the three per cents., is not liable for loss occasioned by the fluctuations of that fund;^(p) but he is liable for the fluctuations of any unauthorized fund.^(q) However, it may be observed, that an investment of trust funds by a trustee in Exchequer bills, pending the preparation of a mortgage, is a justifiable and proper step,^(r) but not as a proper investment.^(s)

In an early case, Lord Harcourt stated his opinion, that if an executor put out money on a real security, where there was no ground at the time to suspect, he was not liable to answer for the loss, though he acted without the indemnity of a decree.^(t) However, his Lordship admitted, that the point had not been settled; nor does it appear, that the opinion then expressed has ever been judicially adopted.⁽¹⁾ A trustee, therefore, could not be advised to undertake the responsibility of laying out trust-money on real security, where such an investment is not expressly authorized by the instrument creating the trust.^(u) It is clear that where there is an express direction to invest in the funds an investment on a mortgage security is improper.^(x) And it is equally certain, that where trust property is properly invested in the three per cents., a trustee cannot without especial authority sell out the stock, and invest the proceeds in land; and if he do so, he will be decreed to replace the stock with costs.^(y)

So it is also unquestionably clear, that trustees have no power permanently to convert the nature of the trust property, by laying out

(o) *Trafford v. Boehm*, 3 Atk. 444; *Holland v. Hughes*, 16 Ves. 114; *Howe v. E. of Dartmouth*, 7 Ves. 150.

(p) *Peat v. Crane*, 2 Dick. 499, n.; *Clough v. Bond*, 3 M. & Cr. 496; *Jackson v. Jackson*, 1 Atk. 513; *Ex parte Champion*, 3 Bro. C. C. 434; cited *Franklin v. Frith*, 3 Bro. C. C. 434.

(q) *Hancom v. Allen*, 2 Dick. 498; *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Clough v. Bond*, 3 M. & Cr. 496, 7.

(r) *Matthews v. Brise*, 6 Beav. 239.

(s) *Ex parte Chaplin*, 3 Y. & C. 397.

[*Knott v. Cottee*, 13 Eng. L. & Eq. 311.]

(t) *Brown v. Litton*, 1 P. Wms. 141; see Lord Eldon's observations on the propriety of calling in trust money laid out on real securities, in *Howe v. Earl of Dartmouth*, 7 Ves. 150; and see *Norbury v. Norbury*, 4 Mad. 191; *Widdowson v. Buck*, 2 Mer. 498, 9; *Caldecott v. Caldecott*, 1 N. C. C. 322.

(u) See *Wyatt v. Sherratt*, 3 Beav. 498.

(x) *Pride v. Fooks*, 2 Beav. 430.

(y) *E. Powlett v. Herbert*, 1 Ves. jun. 297.

(1) However, in *Pocock v. Reddington*, 5 Ves. 800, the Master of the Rolls seems to admit the general power of a trustee to invest on real security, if he thinks proper; and Sir K. Bruce, V. C., appears to have been of the same opinion in the late case of *Lyse v. Kingdom*, 1 Coll. 188; but see *Norbury v. Norbury*, 4 Mad. 191.

money in the *purchase* of real estate, unless a special authority for so doing is conferred upon them by the trust instrument.^(z)¹ And the exercise of a mere discretionary power to make such a conversion, cannot be enforced against the trustees.^(a) Although it will be otherwise if the power be made *imperative* by the terms of the trust instrument.^(b)

In one case, where the trust was to lay out the surplus rents upon mortgage or government securities with a view to accumulation, the court on petition ordered an accumulated sum to be laid out in the *purchase* of *real estate, but with a declaration, that it was [*378] to be considered as personal estate.^(c)

So the lending trust-money on *leaseholds* without a special power in the trust instrument is a breach of trust, for the consequences of which the trustee will be held responsible.^(d)

And an investment in South Sea Stock,^(e) or Bank,^(f) or India Stock,^(g) though practically as safe as any government security, is not regarded by the court as a proper disposition of trust funds; and upon acquiring judicial cognizance of the existence of such securities the court will order them to be sold and invested in the three per cents. Consequently, should any loss be occasioned to the trust estate by the fluctuation or depreciation in value of those securities, it would have to be made good by the trustees.^(h)² These remarks apply with equal or even greater force to canal and railway shares and other similar securities; as also to the public funds of any foreign state. And if a trustee upon his own responsibility adopt any such investments, he must be prepared to take the consequences of any

(z) See *E. of Winchelsea v. Norcliffe*, 1 Vern. 434; as to effect of power of varying the securities, vide post, p. 482, Sect. 3, Pl. III. of this chapter.

(a) *Lee v. Young*, 2 N. C. C. 532.

(b) *Beauclerk v. Ashburnham*, Rolls, 26th February, 1845, MS.; [8 Beav. 322;] vide post, *ubi supra*.

(c) *Webb v. Lord Shaftesbury*, 6

Mad. 100. [See *Ex parte Calmer*, 1 Hill's Eq. 112.]

(d) *Fyler v. Fyler*, 3 Beav. 550; *Ful-ler v. Knight*, 6 Beav. 205.

(e) *Trafford v. Boehm*, 3 Atk. 444.

(f) *Trafford v. Boehm*, 3 Atk. 444; *Howe v. Earl of Dartmouth*, 7 Ves. 150.

(g) *Powell v. Cleaver*, 7 Ves. 142, n.

(h) *Hancorn v. Allen*, 2 Dick. 498; *Clough v. Bond*, 3 M. & Cr. 496.

¹ *Bonsall's App.*, 1 Rawle, 273; *Billington's App.*, 3 Rawle, 55; *Kaufman v. Crawford*, 9 W. & S. 131; *Royer's App.*, 11 Penn. St. 36; *Ringgold v. Ringgold*, 1 H. & G. 11; *Eckford v. De Kay*, 8 Paige, 89; *Heth v. Richmond, &c.*, R. R. Co. 4 Gratt. 482; *Morton's Ex'rs. v. Adam*, 1 Strob. Eq. 72. In Pennsylvania, however, where the powers of guardians are extensive, it has been held that a guardian might, in a case of imminent necessity, buy in real estate. *Bonsall's App.*; *Royer's App.* ut supra. So, in *Billington's Appeal*, 3 Rawle, 55, it was held that an administrator might purchase his debtor's land under a judgment against him, to prevent a sacrifice, and the debt being lost.

² See ante, note to p. 368. Whether investments in banking and other corporations, are within the general powers of trustees, is not quite settled in this

loss. If, therefore, such investments are considered desirable, they should always be expressly authorized by the trust instrument.

It is still more obvious, that a trustee cannot be justified in risking the funds intrusted to his management upon mere personal security, whether the fund belongs to infant or adult *cestui que trusts*,⁽ⁱ⁾ and although it was stated on one occasion by Lord Northington, that the lending trust-money on personal security, as on a promissory note, would not of itself amount to a breach of trust without any circumstances of gross negligence,^(k) and that *dictum* is also countenanced by some very early decisions,^(l) yet this doctrine has been long since clearly overruled, and it is settled that an investment on personal security, whether created by a promissory note,^(m) or a bond,⁽ⁿ⁾ constitutes a breach of trust, for which the trustee will be personally liable.^(o)¹ It is immaterial, moreover, that the person to whom the money is lent, and by whom the security is entered into, is a co-trustee of the fund.^(p)

(i) See *Adye v. Feuilleton*, 3 Sw. 87, 11. Prec. Ch. 273; *Walker v. Symonds*, 3

(k) *Harden v. Parsons*, 1 Ed. 145. Sw. 1.

(l) *Sir Edward Hale's and Lady Carr's case*, 3 Sw. 63, n.; see *Emelie v. Emelie*, 7 Bro. P. C. 259.

(m) *Ryder v. Bickerton*, 3 Sw. 80, n.; *Darke v. Martyn*, 3 Beav. 525; *Vigrass v. Binfield*, 3 Mad. 62.

(n) *Adye v. Feuilleton*, 2 Cox, 24; 3 Sw. 84, n.; *Wilkes v. Steward*, Coop. 6; *Langston v. Ollivant*, Id. 33; *Collis v. Collis*, 2 Sim. 365; *Terry v. Terry*,

(o) *Holmes v. Dring*, 2 Cox, 1; *Walker v. Symonds*, 3 Sw. 63; *Clough v. Bond*, 3 M. & Cr. 496; *Watts v. Girdlestone*, 6 Beav. 188, 191.

(p) *Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Kebble v. Thompson*, 3 Bro. C. C. 112; *March v. Russell*, 3 M. & Cr. 31; *Walker v. Symonds*, 3 Swanst. 1; *Hewett v. Foster*, 6 Beav. 259. [See ante 309, note.]

country. In *Harvard College v. Amory*, 9 Pick. 447, where there was a bequest of \$50,000 "in trust to loan the same upon ample and sufficient security, or to invest the same in productive stock, either in bank shares or other stock, according to their best judgment," the trustees were held to be authorized to invest in the stock of an incorporated manufacturing company. The court appear to consider bank stock, indeed, as a safer investment than land. See also *Lovell v. Minott*, 20 Pick. 116. But such investments are never considered secure in England; and indeed are only a form of personal security. Therefore, in Pennsylvania, after some little uncertainty, it is now settled that an investment in stock of a banking, manufacturing, or trading corporation, is a breach of trust. *Hemphill's App.* 18 Penn. St. R. 303; see *Nyce's Est.*, 5 W. & S. 254; *Morris v. Wallace*, 3 Barr, 319. In *Hemphill's Appeal*, the trustees of Mr. Girard's will had invested in the stock of the United States Bank, in 1837, and continued the funds therein, till the stock had depreciated to a mere nominal value. Though Mr. Girard had invested in the same stock in 1831, it was held that the trustees were liable. The same conclusion was also arrived at in New York in *Ackerman v. Emott*, 4 Barb. S. C. 626, with regard to bank stock, and the English rule was adopted in its broadest terms. It was said there, that if the trustees go beyond the prescribed limits, "neither good faith, nor care, nor diligence, if they can accompany such departure, will protect them where there is an actual loss."

¹ The investment of trust funds in merely personal security, is, of course, a

It is to be observed, that if a trustee invest on securities, not expressly authorized by the trust, and not sanctioned by the practice of the court, it will be done at his own risk; and he will have to make good any loss occasioned by such an investment. But at the same time he must account to the *cestui que trusts* for any profits arising from the same source.(q)

[*379] *So the employment of the trust funds in trade, or any speculative undertaking, without any express authority, will, *à fortiori*, be treated as a breach of trust.¹ And whatever may be the apparent advantages of such a course, and however well intentioned the conduct of the trustee, there is no question but that the court will visit upon him any loss resulting from such a step:(r) while he will have to account for any profit thus made.(s) And if a trustee stand by and suffer his co-trustee so to deal with the trust funds; or, still more, if he be in any way accessory to the breach of trust, he will be equally liable, although he may not have otherwise actively interfered.(t) And the same rule applies, although the trust property be merely continued in the trade or business of the testator.(u) And it is immaterial that the trustees were the partners of the testator.(x)

(q) *Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Wilkinson v. Stafford*, 1 Ves. jun. 32; *Piety v. Stace*, 4 Ves. 622; *Bate v. Scales*, 12 Ves. 402; *Crawshay v. Collins*, 15 Ves. 226; *Docker v. Somes*, 2 M. & K. 655.

(r) *French v. Hobson*, 9 Ves. 103.

(s) *Brown v. De Tastet*, Jac. 284; *Cook v. Collingridge*, Jac. 607; *Crawshay v. Collins*, 15 Ves. 218; 2 Russ. 325; *Featherstonhaw v. Fenwick*, 17

Ves. 298; *Docker v. Somes*, 2 M. & K. 655; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41.

(t) *Ex parte Heaton*, Buck. 386; *Booth v. Booth*, 1 Beav. 125. [See ante, p. 309.]

(u) *Booth v. Booth*, 1 Beav. 125.

(x) *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41. [See *Cummins v. Cummins*, 3 J. & Lat. 64.]

breach of trust. *Nyce's Est.*, 5 W. & S. 254; *Swoyer's App.*, 5 Barr, 377; *Smith v. Smith*, 4 J. C. R. 281; *Gray v. Fox*, Saxton, 259; *Fowler v. Reynall*, 7 Eng L. & Eq. 270, and many other cases. But in Massachusetts, where, as has been remarked, a looser rule appears to obtain, it was held in *Lowell v. Minott*, 20 Pick. 119, that a loan by a guardian on the promissory note of the borrower, payable in one year with interest, secured by a pledge of shares in a manufacturing corporation, then above par, the amount of the loan being about three-fourths of the par value, did not make the guardian responsible for a subsequent loss; and so, where the shares were sold of a note of the purchaser, with note of a third person, secured by mortgage.

¹ *Munch v. Cockerell*, 5 Myl. & Cr. 178. In *Cummins v. Cummins*, 3 J. & Lat. 64, it was ruled that, though a settlor should authorize the trustees to continue the trust funds of a trading firm, in which he had invested them, if upon a change taking place in the firm, as by the withdrawal of one of the partners, they permit the fund to remain upon the personal security of the new firm, they will be guilty of a breach of trust.

Where the trust property is already invested on personal or other securities which would not be sanctioned by the court, it frequently becomes a question of no little difficulty to determine, how far it is the duty of trustees to call in such securities, and lay out the proceeds on some proper investment.

If there be an express trust declared for the conversion of the existing securities, then, of course, there can be no doubt as to its being the duty of the trustees to act upon that direction, and the neglect to do so will be a breach of trust.(y) And although there may be no positive trust to convert, yet if an order of the court in a suit for the administration of the trust has been made, directing the trustees to convert and invest in the three per cents., they will be liable for neglecting to comply with such an order, and this though the order has been obtained by the trustees themselves.(z)

Where the trust for conversion is created by will, and applies to the residuary estate of the testator, a twelvemonth from the testator's decease appears to have been fixed upon as usually the proper time for effecting the conversion.(a)

Thus, in a late case, where a testator directed that his outstanding personal estate should be got in as soon as conveniently might be after his decease; and the executors and trustees suffered a bond debt to remain outstanding for *five years* after the testator's death, and the sum was lost by the failure of the debtor, the trustees were held liable to make good the amount.(b) And from the observations of the Vice-Chancellor in the course of his judgment in that case, it seems that it would have been a breach of trust, on the part of the trustees, to have suffered the debt to *remain outstanding after *three years* had elapsed from the testator's death.(c) And in [*380] these cases it is not a sufficient excuse for the neglect of the trustees, that the testator had himself created the objectionable security, and reposed great confidence in the debtor, who was supposed to be in affluent circumstances.(d)

But in these cases much must necessarily be left to the discretion of the trustees: and if in the honest and proper exercise of that discretion, they delay the realization, they may not be held liable for any loss occasioned by that delay. As where executors, who were directed by the will to call in the testator's personal estate with all convenient speed, continued his trade for some years after his death, and thus occasioned a considerable loss, the court refused to charge

(y) *Dimes v. Scott*, 4 Russ. 201, 207; *lor v. Clarke*, 1 Hare, 161, 168; see *Mucklow v. Fuller*, Jac. 198; *Bullock v. Walker v. Shore*, 19 Ves. 387; *Gibson Wheatley*, 1 Coll. 130; vide post, *v. Bott*, 7 Ves. 94, 5. [17 Jur. 826.]
[Choses in Action], p. 446.

(z) *Sowerby v. Clayton*, 8 Jur. 597.

(b) *Bullock v. Wheatley*, 1 Coll. 136.

(c) 1 Coll. 136.

(a) *Dimes v. Scott*, 4 Russ. 195; *Tay-*

(d) *Bullock v. Wheatley*, 1 Coll. 130.

them with the loss, as they had acted *bona fide*, and according to the best of their judgment.(e) And again, where one of two executors and trustees delayed the sale of some Mexican bonds for a year and seven months after the testator's death, in the hope that the price, which had greatly fallen, might rise in the interim; Sir R. Pepys, M. R., refused to fix him with the loss.(f) And the trustee so acting will not be the more liable, because he acted against the wishes and conduct of his co-trustee, if his conduct be *bona fide*.(g) And it is immaterial that the direction is to convert *with all convenient speed*, for that is no more than the ordinary duty implied in the office of trustee.(h)

But where there is no actual direction for the conversion of the existing securities, which, on the contrary, are specifically given to the trustees, to be held and applied by them upon the trusts declared; the continuation of the property in its existing state must necessarily have been contemplated by the author of the trust, and may therefore be properly permitted by the trustees; unless some reason arise for calling it in, which did not exist when the trust was created.(i) And if in such a case the relative interests of the *cestui que trusts* would be affected or altered by the disposition of the existing securities, and their investment in the three per cents., the trustees would not be justified in taking that step, although a power is given them to vary the securities.(k)

If, however, the author of the trust in general terms vest his whole estate in trustees, either by deed or will, without any specific mention of the securities, of which it then consists, and there be nothing from which it may be inferred that the trusts were intended to apply to the property in its actual state; it would be a very hazardous course for the trustees to suffer any part of the estate unnecessarily to remain outstanding on improper security. It certainly would be no valid reason for their so doing, that the creator of the trust himself considered the existing securities to be a sufficient investment.(l)

Thus it is settled to be the duty of executors and trustees to call in any part of the trust funds which they may find outstanding on

(e) Garret v. Noble, 6 Sim. 504.

(k) 4 Mad. 455.

(f) Buxton v. Buxton, 1 M. & Cr. 80

(l) Powell v. Evans, 5 Ves. 844; De

(g) 1 M. & Cr. 96.

Manneville v. Crompton, 1 V. & B.

(h) 1 M. & Cr. 93.

359; Bullock v. Wheatley, 1 Coll. 130.

(i) Lord v. Godfrey, 4 Mad. 455.

[See Hemphill's App., 18 Penn. St. 303.]

¹ In Barton's Estate, 1 Pars. Eq. 24, the trustee suffered bank stock of the testator to remain outstanding, by which a loss occurred, and was held not liable therefor; this was, however, before Hemphill's App., 18 Penn. St. R. 303, where another decision of the same court, on a somewhat similar point, was reversed.

mere personal security, although no specific direction for that purpose is contained in the will.(m)

*It has also been laid down to be incumbent on executors to transfer into the three per cents., any funds which they may find invested in other than government stock ;(n) and it seems that this rule will apply to stock of so undoubted a character as Bank of England stock ;(o) it will prevail therefore *à fortiori* with regard to foreign stock, or shares in speculative companies.

However, it is not the duty of trustees to call in money invested on good real security, where no risk is apparent.(p) Although it is otherwise where from change of circumstances the security of the investment is diminished, and the capital endangered, as where the interest is not regularly paid, and becomes greatly in arrear.(q) It is difficult to lay down any definite rule for the guidance of trustees in such cases, in each of which they must necessarily be governed by their own discretion adapted to the particular circumstances ; bearing in mind the general rule, that in all cases a trustee is bound to take the same precautions, and act with the same prudence with regard to the trust estate, as if he were dealing with his own. Where a mortgage security is paid off voluntarily by the mortgagee, it will be the trustee's duty to invest the money in the absence of special directions in the three per cents.(r)

In some cases the trustee will be charged with interest as well as the capital which has been lost by not calling in the improper securities.(s) However, the distinction between trustees putting out money *themselves* on improper security and permitting it to remain upon the security which the *testator* had chosen is fully admitted, and will have due weight with the court in determining the extent of their liability.(t) Interest, therefore, will not be given in these cases, unless there has been great negligence on the part of the trustees.(u)

Where the trust-moneys are once properly invested in stock, the trustees cannot without an express authority dispose of the stock, and

(m) *Lowson v. Copeland*, 2 Bro. C. C. 157 ; *Powell v. Evans*, 5 Ves. 839 ; *Caffrey v. Darby*, 6 Ves. 488 ; *Maitland v. Bateman*, 13 Law Journ. N. S., Chanc. 272 ; *Carrey v. Bond*, 12 Id. 484 ; *Mucklow v. Fuller*, Jac. 198 ; *Tebbs v. Carpenter*, 1 Mad. 297, 8 ; *Bailey v. Gould*, 4 Y. & C. 221 ; *Clough v. Bond*, 3 M. & Cr. 496 ; *Rogers v. Vasey*, V. C. K. Bruce, 27th Jan., 1845, MS. ; *Att.-Gen. v. Higham*, 2 N. C. C. 634.

(n) *Holland v. Hughes*, 16 Ves. 114.

(o) *Howe v. E. of Dartmouth*, 7 Ves. 149, 150.

(p) *Howe v. E. of Dartmouth*, 7 Ves. 150 ; see *Saddler v. Turner*, 8 Ves. 621 ; *Orr v. Newton*, 2 Cox, 274.

(q) *Tench v. Cheese*, M. R., 19th Nov. 1844, MS.

(r) *Challen v. Shipham* [4 Hare, 556].

(s) *Powell v. Evans*, 5 Ves. 839 ; *Mucklow v. Fuller*, Jac. 200.

(t) *Powell v. Evans*, 5 Ves. 841 ; *Clough v. Bond*, 3 M. & Cr. 496.

(u) *Lowson v. Copeland*, 2 Bro. C. C. 157 ; *Tebbs v. Carpenter*, 1 Mad. 298.

invest in other securities; and if they should venture to do so, they will be decreed immediately to replace the stock, and if the stock be replaced for a sum less than that, at which it was sold, to invest the surplus in the same stock to the same uses.(x)¹ And in such cases the *cestui que trusts* will have the option either to have the stock replaced, or to take the money produced by the sale with interest;(y) [*382] and if there have been any *improper conduct on the part of the trustees, they will be charged with interest at five per cent.(z)

It has been decided, that even an express power for the trustees to vary the securities does not authorize changes made without any apparent object, or any prospect of benefiting the trust estate.(a) And if the trustees dispose of the existing securities without having in contemplation any immediate re-investment, they will be liable for any loss that may ensue.(b) The exercise of a power of changing the securities will not be imperative on the trustees, unless it be expressly made so by the terms of the instrument.(c)²

However, a *cestui que trust*, being *sui juris*, who consents to or acquiesces in an investment by a trustee, cannot afterwards question its propriety;(d) indeed if the investment should amount to a breach

(x) *Adams v. Cifton*, 1 Russ. 297; *Earl Powlett v. Herbert*, 1 Ves. jun. 297; see *Witter v. Witter*, 3 P. Wms. 100; *Fyler v. Fyler*, 3 Beav. 550; *Hanbury v. Kirkland*, 3 Sim. 265; *Crackel v. Bethune*, 1 J. & W. 586; *Underwood v. Stevens*, 1 Mer. 712; *Williams v. Nixon*, 2 Beav. 472. [*Murray v. Feinour*, 2 Maryl. Ch. Dec. 421.]

(y) *Forrest v. Elwes*, 4 Ves. 497. [See *Fowler v. Reynal*, 13 Jur. 680.]

(z) *Pocock v. Reddington*, 5 Ves. 794; *Mosley v. Ward*, 11 Ves. 581; *Bate v. Scales*, 12 Ves. 402.

(a) *Brice v. Stokes*, 11 Ves. 324, 5, 6; see *De Manneville v. Crompton*, 1 V. & B. 359. [See 7 Eng. L. & Eq. 270.]

(b) *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 N. C. C. 16; *Watts v. Girdlestone*, 6 Beav. 190.

(c) Vide *supra*, and *post*, p. 482, Section 3, Pl. III. of this Chapter.

(d) *Brice v. Stokes*, 11 Ves. 319; *Langford v. Gascoigne*, Id. 333; *Booth v. Booth*, 1 Beav. 125; *Broadhurst v. Balguy*, 1 N. C. C. 16; *Nail v. Punter*, 5 Sim. 555; *Walker v. Symonds*, 3 Sw. 64.

¹ Where, as in Maryland, there is no stock specially favored by the court, there is even more reluctance in changing an investment made by the author of the trust. *Murray v. Feinour*, 2 Maryl. Ch. 418.

² In general, an investment directed by the testator cannot be changed without the consent of all; if there are *cestui que trusts* not in being, the court will not direct it, *Wood v. Wood*, 5 Paige, 596; *Deadrich v. Cantrell*, 10 Yerg. 263; *Contee v. Dawson*, 2 Bland, 264; *Burrill v. Sheill*, 2 Barb. S. C. 457; see *Trustees Trans. Univers. v. Clay*, 2 B. Monroe, 386; even though to be made in a foreign country. *Burrill v. Sheill*, ut. *supr.* But in *Perroneau v. Perroneau*, 1 Desaus. 521, where a testator dying shortly after the Revolutionary War, and distrusting the stability of the government, for better security of his estate directed his executors to invest in the funds in England; the court subsequently, on the restoration of confidence, under the Constitution, ordered the funds to be invested in this country.

of trust, the interest of the *cestui que trust*, with whose concurrence it was made, is *primarily* liable to make good to the general trust estate any loss, which may thus be occasioned; (e) and if the *cestui que trust*, who so concurs, have derived any actual benefit from the commission of the breach of trust, he will be bound to make compensation to the trustee to the extent of that benefit. (f)

But this consent or acquiescence on the part of the *cestui que trusts* must be with full knowledge of the circumstances; (g) for if there be any misrepresentation or concealment by the trustees, the transaction may be questioned by the *cestui que trusts*, even though a formal deed of compromise has been entered into by them with the trustees. (h)

And it is almost unnecessary to add, that the party whose concurrence or acquiescence is relied upon as a bar to the remedy against the trustee, must be competent to consent; for the acts of a person not *sui juris*, as an infant, or a married woman, (i) are of course not binding; and a *cestui que trust* under such disability may recover against a trustee for any loss occasioned by the improper investment, though it were made with the consent or even at the urgent request of the party by whom it is subsequently questioned. (k)

So the acquiescence of a *cestui que trust* entitled in remainder after the death of a tenant for life will not be binding on him during the continuance of the preceding life estate; for until his own title accrues in possession, he has no immediate right to interfere in the ordinary administration of the trust estate. (l)

*If a trustee have lent the trust-moneys upon the personal security of one of the *cestui que trusts* in a manner not au- [*383]

(e) *Booth v. Booth*, 1 Beav. 125, 130; *Hopkins v. Myall*, 2 R. & M. 86; *Kellaway v. Johnson*, 5 Beav. 319; see

(f) *Ibid.* 130.

Ryder v. Byckerton, 3 Sw. 80, n.

(g) *Mountfort v. Lord Cadogan*, 17 Ves. 489. [See on this subject *Munch v. Cockerell*, 5 Myl. & Cr. 178.]

(k) *Walker v. Symonds*, 3 Sw. 69;

Bateman v. Davis, 3 Mad. 98; *Nail v. Punter*, 5 Sim. 555; see *Marsh v. Russell*, 3 M. & Cr. 31, 42.

(h) *Walker v. Symonds*, 3 Sw. 1; *Underwood v. Stevens*, 1 Mer. 712.

(l) *Bennet v. Coley*, 5 Sim. 181; S. C. 2 M. & K. 225.

(i) *Cocker v. Quaile*, 1 R. & M. 535;

¹ *Murray v. Feinour*, 2 Maryl. Ch. 422; *Barton's Est.*, 1 Pars. Eq. 27. In *Wood v. Wood*, 5 Paige, 598, it was held that the Chancellor as general guardian of infants, could give consent for them, on bill filed, to a proper change of investment. In *Mant v. Leith*, 10 Engl. L. & E. 723, where a trustee at the instance of a *cestui que trust*, a married woman, sold out stock, and placed the trust fund in an improper state of investment, he was charged only with the amount of the dividends which would have accrued on the trust fund, had it remained in its original state of investment. See also as to the approval of an investment by a *feme covert*, *Barton's Est.*, ut. supr. In *Nyce's App.*, 5 W. & S. 254, it was held that merely saying, by a guardian, that a particular fund was a safe investment, did not authorize an investment therein by an executor.

thorized by the trust instrument, he has a right to institute a suit against the party to have the money replaced; and in such a case he will be entitled to his costs.^(m) This may also be done by the representatives of the trustee, by whom the improper investment was originally made.⁽ⁿ⁾

And in like manner, if the trust fund have been transferred by two trustees from their joint names into the name of one of them only, the trustee, who has concurred in the transfer, may institute a suit against the other to have the fund replaced.^(o) And in such a case the *cestui que trust* need not be made parties to the suit.^{(p)(1)}

An authority given to a trustee to lay out and invest the trust-money, empowers him to do all acts essential to such a trust; and it therefore necessarily enables him to give sufficient discharges to the borrowers of the money upon calling it in.^(q)

Where a trustee, for investment in real estate, has possessed himself of the trust-money, and afterwards purchases real estate in his own name, without any allusion to the trust, the purchased estate will not be held liable to the trust, unless some positive or presumptive evidence be adduced, that the purchase was made in execution of the trust.^(r)

A trust to invest in the purchase of land does not authorize the trustees to lay out money in repairs and improvements of the estate.^(s)

Trustees for investment in the purchase of lands which are settled in strict settlement, are bound to watch the proceedings for the benefit of the persons beneficially entitled in remainder, and they are therefore entitled to be present in the Master's office at the investigation of the title to the lands, which are proposed to be purchased, although it would be otherwise where *all* the persons beneficially interested are before the court.^(t)

The usual indemnity clause will not exonerate a trustee from the

^(m) *Payne v. Collier*, 1 Ves. jun. 170; [*Locke v. Lomax*, 11 Eng. L. & Eq. 155; *Greenwood v. Wakeford*, 1 Beav. 576; *Coonrod v. Coonrod*, 6 Hamm. 114; *Fuller v. Knight*, 6 Beav. 205. *Wormley v. Wormley*, 8 Wheat. 421.]

⁽ⁿ⁾ *Greenwood v. Wakeford*, 1 Beav. 576. ^(r) *Perry v. Phillips*, 4 Ves. 108; vide *post*, p. 522 (Remedies for Breach of Trust).

^(o) *Franco v. Franco*, 3 Ves. 75; May v. Selbey, 1 N. C. C. 235. [Ante, 91, note.]

^(p) *Franco v. Franco*, 3 Ves. 75; May v. Selby, 1 N. C. C. 235. ^(s) *Bostock v. Blakeney*, 2 Bro. C. C. 653.

^(q) *Wood v. Harman*, 5 Mad. 368. ^(t) *Davis v. Combermere*, 9 Jur. 76.

(1) If a trustee be compelled to make good to the *cestui que trusts* a loss occasioned by the default of a co-trustee, who has become bankrupt, he may prove for the amount so paid by him as a debt against the bankrupt's estate. *Lincoln v. Wright*, 4 Beav. 427.

consequences of a breach of trust, in neglecting to convert and invest as directed by the trust instrument.^(u)

Where a specific sum (as 2,000*l.*) is given by will to trustees to be invested, the costs of the investment in the absence of any express directions, must be defrayed out of the particular sum, and will not fall upon the testator's general estate.^(x)

It is the duty of trustees to give their *cestui que trusts* full information as to the disposition and investment of the trust property.^(y)

*VI.—OF TRUSTEES OF PROPERTY SETTLED FOR LIFE, WITH REMAINDER OVER. [*384]

Trustees of settled property hold as much for the protection and benefit of those entitled in remainder, as of those to whom the immediate beneficial enjoyment is given. In administering the trust, therefore, the interests of both must be equally consulted, nor must any advantage be given to either of them at the expense of the other.

It has been already seen,^(z) that in the case of real estate, the trustees, and not the equitable tenant for life, are entitled to the custody of the title deeds: although it is otherwise if the tenant for life have the *legal* estate.^(a) And if the trustees be guilty of great negligence by suffering the tenant for life to possess himself of the deeds; or *à fortiori* if they deliver them over to him with cognizance of the intention to make an improper use of them, they will be responsible to the remainderman for any loss that may ensue.^(b) In the recent case of *Denton v. Denton*,^(c) in the Rolls, a testator, by his will, charged certain annuities on his residuary real estate, which he devised to two trustees, in trust, to pay or permit the rents to be received by A. for life with remainder over. Upon the testator's death, A. entered into possession of the estate, and acquired possession of the title deeds, which he kept with the acquiescence of the trustees for four years; the annuities were also regularly paid by him. The trustees then insisted upon having possession of the title deeds, and gave notice to the tenants to pay the rents to them, and commenced an action against A. for the recovery of the deeds. A. filed his bill, to restrain the trustees from continuing these proceedings; and the Master of the Rolls granted the injunction on terms, one of which was, that A. *was to bring the deeds into court*. His

(u) *Mucklow v. Fuller*, Jac. 198; see *Langston v. Olivant*, Coop. 33. [*Fenwick v. Greenwall*, 10 Beav. 412.]

(x) *Gwitter v. Allen*, 1 Hare, 505.

(y) *Walker v. Symonds*, 3 Sw. 58.

(z) Ante, Pt. II. Ch. III. page 272.

(a) Ante, Pt. II. Ch. III.

(b) *Evans v. Bicknell*, 6 Ves. 174.

(c) *Denton v. Denton*, 8 Jur. 388; [7 Beav. 388.]

lordship appears to have attached much weight to the long acquiescence of the trustees in the possession of the tenant for life.(c)

So it has been also stated, that in the absence of any express directions in the instrument creating the trust, the trustees will be entitled to the possession and management of the estate, if the nature of their duties require that they should have a controlling power.¹ For instance, where the trust is to keep up insurances, or pay annuities, or other periodical sums, out of the rents, the *cestui que trust*, who is entitled for life subject to those charges, cannot assert a claim to the possession and management of the estate to the exclusion of the trustees.(d) In *Naylor v. Arnitt*, a testator devised all his real estates to two trustees, their heirs and assigns, in trust out of the rents and profits to pay two life annuities, and subject thereto to permit and suffer A. to receive and take the rents, &c., during his life, with a similar trust in favor of the wife of A., and subsequent limitations over to their children. It was held by Sir J. Leach, M. R., that the trustees had power to lease the land for ten years.(e) However, where the income of the estate is amply sufficient to defray the prior charges upon it, the tenant for life will be let into possession [*385] upon giving *proper security for payment of the annuities or other charges.(f) Although possession will not be given him until the sufficiency of the estate for that purpose has been ascertained by taking the accounts.(g) In the case of *Denton v. Denton*,(h) which is stated above, the trustees of an estate, charged with the payment of annuities, were restrained from taking proceedings to compel the payment of the rents into their hands, rather than into those of the *cestui que trust* for life, upon the latter's undertaking to keep down the annuities.(h) Where the *cestui que trust* for life is a female, that is an additional reason for excluding her from the control or management of the estate.(i) But we have also seen, that where it appears, that the trustees were not intended to have the exclusive management of the property, that intention will prevail.(k) And if the personal possession or occupation of the pro-

(c) *Denton v. Denton*, 8 Jur. 388.

(g) *Ibid*.

(d) *Tidd v. Lister*, 5 Mad. 429; and see *Jenkins v. Milford*, 1 J. & W. 629; ante, Pt. II. Ch. III.

(h) *Denton v. Denton*, 8 Jur. 383; [7 Beav. 388.]

(e) *Naylor v. Arnitt*, 1 R. & M. 501.

(i) 5 Mad. 432. [*Young v. Miles' Exr's.*, 10 B. Monr. 290.]

(f) *Blake v. Bunbury*, 1 Ves. jun. 194, 514; S. C., 4 Bro. C. C. 21.

(k) *Ibid*.

¹ Thus in *Young v. Miles' Exr's.*, 10 B. Monroe, 290, on a trust for separate use, it was held, that as to such of the trust property as could be used by the *cestui que trust*, and her husband without conversion, they had the right to the possession, the right to control being in the trustees; but that the money and stocks should remain in the possession of the latter.

perty be essential to its beneficial enjoyment, as in the case of a family residence, there the court will, in any case, deliver the possession to the *cestui que trust* for life, taking means to secure due protection of the property for the benefit of those in remainder.(l)

Where the tenant for life takes the *legal* estate as well as the equitable interest, the right of possession usually follows, and is commensurate with, the title.(m)¹

It is the duty of the trustees to protect the estate for the benefit of the remaindermen against the acts of the equitable tenant for life. Therefore, they must not permit him to cut timber, or open mines, or commit other waste.(n)²

But where the *cestui que trusts* for life are without impeachment of waste, the trustees, with the concurrence of the tenants for life, will be justified in cutting such timber as show symptoms of decay;(o) but not ornamental timber,(p) nor to such an extent as will materially lessen the value of the estate.(q)

Where the beneficial enjoyment of movable articles, such as heirlooms, or furniture, plate, &c., is given to the tenant for life, it will be a sufficient precaution on the part of the trustees to take a schedule of the articles, signed by the *cestui que trust* for life. And as a general rule, and in the absence of special circumstances of danger or suspicion, it is not requisite to take any security from the tenant for life for the safe keeping of such articles, and their redelivery to the trustees upon the determination of the life estate.(r)³

(l) 5 Mad. 432, 3; ante, Pt. II. Ch. III.

(m) See Tidd v. Lister, 5 Mad. 432; supra, Pt. II. Ch. III. [p. 269]

(n) Whitfield v. Benett, 2 P. Wms. 242; Denton v. Denton, 8 Jur. 388.

(o) Waldo v. Waldo, 7 Sim. 261; see Smythe v. Smythe, 2 Sw. 251; Brydges v. Brydges, Id. 150; Wykham v. Wykham, 19 Ves. 419.

(p) Newdigate v. Newdigate, 1 Sim.

131; Davies v. Leo, 6 Ves. 786; Chamberlain v. Dummer, 3 Bro. C. C. 549.

[See on this subject Marker v. Marker, 4 Engl. L. & Eq. 95; Morris v. Morris, 15 Sim. 510; 11 Jur. 196; Duke of Leeds v. Lord Amherst, 14 Sim. 357; 2 Phill. 117.]

(q) Burge v. Lamb, 16 Ves. 174.

(r) Bill v. Kynaston, 2 Atk. 82; Leeke v. Bennett, 1 Atk. 471.

¹ But the tenant for life is in such case trustee for the remaindermen, and may be called on for an account. Clarke v. Saxon, 1 Hill's Eq. 69; Horry v. Glover, 2 Hill's Eq. 515. The trust is, however, an implied, and not an express one. Joyce v. Gunnels, 2 Rich. Eq. 259.

² Freeman v. Cook, 6 Ired. Eq. 376; Woodman v. Good, 6 W. & S. 169. In the latter case it was held that the trustee might bring an action of waste against the equitable tenant for life.

³ It is now established, that the first taker of articles specifically bequeathed to several persons in succession, is not to be required in the first instance to do more than give an inventory or schedule, signed by himself; but that where there is any danger that the property will be wasted, secreted, or carried off, then the parties in remainder may, through a court of equity, require security to be given, or an account to be taken, and also, if necessary, obtain an injunction against their

Where the trust property consists of stock or other personal estate, which is necessarily much more within the power of the immediate possessor than real estate, it is unquestionably the duty of the trustees to retain the possession for the benefit of those entitled in remainder; and if they *deliver over the fund unprotected into [*386] the possession or power of the tenant for life, who disposes of it for his own benefit, they would unquestionably be answerable to the remaindermen for the loss.

However, although the trustee would not be justified in putting the *corpus* of the fund within the exclusive control or possession of the *cestui que trust* for life, the annual income as it arises is his sole property; and, therefore, a power of attorney for him to receive the dividends (which is the readiest method of putting him in possession of what the author of the trust intended him to have), cannot entail any responsibility upon the trustees, as long as no circumstance occurs to alter or defeat the right of the tenant for life to the enjoyment of the income. However, it may be added, that if the trustee, or one of several trustees, by whom a power of attorney is given, himself once receive the dividends, that will operate as a revocation of the power, and a new one must consequently be executed for the receipt of future dividends. It is almost needless to add, that the death of the trustee, or all the co-trustees, who have executed such a power, will have the same effect.

removal. *Long v. Chadwick*, 13 Conn. 42; *Hudson v. Wadsworth*, 8 Id. 363; *Holliday v. Coleman*, 2 Munf. 162; *Mortimer v. Moffat*, 4 Henn. & Munf. 503; *Chisholm v. Starke*, 3 Call, 25; *McLemore v. Good*, 1 Harp. Eq. 272; *Swann v. Ligan*, 1 McCord Ch. 227; *Cheshire v. Cheshire*, 2 Ired. Eq. 569; *Sutton v. Cradock*, 1 Id. 134; *Howell v. Howell*, 3 Id. 522; *Swann v. Ligan*, 1 McC. Ch. 227; *Henderson v. Vaulx*, 10 Yerg. 30; *Clarke v. Saxon*, 1 Hill's Eq. 75; *Spear v. Tucker*, 2 Barb. Eq. 211; see *Kinnard v. Kinnard*, 5 Watts, 109; though the tenant for life be a feme covert, *Clarke v. Saxon*, 1 Hill's Eq. 75. And a purchaser from tenant for life may also be compelled to give security, *Condy v. Adrian*, 1 Hill's Eq. 154; *Walcott v. Cady*, 5 J. C. R. 51; or (in South Carolina) a purchaser at an execution against the life tenant. *Pringle v. Allen*, 1 Hill's Eq. 135. In Pennsylvania, before the Act of 1834 (*Dunlop*, 528), it was thought that the courts had no power to require security for a legacy for life in the first instance, though they might stay execution till it was given; see *Lippincott v. Warder*, 14 S. & R. 118; *Kinnard v. Kinnard*, 5 Watts, 108; but now by the 49th section of that act, it is provided, that whenever personal property is bequeathed to any person for life, or for a term of years, or for any other limited period, or upon a condition or contingency, the executor of such will shall not be compelled to pay or deliver the property so bequeathed, until security be given in the Orphans' Court having jurisdiction of his accounts, in such sum and form, as in the judgment of such court, shall sufficiently secure the interest of the person entitled in remainder. As to the collateral inheritance tax, see § 63 of the same act; and on the construction of the clause, see *Rodgers v. Rodgers*, 7 Watts, 19.

See also a discussion of this subject in the American notes to *Howe v. Earl of Dartmouth*, 2 Lead. Cas. Eq., part i. 425, 1st Am. Ed.

It is settled, that any extraordinary *bonus* or addition to the usual annual income of stock or other property, which is settled in trust for one for life with remainder over, must be treated as capital and added to the principal fund. The trustees, therefore, will not be justified in paying over these unusual additions to the beneficial tenant for life, but they must invest them for the benefit of all parties.^(s)¹

This brings us to the consideration of a very important rule, which has been established, as to the duty of trustees of property settled for life with remainder over, where the property is of a perishable nature, such as leaseholds, or annuities for some limited period. As such interests become exhausted by the effluxion of time, if the whole amount of the annual income were paid to the tenant for life, he would in reality be in receipt not only of the interest, but also to a certain extent of the capital of the trust fund, to the prejudice of the remaindermen; and if the life estate lasted sufficiently long, there might be nothing left at its expiration.

It has therefore been long established as a general rule, that where a testator makes a *general* gift of his estate, or the residue of his estate, generally to, or in trust for, a person for life with remainder over, so much of the property as consists of leaseholds, or terminable annuities, or other interests of a perishable nature, must be converted and invested in permanent securities for the benefit of the remainderman.^(t)² And the same rule applies to articles, which *ipso usu consumuntur*, such as wines, live stock, and other property of that nature.^(u) And if in contravention of this rule, the trustees suffer the tenant for life to receive the whole income arising from the perishable securities, he will be decreed to refund what he may have

(s) *Brander v. Brander*, 4 Ves. 800; *Sloper*, 2 M. & K. 701, 2; *Mills v. Mills*, Paris v. Paris, 10 Ves. 185; see *Hooper* 7 Sim. 501; *Pickering v. Pickering*, 2 v. Rossiter, 13 Price, 774; S. C. 1 M'Clel. Beav. 57; S. C. 4 M. & Cr. 298; *Lichfield v. Baker*, 2 Beav. 481; *Benn v.* 527.

(t) *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Fearn v. Young*, 9 Ves. 552; *Dixon*, 10 Sim. 636.
(u) *Randall v. Russell*, 3 Mer. 194, *Dimes v. Scott*, 4 Russ. 200; *Alcock v.* 195.

¹ In *Price v. Anderson*, 15 Sim. 473, however, where an insurance company had declared for several years yearly dividends of 2½ per cent., but in 1846 declared a dividend of 12½ per cent., it was held that a tenant for life of the stock was entitled to the whole amount. So in *Johnson v. Johnson*, 15 Jur. 714; 5 Engl. L. & Eq. 164, a "bonus or increased dividend of £10 per share, to be added to the usual dividend of £3 per share, making altogether £13 per share," declared by an Insurance Company two years after a testator's death, was held to be income, and the tenant for life of the shares entitled thereto. See, also, *Cogswell v. Cogswell*, 2 Edw. Ch. 231; and *Ware v. McCandlish*, 11 Leigh, 395; the general rule being, that the tenant for life is entitled to increase and profit.

² See post, note to page 390.

received over and above what he would have received, if the conversion had been duly made, and the proceeds *invested in [*387] the three per cents. ;(x) and this difference will be treated as capital to be invested for the benefit of all parties entitled.(y) The tenant for life is in the first place bound to make good this difference; but on his failure or inability, the parties entitled in remainder may claim against the trustees the full amount, which has so been paid by them in breach of their trust.(z)¹

If, however, the remaindermen have acquiesced for a considerable period in the receipt of the whole actual income by the tenant for life, and do not claim any relief by their bill as to the prior payments, the court will confine its decree to the conversion, without directing any account of the previous receipts.(a) And where it appeared to be beneficial to all parties, that annuities and policies settled on a party for life should not be sold, the court on application has sanctioned their retention *in specie* by the trustees.(b)

It is settled that bank stock, when settled for life, though a permanent security, must also be converted and invested in the three per cents. : because it depends on the will of the directors, whether the casual profits (which are full as valuable as the ordinary profits) shall go to the tenant for life, or form part of the capital ; and the court will not allow the interests of tenants for life and of remaindermen to depend on such an uncertainty.(c) The same rule, therefore, ap-

(x) *Howe v. Earl of Dartmouth*, 7 Ves. 151; *Mills v. Mills*, 7 Sim. 509.

(y) *Ibid*.

(z) *Howe v. Earl of Dartmouth*, 7 Ves. 151; *Dimes v. Scott*, 4 Russ. 195, 206.

(a) *Lichfield v. Pickering*, 2 Beav. 481, 8; see *Pickering v. Pickering*, 4 M. & Cr. 298, 304.

(b) *Glengall v. Barnard*, 5 Beav. 245.

(c) *Mills v. Mills*, 7 Sim. 509; see *Howe v. Earl of Dartmouth*, 7 Ves. 150. [See *Price v. Anderson*, 15 Sim. 479.] It has been already stated that where property of this description is made the subject of a trust, the bonuses must be treated as capital and invested. [Ante, p. 386.]

¹ In *Meyer v. Simonson*, 13 Engl. L. & Eq. 133, the principles which govern the Court of Chancery on this subject, are thus stated by Parker, V. Ch.: "The personal estate of a testator may be considered as divided into three different classes. First, property which is found at the testator's death invested in such securities as the court can adopt; as money in the funds, or on real securities. The tenant for life is entitled to the whole income of this. Secondly, property which can be converted into money without sacrificing anything by a forced sale. As to this the rule is clear; it must be converted, and the produce must be invested in securities which the court allows, and the tenant for life is entitled to the income of such investment. Thirdly, property which, according to a reasonable administration, is not capable of an immediate conversion, and which cannot be sold immediately without involving a sacrifice of both principal and interest. In this case, the rule is to take the value of the testator's interest, and to give the tenant for life the income of that present value."

plies with equal force to other securities, on which there are frequent bonuses, or other casual profits, which are subject to the arbitrary disposition of the parties, by whom such additions are declared.

So where there is a *positive direction* in a will for the trustees to *convert* the personal estate into money, and to invest in government or real securities, and the trusts of the investments are declared for the benefit of one for life with remainder over, the *cestui que trust* for life is entitled to receive the amount only of so much income, as would have arisen from the personal estate if converted and invested according to the trust within a year after the testator's death; and the trustees will not be allowed any greater payment to him in passing their accounts. If, therefore, they suffer a security producing a much higher rate of interest,—as for instance an Indian security producing ten per cent.—to remain undisposed of, and pay the whole of the income arising from that security to the tenant for life, they will be liable to make good to the remainderman the difference between the annual amount actually paid, and that which, according to the foregoing rule, ought to have been paid by them to the tenant for life.(d)

And although the security bearing the higher interest is subsequently disposed of and invested in the three per cents. at a much more advantageous rate than if the investment had been made at the proper time, the trustees will not be entitled to indemnify themselves for their liability in *respect of the over-payment to the tenant for life, by setting off against it the increase to the [*388] trust estate, which had proceeded from the delay in making the required investment; but they will be charged with the whole of the stock actually purchased, as well as the whole interest actually received, while their allowances in discharge for payments to the tenant for life will be confined to the amount that would have been payable to him, if the improper security had been converted, and the investment in consols made at the proper time.(e)

However, in deciding on the liability of the trustee in *Dimes v. Scott*, both the Master of the Rolls,(f) and the Lord Chancellor,(g) appear to have laid considerable stress upon the *positive direction* in the will for the executors to convert and invest. And where no *express* trust for conversion and investment is contained in the instrument, it has never been decided, that the trustees would not be justified in paying over to the tenant for life the whole of the income arising from a permanent security, which produces more than the or-

(d) *Dimes v. Scott*, 4 Russ. 195. [So of a discretionary direction to convert, *Prendergrast v. Prendergrast*, 3 Eng. L. & Eq. 1.]

(e) *Dimes v. Scott*, ubi supra.

(f) 4 Russ. 201.

(g) 4 Russ. 207.

dinary interest, as long as the trust funds or any part of them are suffered to remain on that security.^(h)

Where a testator directs his residuary estate to be converted and invested in a particular manner, we have seen that the tenant for life is entitled *from the first year after the testator's death* to receive the amount of income, which those investments would have produced, if made at that time.⁽ⁱ⁾ The interest which the tenant for life will take *during the first year after the testator's death*, is yet an unsettled question. This question admits of four possible solutions, and the decisions of very eminent judges may be urged in support of each.

1st. The tenant for life *may be entitled to nothing* until the expiration of a twelvemonth from the testator's death, according to the opinion of Sir John Leach in *Scott v. Hollingworth*,^(k) and of Sir Thomas Plumer in *Taylor v. Hibbert*;^(l) and the income in the mean time is to be added to, and form part of the capital of the residue. Both those two learned judges appear to have assumed, that this opinion was in accordance with the established rule of the court, and Sir Thomas Plumer^(m) treats this general rule as having been so settled by Lord Eldon in the case of *Sitwell v. Bernard*.⁽ⁿ⁾ However, in the subsequent case of *Angerstein v. Martin*,^(o) that great judge himself disclaimed any intention of establishing any such general rule by his decision in *Sitwell v. Bernard*,⁽ⁿ⁾ a decision which he stated to have been founded on the direction to accumulate, which formed an ingredient in that case; and his lordship's further observations on the decisions in *Sitwell v. Bernard*⁽ⁿ⁾ and *Scott v. Hollingworth*, have materially weakened the authority of those cases, if indeed they do not expressly overrule them.^(p) The case of *Vickers v. Scott*^(q) arose upon real estate, which was directed to be sold, and the point in question does not seem to have been much argued in that case.

[*389] *2d. According to the decision of Sir A. Hart, V. C., in *La Terriere v. Bulmer*,^(r) the *cestui que trust* for life, during the first year after the testator's death, will take *the income of such parts of the estate as are properly invested at the testator's death, or may become so invested during that year*. Lord Eldon's decisions in *Gibson v. Bott*,^(s) and *Hewitt v. Moris*,^(t) are also in favor of this

(h) See *Howe v. Earl of Dartmouth*, 7 Ves. 150; [and *Meyer v. Simonson*, 13 Engl. L. & Eq. 133; *Williamson v. Williamson*, 6 Paige, 503.]

(i) *Dimes v. Scott*, 4 Russ. 195; see preceding page.

(k) 3 Mad. 161; and see *Vickers v. Scott*, 3 M. & K. 500.

(l) 1 J. & W. 308; and see *Tucker v. Boswell*, 5 Beav. 607.

(m) 1 J. & W. 313.

(n) 6 Ves. 522.

(o) T. & R. 238; and see *Hewitt v. Morris*, T. & R. 244.

(p) T. & R. 239.

(q) 3 M. & K. 500.

(r) 2 Sim. 18.

(s) 7 Ves. 95.

(t) T. & R. 241.

doctrine, which is also strongly supported by the observations of Sir J. Wigram, V. C., in the recent case of *Taylor v. Clark*.^(u)

3d. The tenant for life may be entitled to *the income arising from the property in its existing state* during the first year from the testator's death. And this view of the law is supported by Lord Eldon's decision in the case of *Angerstein v. Martin*,^(x) and by that of Lord Langdale, M. R., in *Douglas v. Congreve*.^(y) It has been observed by Vice-Chancellor Wigram,^(z) that it might be a question, whether Lord Eldon's decree in *Angerstein v. Martin* was intended to impeach the law as laid down in *La Terriere v. Bulmer*;^(a) and even if such were Lord Eldon's intention, it must have been considered as overruled by Lord Lyndhurst's decision in *Dimes v. Scott*.^(b) The latter case of *Douglas v. Congreve*,^(c) which is clearly inconsistent with *Dimes v. Scott*, was also strongly questioned by Vice-Chancellor Wigram in the recent case of *Taylor v. Clark*,^(d) in which all the authorities on this subject are collected and reviewed, and his Honor's decision, in which he followed *Dimes v. Scott* in preference to *Douglas v. Congreve*, is directly at variance with the latter case.^(e)

4th. According to the determination of Lord Lyndhurst in *Dimes v. Scott*,^(b) the tenant for life will take, not the interest actually arising from the property during the first year after the testator's death, but *the amount of the dividends on so much three-per-cent. stock, as would have been produced by the conversion of the property at the end of that year*. And this solution of the question has recently been adopted by Vice-Chancellor Wigram in the case of *Taylor v. Clark*.^(f)

In this conflicting state of the authorities on the subject, nothing but the decisions of the highest judicial authority can set the question completely at rest. But, in the mean time, it is conceived, that the fourth alternative, as established by the present Lord Chancellor in *Dimes v. Scott*, and adopted in *Taylor v. Clark*, the latest case on the subject, must be considered as carrying with it the greatest authority in its favor.¹ However, should any adverse claim be origi-

(u) 1 Hare, 173, 4; see also *Caldecott v. Caldecott*, 1 N. C. C. 312.

(x) T. & R. 232.

(y) 1 Keen, 410.

(z) 1 Hare, 172; and see *Caldecott v. Caldecott*, 1 N. C. C. 318.

(a) 2 Sim. 22.

(b) 4 Russ. 209.

(c) 1 Keen, 410.

(d) 1 Hare, 172, 3.

(e) See *Caldecott v. Caldecott*, 1 N. C. C. 320.

(f) 1 Hare, 161.

¹ The determination of the Chancellor in *Dimes v. Scott*, is also approved by Mr. Spence, after a full discussion of the authorities; 2 Spence, Eq. Juris. 564, &c.; and was followed by the Master of the Rolls in *Morgan v. Morgan*, 14 Beav. 72; overruling *Douglass v. Congreve*, &c. In *Robinson v. Robinson*, 9 Eng. L. & Eq.

nated on this point, no trustee could be advised to take upon himself the responsibility of putting his own construction on the relative rights of the tenant for life and remainderman, which could only be determined with perfect safety to all parties by the decision of the court.

It may be observed here, that although the testator may not in [*390] terms *have given the tenant for life any interest *until certain investments are made*, the court (in the absence of any provisions indicating a contrary intention) considers, that the testator meant the *cestui que trust* for life to take an immediate and certain benefit, which he will not be deprived of by any neglect or delay on the part of the trustee in making the required investments. The property will, therefore, be treated as if it had been duly converted at the end of the first year after the testator's death, and from that time, *at least*, the tenant for life will be entitled to the amount of the income which the property would produce if actually in a proper state of investment. (h)

(h) *Sitwell v. Bernard*, 6 Ves. 520; *v. Bruere*, Ib. 529, n.; *Walker v. Shore*, *Tucker v. Boswell*, 5 Beav. 607; En- 19 Ves. 387; *Taylor v. Clark*, 1 Hare, *twistle v. Markland*, Ib. 528, n.; *Stuart* 167, 8.

70, the Lord Justices held, overruling, S. C., 12 Jur. 969, that where trustees had an option to invest in the three per cents., or real security, which they neglected to do, the tenant for life was entitled to interest from the end of one year after the death of the testator, at four per cent. on the money the property would have produced, at the end of that year up to the time of the investment in the three per cents.

In *Meyer v. Simonson*, 13 Eng. L. & Eq. 135, where the money consisted of personal estate invested on personal security, payable by instalments, V. Ch. Parker held that the tenant for life (the widow), was only entitled to four per cent. on the principal sum secured from the death of the testator; the additional one per cent. to be invested from time to time, and the income of that investment to be paid to her; and that the principal sum, as it came in, was also to be invested, and the income thereof paid to her. This subject was also discussed in *Williamson v. Williamson*, 6 Paige, 304; and the result of the English authorities said to be, and it was so decided, that in the bequest of a life estate in a residuary fund, where no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed *from the death of the testator*. The conflicting decisions were, it was said, cases where there was a direction for a conversion, for which the usual year was allowed. In this case, five per cent. stock was considered, in New York, as equivalent to the three per cent. consols in England, in estimating the value of legacies at the end of the year.

From *Evans v. Inglehart*, 5 G. & J. 191, however, the English rule appears to be inapplicable in Maryland, as the tenant for life there is entitled to specific articles of the residue without conversion. In both this case, however, and *Williamson v. Williamson*, the law was supposed to have been settled in England by *Angerstein v. Martin*, cited in the text.

The general rule, which requires the conversion of property of a wasting or perishable nature, proceeds upon the supposed intention of the testator, that the property given to the tenant for life should go undiminished to those entitled in remainder. If, therefore, the will shows an intention on the part of the testator to give the property *in its existing state* to the tenant for life, the general rule in favor of conversion can have no place; but the intention expressed or implied in the particular case will be carried into effect.(i)

Thus, if a leasehold estate, or a certain sum of terminable annuities, or other property, which is wasting (no matter how rapidly), be bequeathed *specifically* to, or in trust for, A. for life with remainder over: although the tenant for life may very possibly exhaust the entire property to the total exclusion of the remainderman,¹ the testator is himself the best judge of what he intended the parties to take, and the general rule for conversion will not apply.(k)

And where there is a *specific gift* of articles *quæ ipso usu consumuntur*, such as wines, stock, &c., in trust for an individual for life, the *cestui que trust* for life will be entitled absolutely to the whole property, and the limitation over of such articles after the life interest is inoperative.(l)

There is little difficulty, therefore, in those cases, *where the bequest is clearly specific*. But it has been observed by Lord Cottenham,(m) that there are other cases of very great difficulty, in which it may be very doubtful, whether the testator has left the property specifically, but in which there are expressions which raise the question, whether the property is not to be enjoyed specifically. In these cases, the construction will, of course, be governed by the particular expressions used, coupled with the general object and scope of the will; but it may be remarked, that the courts in modern times appear to have laid hold of very slight circumstances in order to construe a gift as specific, and to take a case out of the principle requiring a conversion, a principle, which was said by Lord Cottenham(n) to be often very difficult to carry out.(o)²

(i) *Alcock v. Sloper*, 2 M. & K. 702; *Morgan*, 14 Beav. 721; *Howe v. Howe*, 14 Jur. 369; *Cotton v. Cotton*, 14 Jur.

(k) *Howe v. Earl of Dartmouth*, 7 Ves. 149; *Bethune v. Kennedy*, 1 M. & Cr. 116; *Pickering v. Pickering*, 4 M. & Cr. 299; *Vaughan v. Buck*, Phill. 80; *Lord v. Godfrey*, 4 Mad. 455. [*Prendergrast v. Prendergrast*, 3 Eng. L. & Eq. 14 (in the *Domus Proc.*); *Morgan v.*

(l) *Randal v. Russell*, 3 Mer. 194, 5.

(m) 4 M. & Cr. 299.

(n) In *Pickering v. Pickering*, 4 M. & Cr. 303.

(o) See *Hinves v. Hinves*, 3 Hare, 611, 12.

¹ Therefore, where leasehold property specifically bequeathed for life, is wrongfully converted by the trustees, the tenant for life surviving the term is entitled to the *whole fund*, to the exclusion of the remainderman. *Phillips v. Sargent*, 7 Hare, 33.

² *Cafe v. Bent*, 5 Hare, 35, where it was said, that the general rule as to the

Thus, it seems to be now clearly settled, that a general residuary gift, in trust for a person for life, followed by a direction *to sell after*

conversion of wasting property, "does not proceed on the assumption that the testator intended his property to be sold; but upon this, that the testator has intended the enjoyment of perishable property by different persons in succession; and this the court can accomplish only by a sale." To the same effect are the observations of Lord Brougham in the case of *Prendergrast v. Prendergrast*, 9 Eng. L. & Eq. 14, in the House of Lords. The rule above stated, and established in *Howe v. Lord Dartmouth*, is not very favorably regarded in the modern case; Sir Knight Bruce, indeed, remarks of it, in *Cotton v. Cotton*, 14 Jur. 950, "that though not to be questioned as a general rule, it had, in his opinion, quite as often defeated as carried out the intention of the testator." The leaning of the courts is, therefore, at present, to treat gifts of this nature, as far as possible, specific; and very slight circumstances of intention will be deemed sufficient to take a case out of the general rule. *Morgan v. Morgan*, 14 Beavan, 72; *Mackie v. Mackie*, 5 Hare, 77; *Cotton v. Cotton*, 14 Jur. 950; *Blann v. Bell*, 13 Eng. L. & Eq. 191; (see, however, the remarks of L. J. Knight Bruce in this case on appeal, 22 L. J. Ch. 238;) *Burton v. Mount*, 2 De G. & Sm. 383; 12 Jur. 934; *Howe v. Howe*, 14 Jur. 359; and see 2 Spence Eq. Jur. 42, 554, and the authorities there cited. "The court," it was said in *Prendergrast v. Prendergrast*, *ub. supr.*, "attentively and anxiously looks to all indications of such an intention; and before it orders a conversion, must be satisfied that such a course is not excluded by the whole instrument taken together." "The result of the authorities is," remarks Vice Ch. Parker in *Blann v. Bell*, 13 Eng. L. & Eq. 191, "that the applicability of the rule, in a particular case, is to be ascertained by construing the whole will according to the directions given by the testator." It is still incumbent, however, on those contesting the applicability of the rule, to point out the expressions of intention which are relied on to prevent its operation. *Morgan v. Morgan*, 14 Beavan, 72; *Sutherland v. Cooke*, 1 Coll. 498; *Blann v. Bell*, 22 L. J. Ch. 238. See, also, an able and thorough discussion of the subject in the London Law Magazine for August, 1853, vol. 50, p. 171.

The difference between a specific and a residuary gift of chattels is fully recognised in the United States. Where there is *specific* gift of articles *quæ consumuntur usu*, as hay, corn, wine, provisions, &c., for life, a remainder over is void, and the first legatee takes absolutely; where such gift is of articles which are not consumed by use, but are only deteriorated, or wear out, as furniture, plate, farming utensils, &c., the remainder is good, but the tenant for life is entitled to the use of the articles. If, however, the gift is *residuary*, the property, of whatever kind, must be sold, and the interest, only, of the proceeds, given to the tenant for life. *Covenhoven v. Schuler*, 2 Paige, 132; *Patterson v. Devling*, 1 McMull. Eq. 459; *Woods v. Sullivan*, 1 Swann, 507; *Robertson v. Collier*, 1 Hill. Eq. 373; *Horrey v. Glover*, 2 Id. 515; *De Peyster v. Clendenning*, 7 Paige, 403; *Williamson v. Vaulx*, 10 Yerg. 30; *Homer v. Shelton*, 2 Metcalf, 194; *Kinnard v. Kinnard*, 5 Watts, 108. In *Evans v. Inglehart*, 6 Gill & Johns. 192, however, it was held that the English rule, which requires an executor to convert the personal assets, was inconsistent with the Maryland Act of 1798, ch. 101; and, therefore, that a tenant for life of a residue was entitled to enjoy specific articles forming part thereof *in specie*. But if the residue consists of money, or property whose use is the conversion into money, and which it could not be intended should be specifically enjoyed, then the executor must convert. *Ibid*; *Wooten v. Burch*, 2 Maryl. Ch. Dec. 199. In the case of a pecuniary legacy, or stocks,

**the death* of the tenant for life, will entitle the tenant for life to the specific enjoyment of such parts of the trust estate as consist of leaseholds, or other perishable securities,^(p) and the contrary decisions of the Vice-Chancellor of England in *Mills v. Mills*,^(q) and *Benn v. Dixon*,^(r) would scarcely be suffered to prevail against the other authorities.^(s) A direction, that the trust estate shall be divided after the death of the tenant for life, has also been held to have the same effect.^(t)

In *Alcock v. Sloper*^(u) the testator gave the residue of his estate, real and personal, to his executors upon trust to permit his wife to receive the rents, profits, and annual proceeds thereof during her life, and *after her decease to sell* his freehold house in Oxford Street, and also his leasehold houses by auction; and he desired that A. should be employed as auctioneer to convert *the whole of his estate and effects* into money for the purposes therein mentioned. Sir John Leach, M. R., considered that the express direction, to convert his leasehold houses and the whole of his estate *after the death of his wife*, excluded the supposition, that he intended any part of it to be converted *during her life*, and that she was therefore held entitled to

(p) *Alcock v. Sloper*, 2 M. & K. 699; *Daniel v. Warren*, 2 N. C. C. 290.

(q) 7 Sim. 501.

(r) 10 Sim. 636. [See, also, *Chambers v. Chambers*, 15 Sim. 189.]

(s) See *Hinves v. Hinves*, 3 Hare, 611.

(t) *Collins v. Collins*, 2 M. & K. 703; *Bethune v. Kennedy*, 1 M. & Cr. 114.

(u) *Alcock v. Sloper*, 2 M. & K. 699.

the tenant for life is only entitled to the interest, unless he gives security. *Patterson v. Devlin*, ut supr.; *Eichelberger v. Barnitz*, 17 S. & R. 293; *Kinnard v. Kinnard*, ut supr.; *Rodgers v. Rodgers*, 7 Watts, 19; *Freeman v. Cook*, 6 Ired. Eq. 379. With regard to the increase of stock, &c., it will in general go to the tenant for life, he keeping up the original amount. *Robertson v. Collier*, 1 Hill's Eq. 370; *Horry v. Glover*, 2 Id. 515; *Patterson v. Devling*, McMull. Eq. 459; *Pointdexter v. Blackburn*, 1 Ired. Eq. 286; *Evans v. Inglehart*, 6 Gill & John. 172; *Woods v. Sullivan*, 1 Swann, 507; *Hunt v. Watkins*, 1 Humph. 498; 2 Kent's Comm. 353, note (a). But where a life estate is given in slaves, it has been held, in Virginia and North and South Carolina, that the remainderman was entitled to the issue. *Ellison v. Woods*, 6 Munf. 368; *Covington v. McIntire*, 2 Ired. Eq. 316; *Milledge v. Lamaz*, 4 Desaus. 607; *Robertson v. Collier*; *Horry v. Glover*; *Devling v. Patterson* ut supr. But in Maryland, the general rule appears to apply. *Dobson v. Scott*, 1 H. & McH. 160; *Evans v. Inglehart*, 6 G. & John. 172; *Wootten v. Burch*, 2 Maryl. Ch. Dec. 191. In *Flowers v. Franklin*, 5 Watts, 265, under the particular expressions in the will, the remaindermen were held entitled to stock and implements purchased to replace the deteriorations by death, accident, and wear and tear. But see *Devling v. Patterson*, 1 McMull. Eq. 459; *Covenhoven v. Schuler*, 2 Paige, 131; *Black v. Ray*, 1 Dev. & Batt. Eq. 443.

receive the income of some long annuities which formed part of the residuary estate.(u)(1)

So in *Collins v. Collins*(x) the devise was as follows,—“I give to my wife Sarah Collins all and every part of my property in every shape and without any reserve, and in whatever manner it is situated for her natural life; and at her death the property so left to be divided in the following manner—one-half in equal proportions to my father,” and so on, and Sir J. Leach was of opinion, that the remaindermen were not entitled to have a leasehold estate of the testator sold, there being a sufficient indication of the testator’s intention, that the widow should enjoy the property *in specie*: and this decision was afterwards approved of and acted upon by Lord Cottenham in *Pickering v. Pickering*.(y)

In *Bethune v. Kennedy*(z) the testatrix, after making two specific bequests of sums in the long annuities, gave the residue of her property, *all she did or might possess in the funds, copy or leasehold estates*, to her two sisters during their lives; *at the decease of both of them to be equally divided*, share and share alike, between her three cousins or their heirs. The residuary estate, after satisfying the two specific bequests, consisted in part of 150*l.* per annum in the long annuities. The bill was filed by two of the legatees in remainder to have the long annuities converted into a permanent fund, but Sir C. Pepys, M. R., was of opinion, that the long annuities in question were to be enjoyed by the tenant for life as a specific bequest, and dismissed the bill.(z)

*The next case is *Pickering v. Pickering*.(a) where the [*392] testator gave and bequeathed to his wife all the interest, rents, dividends, annual produce and profits, use and enjoyment, of all his estate and effects whatsoever, real and personal, for and during the term of her natural life, and (after giving her certain specified articles) at the decease of his said wife; he gave, devised, and bequeathed to his son-in-law, E. R. P., all the rest and residue of his estate and effects whatsoever, both real and personal; it was held by Lord Langdale, M. R., on the general construction of the will, that the widow was entitled to the enjoyment *in specie* of the perishable

(u) *Alcock v. Soper*, 2 M. & K. 699.

(x) 2 M. & K. 703. [See *Hunt v. Scott*, 1 De G. & Sm. 219.]

(y) 4 M. & Cr. 300.

(z) *Bethune v. Kennedy*, 1 M. & Cr. 114.

(a) *Pickering v. Pickering*, 2 Beav.

31; S. C. on Appeal, 4 M. & Cr. 289. [See *Prendergrast v. Prendergrast*, 3 Engl. L. & Eq. 15; see further *Burton v. Mount*, 2 De G. & Sm. 383; 12 Sm. 934.]

(1) However, in *Mills v. Mills*, 7 Sim. 501, a direction by a testator for the sale of his freehold and leasehold estates, of which there had been a previous gift for life, was held by Sir L. Shadwell, V. C., not to prevent the application of the general rule requiring the conversion of the leasehold property.

property of the testator during her life without any conversion for the benefit of the remainderman. And this decision was affirmed on appeal by Lord Cottenham.(a)

In *Goodenough v. Tremamondo*,(b) the testator gave his residue to his trustees in trust, to permit the *rents*, issues, profits, interest and annual proceeds thereof, to be received by his son Richard during his life, and after his decease upon trust for the two daughters of his son, when they should attain twenty-one; with power for the trustees after the death of the son to apply the *rents*, &c., towards the maintenance of the daughters until the vesting of their shares. Part of the residue consisted of a leasehold house, and at the hearing on further directions it was contended, that this leasehold ought to have been converted; but the Master of the Rolls (Lord Langdale), without calling upon the counsel for the other side, said, that he could not declare this to be a case of conversion without striking out of the will the word "rent," which was twice repeated; *there being no other property except the leasehold to which the term was applicable*.(b) It may be remarked, that the term "rents" was also made use of by the testator in *Pickering v. Pickering*, although neither of the learned judges, who decided that case, appears to have attached any particular importance to that circumstance. There indeed the testator appears to have been possessed of an estate in land *pur autre vie*, to which the term "rents" might have applied.(c)(1)¹

(a) *Pickering v. Pickering*, 2 Beav. 31; S. C. on Appeal, 4 M. & Cr. 289. [See *Prendergrast v. Prendergrast*, 3 Engl. L. & Eq. 15; see further, *Burton v. Mount*, 2 De G. & Sm. 383, 12 Jur. 934.]

(b) *Goodenough v. Tremamondo*, 2 Beav. 512. In a late case it was held

by the same learned judge, that a direction that the tenant for life should have "the full and entire enjoyment of real and personal estate" operated as a specific gift of leaseholds. *Harvey v. Harvey*, 5 Beav. 134; see *Att.-Gen. v. Peter*, 5 Beav. 164.

(c) 4 M. & Cr. 292.

(1) In *Mills v. Mills*, 7 Sim. 501, the same expression occurred, but Sir L. Shadwell, V. C., notwithstanding, held, that the property ought to have been converted in favor of the remainderman.

¹ In *Harris v. Poyning*, 13 Engl. L. & Eq. 268, 1 Drewry, 174, a testator gave all his residuary real estate, and all his stock, mortgages, and other securities for money, and other his personal estate and effects, to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed real and personal estate, of which his wife was to have the *yearly interest*, upon trust for his son absolutely. The testator having *inter alia*, left leaseholds, it was held that these were to be enjoyed by the widow *in specie*. See also *Neville v. Fortescue*, 16 Sim. 333; *Howe v. Howe*, 14 Jur. 359. In *Thornton v. Ellis*, (10 Engl. L. & Eq. 65) however, where the testator bequeathed the interest and proceeds of the residue of his property "o. every description it might be at his death," to certain persons for life, and after

The recent decision of the Lord Chancellor in *Vaughan v. Buck*(*d*) is also in favor of the enjoyment of the residue *in specie* by the legatee for life.

But in the late case of *Benn v. Dixon*,(*e*) the testator gave to his wife the whole of the interest arising from his property both real and personal during her life, *and at her decease to be disposed of* as thereafter named, and should he die without leaving issue, he gave the whole of his property, both real and personal, to his brothers and sister in equal proportions. Part of the testator's estate consisted of a leasehold house, in which he resided, and which his widow continued to occupy after his *death. It was contended on behalf of the widow, on the authority of *Alcock v. Slopers*, *Collins v. Collins*, and *Pickering v. Pickering*, that she was entitled to the specific enjoyment of this property; but Sir L. Shadwell, V. C. E., held that there was nothing on the face of the will to take the case out of the operation of the general rule, according to which the property was to be converted and invested in the funds, in order to produce the same interest to the remainderman as was enjoyed by the tenant for life.(*f*) However, in the subsequent case of *Daniel v. Warren*,(*g*) before Sir K. Bruce, V. C., there was a residuary gift of all the testator's property in trust for S. M. W. for life, and after her death unto her children in equal proportions, and *in the event of her death without leaving issue to attain twenty-one, the whole of the property to be sold by public auction*. The Vice-Chancellor held, that S. M. W. was entitled to the enjoyment *in specie* of leaseholds, which formed part of the testator's estate.¹

(*d*) 1 Phill. 76.

see *Mills v. Mills*, 7 Sim. 501, stated

(*e*) 10 Sim. 636.

supra, 391, n.

(*f*) *Benn v. Dixon*, 10 Sim. 639; and

(*g*) 2 N. C. C. 290.

wards over, it was held that railway shares ought to be converted; and see *Morgan v. Morgan*, 14 Beav. 92. So in *Blann v. Bell*, 22 L. J. Ch. 236, where a testator gave the residue of his estate to trustees to pay the dividends of 1500*l.* stock to A. for life, and after to divide the dividends between F. B. and F. R., and the survivor of them. He gave the residue of his freehold, copyhold, and leasehold estate, and all other his estates and effects upon trust to pay the dividends, interest, rents, and annual produce to his wife E. B. for life, with remainder to F. R. for life, with other remainderers. The testator had leasehold property, canal, and insurance shares, and Dutch bonds. It was held by the Lords Justices, affirming, S. C. 13 Engl. L. & Eq. 191, that she was not entitled to enjoy the shares and Dutch bonds in specie, though she was the leaseholds.

¹ A testator possessed of sums in various stocks, and of long annuities, gave certain specific and general stock legacies, "and as to all the rest, residue, and remainder of his estate," he gave it to his widow for life; and after her decease he bequeathed "it as follows":—He then gave various general stock legacies, and whatever there might be then remaining, after the above-mentioned directions had been made, he gave to the plaintiffs. It was held by Lord Cottenham that the widow was not entitled to enjoy the long annuities in specie. *Lechfield v. Baker*, 13 Beav. 447.

And in the still later case of *Hinves v. Hinves*,^(h) a testator bequeathed to his executors to dispose of his property in the manner after mentioned, all debts and funeral expenses paid, viz. to his wife S. H. the whole income of his property of all descriptions whatsoever for her life at her own disposal, *but not to sell without the consent of all parties*. He then gave certain particular legacies to his wife, and the residue of his estates or property whatsoever equally to his five brothers. It was held by Vice-Chancellor Wigram, that the testator's wife was entitled to the income of leaseholds and long annuities *in specie*. And his Honor in the course of his judgment, remarked upon the cases of *Mills v. Mills*, and *Benn v. Dixon*, as differing in principle from the current of the modern authorities.

If any part of the property, given for life with remainder over, consist of a reversionary interest, which produces no immediate available income, but which admits of being valued, and converted into money, the same rule which in the cases hitherto considered works for the benefit of the persons entitled in remainder, will also hold good (to the same extent and subject to the same exception) for the benefit of the tenant for life: and according to that rule it is *prima facie* the duty of the trustees at once to dispose of such an interest, and invest the proceeds in stock, which will produce an immediate income available for the benefit of the tenant for life.⁽ⁱ⁾

If the trustees of a settled estate join with the remainderman to evict the tenant for life from the possession of the property, they will be personally liable to make good the whole rent for the time of such eviction, without any allowance for any accidental deficiencies in the amount actually received.^(k)

A trust for the accumulation of the income of property settled for life, is one of very frequent occurrence, more especially where the settlement is made by will. Previously to the statute 39 & 40 Geo. III. c. 98 (usually called the *Thellusson Act*),¹ the enjoyment of the

(h) 3 Hare, 609.

(k) *Kaye v. Powell*, 1 Ves. jun. 408.

(i) *Fearn v. Young*, 9 Ves. 549, 552;

Dimes v. Scott, 4 Russ. 200.

¹ Upon the construction of this Act, the following decisions, since the publication of the text, may be referred to as involving important and interesting questions; *Browne v. Stoughton*, 14 Sim. 369 (see the remarks of Mr. Lewis on this case; *supp.* to *Lewis on Perp.* 174); *Marquis of Bute v. Harnum*, 9 Beav. 320; *Bateman v. Hotchkin*, 10 Beav. 426; *Routh v. Hutchinson*, 8 Beav. 581; *Boughton v. Boughton*, 1 H. L. Ca. 406; *Lady Rosslyn's trust*, 16 Sim. 391; *Halford v. Stains*, *Id.* 488; *Ellis v. Maxwell*, 12 Beav. 104; *Wilson v. Wilson*, 3 Engl. L. & Eq. 138; *Basset v. Lister*, 9 Hare, 177; 7 Engl. L. & Eq. 158; *Morgan v. Morgan*, 2 Engl. L. & Eq. 35; S. C. 6 *Id.* 130; *Bourne v. Buckton*, 2 Sim. N. S. 91; 9 Engl. L. & Eq. 144; *Corporation of Bridgenorth v. Collins*, 15 Sim. 528. See as to proviso with regard to portions, *ante*, 368, and note. In Penn-

[*394] income of *property might have been suspended for so long a period as the vesting of the estate itself; viz. for a life in being, and a subsequent period of twenty-one years.^(l) The abuse of this legal right in the case of the will of the late Mr. Thellusson, induced the legislature to interfere for the purpose of curtailing the period for accumulation, and that period is now restricted by that act to four alternate terms, viz. 1st, The life of the settlor; 2d, Twenty-one years from the death of the settlor; 3d, The minority or minorities of any person or persons living at the death of the settlor, or 4th, During the minority or minorities of any person or persons, who, if of full age, would be entitled under the limitations to the income, which is directed to be accumulated. But the act contains an exception in favor of any accumulation directed for the payment of debts, or for raising portions for children.

It has been determined that these four periods are alternative and not cumulative, that is to say, a testator may direct the income of trust property to be accumulated for twenty-one years after his death, or for the minority of A., but not for twenty-one years from his death, and during that minority.^(m)

The act goes on to direct, that any accumulations directed contrary to its provisions shall be void, and that the income directed to be accumulated shall go to the person who would have been entitled to it, if there had been no such direction. Upon the construction of this provision, it was held that any accumulation directed for too long a period is void only for the excess, and not *in toto*.⁽ⁿ⁾ And

(l) Lord Southampton v. Marquis of Hertford, 2 V. & B. 61. [Hillyard v. Miller, 10 Barr, 333.]

(m) Griffiths v. Vere, 9 Ves. 136; 1 Jarm. Pow. Dev. 418, 9; Ellis v. Maxwell, 3 Beav. 587. [Wilson v. Wilson, 3 Engl. L. & Eq. 138.]

(n) Lade v. Holford, Ambl. 479; Eyre v. Marsden, 2 Keen, 564; S. C. on ap-

peal, 4 M. & Cr. 231, and cases cited; Marshall v. Holloway, 3 Swanst. 432; Griffiths v. Vere, 9 Ves. 129; Longdon v. Simpson, 12 Ves. 295; Lord Southampton v. Hertford, 2 V. & B. 61; Haley v. Banister, 4 Mad. 277. [Nettleton v. Stevenson, 3 De G. & Sm. 366; see the remarks of Gibson, C. J., in 10 Barr, 335; but see note below.]

sylvania, there was formerly no legislative provision especially directed against accumulations, but they have been rigidly restricted within the common law rule as to perpetuities; even where the fund to be thus created was directed to be ultimately applied to the foundation and support of a charity. Hillyard v. Miller, 10 Barr, 326. Now, however, the Legislature, by the act of 1853 (P. L. 507), § 9, has substantially adopted the Thellusson Act, omitting, however, the proviso with regard to trusts for debts and portions. On the other hand, in addition, donations, bequests and devises, for any literary, scientific, charitable or religious purpose, are excepted out of the act; accumulations are also made void only as to the excess above the period prescribed. In New York, by the Revised Statutes, part II. ch. 1, tit. 2, § 15, 37; tit. 4, § 1, &c., there are restrictions against the accumulations, even more stringent than the Thellusson Act.

when the period allowed by the act for accumulation has expired, the income during the residue of the time appointed for its accumulation by the testator, will be held in trust for his heir-at-law or next of kin, according to the nature of the estate,^(o) or for his residuary legatees, if the residuary clause be so framed as to pass the interest, thus becoming undisposed of.^(p)

Where real estate is settled in trust for a tenant for life with remainder over, the trustees will not be justified in raising out of the *corpus* of the estate any sums, which may be requisite for the substantial repairs of the mansion house or estate (although occasioned by the existence of dry rot); but such expenses must be defrayed out of the interest of the tenant for life in possession.^(q)¹

Previously to the act 4 & 5 Will. IV. c. 22, the representatives or assigns of tenants for life of rents, annuities, or stock, &c., were not entitled to any apportionment in case of the death of the tenant for life, in the interval between the regular days of payment; unless indeed there were an express provision for that purpose.² But by that

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| <p>(o) <i>Eyre v. Marsden</i>, 2 Keen, 564; 4 M. & Cr. 231; <i>M'Donald v. Bryce</i>, 2 Keen, 271. [<i>Sewell v. Dewny</i>, 10 Beav. 315; <i>Barrett v. Buck</i>, 12 Jur. 771; <i>Boughton v. Boughton</i>, 1 H. L. Cas. 406; <i>Nettleton v. Stevenson</i>, 3 De G. & Sm. 366.]</p> | <p>(p) <i>O'Neil v. Lucas</i>, 2 Keen, 313; <i>Ellis v. Maxwell</i>, 3 Beav. 587; <i>Att. Gen. v. Poulden</i>, 3 Hare, 555.
(q) <i>Bostock v. Blackeney</i>, 2 Bro. C. 653; <i>Hibbert v. Cooke</i>, 1 S. & St. 552; <i>Nairn v. Majoribanks</i>, 3 Russ. 582; <i>Caldecott v. Brown</i>, 2 Hare, 144.</p> |
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¹ See *Thurston v. Dickenson*, 2 Richard. Eq. 317; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Jones v. Dawson*, 19 Alab. 692. But in *Parsons v. Winslow*, 10 Mass. 361, it was said that where trustees are directed to invest in real estate, and purchase a house, the expenses of putting it in tenantable repair, come out of the capital. And in *Harris v. Poyner*, 13 Engl. L. & Eq. 268, where leaseholds were specifically bequeathed for life, and the tenant for life was compelled to make good dilapidations incurred by the testator, under a covenant in the lease, it was held that the expenses were to be charged on the *corpus* of the estate; though the rule is as different between a specific and a residuary legatee. *Hickling v. Boyer*, 9 Engl. L. & Eq. 209. In the case of a total destruction of an insured building by fire, the property is so far converted into personalty, and where there is a life estate with remainders, the parties are entitled to the use of it according to their respective interests; and the money is not to be applied to the rebuilding of the house, *Haxall's Ex'rs v. Shippen*, 10 Leigh, 536; but the case of a partial injury is different, and the amount of the insurance is to be applied to the repair of the building. *Brough v. Higgins*, 2 Gratt. 408.

² In most of the States there are now statutory provisions authorizing the apportionment of *rent* on the death of the tenant for life; following the 11 Geo. I. ch. 19, &c. See 3 Kent Comm. 471; Pennsylvania Act of 1834, § 7 (*Dunlop* 518); 3 Greenleaf Cruise, 117 (306), note; Code of Virginia, 1849, p. 574. With regard to *annuities*, the general rule is that they are not apportionable. *Wiggin v. Swett*, 6 Metcalf, 194; *Mannings v. Randolph*, 1 Southard, 144; *Tracy v. Strong*, 2 Conn. 659; *Earp's Will*, 1 Pars. Eq. 168; see *Gheen v. Osborne*, 17 S. & R. 171; *McLemore v. Goode*, Harp. Eq. 275; *Waring v. Purcell*, 1 Hill's Eq. 199. Where, however, a testator gave an annuity to his wife "in lieu of dower," it was held apportion-

statute the right to such an apportionment is given in all cases, where the right to the payment *is created by any instrument or [*395] will executed or coming into operation after the passing of the act.(r)

The tenant for life, who is in the possession of the estate, is liable to all rates and taxes, and the trustees will not be justified in defraying those charges out of the general trust fund.(s)¹

It not unfrequently happens that the interest given to a *cestui que trust* for life, is directed to go over for the benefit of other parties on his bankruptcy or insolvency, or any attempt at alienation. And it has repeatedly been decided, that such a direction is valid, and that the assignees of the *cestui que trust* for life will take no interest in the trust property so limited.(t) But if any beneficial interest remains in the tenant for life; as, for instance, where the property in the event contemplated is to be in trust for the benefit of *him and his wife and family*; in that case, whatever benefit he is entitled to,

(r) See *re Markby*, 4 M. & Cr. 484; *Cooper v. Wyatt*, 5 Mad. 482; *Shee v. Michell v. Michell*, 4 Beav. 549. *Hale*, 13 Ves. 404; *Lewes v. Lewes*, 6

(s) *Fontaine v. Pellet*, 1 Ves. jun. Sim. 304; *Twopenny v. Peyton*, 10 Sim. 487; *Page v. Way*, 2 Beav. 20; *Brand v. Aston*, 2 N. C. C. 24.

(t) *Dommet v. Bedford*, 3 Ves. 149; *don v. Aston*, 2 N. C. C. 24.

able. *Gheen v. Osborne*, 17 S. & R. 171; though the contrary was ruled in *Tracy v. Strong*, 2 Conn. 659. And in *Fisher v. Fisher* (Dist. Ct. Philadelphia), 4 Am. Law Journ. N. S. 539, it was laid down as a general proposition, that where, as in the case of a bequest to a wife or child, it is not dependent on the mere generosity of the donor, an annuity is apportionable. *Dividends* from money in the funds, and bank stock, are also not apportionable; *Earp's Will*, 1 Pars. 468; *Wilson v. Hosmer*, 2 Ves. Sr. 672; though see *contra*, *Ex parte Rutledge*, Harp. Eq. 65; but interest on money out on bond or mortgage is. *Earp's Will*; *Sweigart v. Berks*, 8 S. & R. 299.

¹ *Cairns v. Chabert*, 3 Edw. Ch. 362. In *Cochran v. Cochran*, 2 Desaus. 521, however, only one-third of the taxes and repairs were charged on the tenant for life (a widow), probably on the ground of that being supposed then to be the proportionate value of a life estate. So the charge of keeping down incumbrances on the estate, falls on the tenant for life. 4 Kent's Comm. 74; *Jones v. Sherrard*, 2 Dev. & Batt. Eq. 187; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; see *Caulfield v. McGuire*, 2 J. & Lat. 141; *Hinves v. Hinves*, 3 Hare, 609. In *North Am. Coal Co. v. Dyott*, 7 Paige, 1, where a manufacturing establishment was held in trust, it was ruled that the one entitled to the present income was exclusively responsible for the debts incurred in carrying on the establishment. Where land is sold under an incumbrance, the tenant for life and remainderman are entitled to share according to their relative proportions. *Williams's Case*, 3 Bland, 106. What the proportion is, see 4 Kents' Comm. 74, and *Williams's Case*, ubi supra. Formerly it was estimated at a third, but it is now usually referred to a Master, to inquire what the value of the estate is according to the life annuity tables. *Niemcewicz v. Gahn*, 3 Paige, 652; *Jones v. Sherrard*, 2 Dev. & Batt. Eq. 189.

will unquestionably go to his assignees.(u) However, where it is left entirely in the discretion of the trustees to continue or withhold any benefit to the bankrupt or insolvent, his assignees will not be entitled to anything, as long as nothing is given to him by the trustees.(x) But whatever interest they should actually give him in the exercise of that discretion, will unquestionably go to the assignees.(y) And in these cases, the intention to exclude the assignees, on the bankruptcy or insolvency of the *cestui que trust* for life, must be clearly expressed; and where the forfeiture seems only to contemplate a *particular* and voluntary alienation, it will not be extended to an alienation by act of law.(z)¹

(u) *Rippon v. Norton*, 2 Beav. 63; and that of *Twopenny v. Peyton*, 10 Lord v. Bunn, 2 N. C. C. 98; *Green v. Sim.* 487, in 1 Coll. Ch. 400, and in 10 Spicer, 1 Ross & Milne, 395; *Piercy v. Jur.* 419.] Lord v. Bunn, 2 N. C. C. 98; Roberts, 1 M. & K. 4; *Snowdon v. Kearsley v. Woodcock*, 3 Hare, 185. Dales, 6 Sim. 524; *Youngehusband v. (y) Lord v. Bunn*, 2 N. C. C. 98; Gisborne, 3 Jur. 750; S. C. 1 Coll. N. Kearsley v. Woodcock, 3 Hare, 185. C. C. 400; [affirmed 10 Jur. 419; *Rochford v. Hackman*, 9 Hare, 475; 10 Engl. L. & Eq. 64.] (z) *Lear v. Leggett*, 2 Sim. 479; 1 R. & M. 690; *Whitfield v. Prickett*, 2 Keen, 608. [*Rochford v. Hackman*, 9 Hare, 475, 482; 10 Engl. L. & Eq. 68.]

(x) *Godden v. Crowhurst*, 10 Sim. 642. [But see the remarks on this case, 68.]

¹ In *Rochford v. Hackman*, 10 Engl. L. & Eq. 64; 9 Hare, 475, it was held, that though a proviso restraining alienation was as much void in the case of a life estate as of a fee, a limitation over on such alienation was good; and that the limitation need not necessarily be connected with the gift, but the intention to create it might be gathered from a subsequent part of the will. Under such a limitation, taking the benefit of the insolvent law was included. In *Dickson's Trust*, 1 Engl. L. & Eq. 149, a condition that a legacy to a daughter should be forfeited, on her becoming a nun, was held good, though there was no limitation over; and the distinction was taken between *conditiones rei licitæ*, which that was held to be, and *conditiones rei non licitæ*, as those in restraint of marriage, in which case a limitation over, or direction that the forfeited share shall form part of the residue, the residue being given over, is necessary. In *Rochford v. Hackman*, however, Vice-Ch. Turner remarking on this case, says: "It was said at the bar that a limitation over is unnecessary; and the case of *Dickson's trust* was relied on. I do not think it necessary to decide the point at present, but I do not understand the case of *Dickson's trust* as deciding that a life interest may be well determined merely by a proviso that it should cease in a certain time, without any gift over being made. The true rule is, that the court must collect the testator's intention,—whether the life estate should continue or not,—from the whole will." But he remarks subsequently, "it would be difficult to argue that more force was due to a gift over, than to a proviso for *cesser*."

In *Grace v. Webb*, 12 Jur. 987; 2 Phillips, 701, a covenant to pay to a single woman for a life, subject to a proviso thereafter contained, an annuity of £40, the proviso being, that if she should afterwards marry, the annuity should be reduced to £20, it was held that the gift in the first instance was a qualified one, and the proviso was good. The Chancellor (Lord Cottenham) was also of opinion that the condition, if one, was *precedent* to the accruing of each annual sum, not subsequent, and therefore, also, good. This principle was again recog-

VII.—OF TRUSTEES FOR INFANTS.

Infants and their property are in an especial manner under the protection of the Court of Chancery, which regards with peculiar jealousy anything approaching to a dereliction of duty by their trustees.

It is the settled rule of the court, and one that is never varied without special circumstances, that trust-money belonging to an infant must be laid out by the trustee in the three per cents.: and the court will not even direct a reference to the Master, to inquire whether it would be for the infant's benefit, that the fund should be laid out on real security, unless there is something very special in the case to induce it to relax the general rule.(a)

So trustees or guardians will not ordinarily be permitted to change the nature of the infant's property, by converting personalty into real estate, or *vice versa*.(b)¹ And where the trustees of an infant,

(a) *Norbury v. Norbury*, 4 Mad. 191. 122; *Witter v. Witter*, 3 P. Wms. 101;

(b) 1 Mad. Ch. Pr. 269, 270; 1 Fonbl. Rook *v. Worth*, 1 Ves. 461; *Tullitt v. Eq. B. 1*, ch. 2, s. 5, n. (b); 2 Story Eq. *Tullitt, Ambl.* 370. Jur. § 1357; *Ex parte Phillips*, 19 Ves.

nised in *Lloyd v. Lloyd*, 10 Engl. L. & Eq. 431. The case of *Grace v. Webb*, was, however, pointedly disapproved in *Hoopes v. Dundas*, 10 Barr, 75. The general rule as to conditions in restraint of marriage, is, that they are valid when annexed to real estate, *Comm. v. Schaeffer*, 10 Barr, 350; but void (without a limitation over) in bequests of personalty and annuities. *Hoopes v. Dundas*, 10 Barr, 75. Whether a proviso in the creation of a trust, that the trust property shall not be liable to the *cestui que trust's* debts, is valid, is not settled in this country. It was held not to be so in *Hallett v. Thompson*, 5 Paige, 383; (see *Rider v. Mason*, 4 Sandf. Ch. 352;) and *Dick v. Pitchford*, 1 Dev. & Batt. Eq. 480. In *Stagg v. Beekman*, 2 Edw. Ch. 89; however, it was held that a direction in a will for the investment, under the direction of the court, of a certain sum, for the sole benefit of a person, discharged from all claim of his creditors, or if not possible, the fund to sink into the residue, could be carried into effect. In Pennsylvania, it is considered that there is nothing unlawful in a parent's making such a provision for his child; and it will be sustained, where the *cestui que trust* is himself excluded from the control of the property, though with no limitations over. *Ashhurst v. Given*, 5 W. & S. 323; *Vaux v. Parke*, 7 W. & S. 19; *Fisher v. Taylor*, 2 Rawle, 33; *Norris v. Johnston*, 5 Barr, 289; *Eyrich v. Hetrich*, 13 Penn. St. R. 491. So in Kentucky. *Pope v. Elliott*, 8 B. Monr. 56. See, in Massachusetts, *Braman v. Stiles*, 2 Pick. 463.

¹ *Royer's App.*, 11 Penn. St. R. 36; *Bonsall's App.*, 1 Rawle, 273; *Kauffman v. Crawford*, 9 Watts & Serg. 131; *Wolf v. Eichelberger*, 2 Penn. R. 346; *Eckford v. De Kay*, 8 Paige, 80; *Rogers v. Patterson*, 4 Paige, 409; *Ex parte Crutchfield*, 3 Yerg. 335. But in a case of imminent necessity, a guardian may purchase land with his ward's money. *Bonsall's App.*, ub. supra; see *Billington's App.*, 3 Rawle, 55; *Royer's App.*, 11 Penn. St. R. 36; though see *Moore v. Moore*, 12 B. Monr. 190, *contra*. So in a proceeding in the Orphans' Court in partition, where the heirs refuse to take the real estate at the valuation, and it is ordered to be sold, the guardian of one of the minor heirs may purchase it for

having saved *3000*l.* out of the profits of his real estate, laid it out in the purchase of lands contiguous to the infant's [*396] estate, with the consent of his guardian, and the infant died under age, it was held by the Lord Chancellor, with Lord Chief Baron Atkins and Lutwich, J., against the opinion of the Master of the Rolls, that the trustees were not justified in making such an investment of their own authority, and that they should therefore account to the infant's executors for the 3000*l.*(*c*)

However, it has been laid down that trustees may change the nature of the infant's estate under particular circumstances, where it is manifestly for his advantage or convenience to do so; and the transaction will be supported, if the court would act so itself under the same circumstances.(*d*) (1) But it is obviously very difficult to

(*c*) *Earl of Winchelsea v. Norcliffe*, 1 Vern. 434; see *Gibson v. Scudamore*, 1 Dick. 45. (*d*) *Inwood v. Twinne*, Ambl. 419; S. C. 2 Ed. 147, 152; see *Terry v. Terry*, Prec. Ch. 273. [*Ante*, note to page 375.]

(1) However, there are several cases which tend to establish the position, that the court itself has no power to direct the sale or conversion of an infant's estate, merely on the ground of its being for the infant's benefit. Thus in *Taylor v. Phillips*, 2 Ves. 23, it was held that an infant's inheritance is never bound by the act of the court. And in *Simpson v. Jones*, 2 R. & M. 365, where the court had sanctioned a settlement of the leasehold estate of an infant ward on her marriage, giving the trustees a *power of sale*, it was held by Sir J. Leach, M. R., that the court had no authority to give such a power, and, consequently, that the trustees could not make a good title. And in the very recent case of *Calvert v. Godfrey*, 6 Beav. 97, a purchaser of an infant's estate under a decree of the

his ward, if *it seems*, it is necessary to prevent its being sacrificed. *Bowman's App.*, 3 Watts, 369. This, however, the court says, would be no conversion, as it would merely be preserving to the ward, real estate descended. *Id.* 373. See, also, as to the power to bind the ward's land by *elegit*, &c., in cases of necessity, *Ronald v. Buckley*, 1 Brock. 356. At common law, the guardian can lease during the period of his guardianship; *Field v. Schieffelin*, 7 J. C. R. 150; *Byrne v. Van Hoesen*, 5 John. 66; *Ross v. Gill*, 4, Call. Va. 250; and, indeed, it is his duty to do so for the benefit of the ward. *Genet v. Talmadge*, 1 J. C. R. 561. Permanent improvements are equivalent to a conversion, and are, therefore, not within the guardian or trustee's power. *Bellinger v. Shafer*, 2 Sandf. Ch. 297; see *Alexander v. Alexander*, 8 Alab. 796. Thus it has been held, that a guardian cannot add a new part to the ward's mansion, to fit it for a tavern; though in the particular case, he was allowed in his accounts, a credit for the improved rent. *Miller's Est.*, 1 Barr, 326. But in *Hood v. Bridport*, 11 Engl. L. & Eq. 271, the court ordered a reference to inquire whether it would be for the interest of an infant petitioner to expend money in repairs of real estate, of which he was tenant in tail in expectancy. And an allowance for permanent improvements may be made, where obviously for the infant's benefit. *Jackson v. Jackson*, 1 Gratt. 143. For purposes of sale and disposition, the power of a guardian over his ward's personal estate, however, is as full as that of an executor; and the purchaser is in no greater degree liable for the application of the money. *Field v. Schieffelin*, 7 J. C. R. 150; *Bank of Va. v. Clegg*, 6 Leigh, 399; see *ante*, page 166, and note.

apply this rule with any degree of safety to any particular case; and no trustee could be advised to take upon himself the responsibility of thus dealing with the infant's estate, but the express sanction of the court for that purpose should always be obtained.

One reason appears to have principally influenced the court in discountenancing the absolute conversion of the personal estate of an infant into real estate. According to the old law, an infant at seventeen years might have disposed of his personal property, while he had no such power over his real estate. Consequently the conversion would have been prejudicial to him, by depriving him of the absolute dominion over his property, which he would otherwise have enjoyed at an earlier period; (e) and on this ground the court, even where it has changed the nature of the infant's estate, has done it not to all intents and purposes, but with this qualification, viz., that if the infant lived he might take it as real estate, but without prejudice to his right over it during infancy as personal property. (f) This reason,

(e) *Earl of Winchelsea v. Norcliffe*, 1 Vern. 436; *Pierson v. Shore*, 1 Atk. 480; *Witter v. Witter*, 3 P. Wms. 101; *Ex parte Grimstone*, Ambl. 708; *Ex parte Phillips*, 19 Ves. 123.

(f) *Sergeson v. Sealey*, 2 Atk. 413, 4; *Ashburton v. Ashburton*, 6 Ves. 6; *Ware v. Polhill*, 11 Ves. 278; *Ex parte Phillips*, 19 Ves. 123; *Webb v. Lord Shaftesbury*, 6 Mad. 100.

court, was discharged from his purchase, on the ground that the court had no jurisdiction to sell or convert an infant's real estate upon the notion that it would be beneficial. And again, in *Peto v. Gardner*, reported in 12th Law Journ. N. S., Chanc. 371, 2 Y. & Coll., Ch. 312, it was held by Vice-Chancellor K. Bruce, that the court had no jurisdiction to exchange personal property belonging to infants for other property to be settled on them, though the arrangement should appear to be beneficial for the infants. And in the still later case of *Garmstone v. Gaunt*, before the same learned Judge, it was held, that the court could not order the sale of an infant's leasehold estate, on the notion of its being for his benefit. [Reported, 1 Coll. 577. The jurisdiction of a court of equity in general to direct the conversion of an infant's estate, was asserted in the *Matter of Salisbury*, 3 John. Ch. 347; *Huger v. Huger*, 3 Desaus. 18; *Stapleton v. Langstaff*, Id. 22; but denied in *Rogers v. Dill*, 6 Hill, 415; see *Williams's Case*, 3 Bland, 186, for a full discussion of this matter; and the last note. In this country, however, in most, if not all of the States, there are statutes authorizing the sale of an infant's real estate, on application of the guardian, &c., where it is necessary, or for the former's benefit. See in Pennsylvania, Acts of 1834, § 33 (3); (*Dunlop*, 476); of 1836, § 1 (*Dunlop*, 695); of 1851, I. § 1 (*Dunlop*, 1133); and the recent act of April 18, 1853. See, also, *Garland v. Loring*, 6 Rand. 396; *Matter of Wilson*, 2 Paige, 412; *Pope v. Jackson*, 11 Pick. 113; *Talley v. Starke*, 6 Gratt. 339; *Duckett v. Skinner*, 11 Ired. 431; *Brown's Case*, 8 Humph. 200; *Peyton v. Alcorn*, 7 J. J. Marsh. 500; *Dow's Petition*, Walker's Ch. 145; *Young v. Keogh*, 11 Illinois, 642. There is no question but that a State Legislature may constitutionally direct such a conversion. *Snowhill v. Snowhill*, 2 Green's Ch. 20; *Norris v. Clymer*, 2 Barr, 277; *Davis v. Johannot*, 7 Metc. 388; *Spotswood v. Peridleton*, 4 Call, 514; *Dorsey v. Gilbert*, 11 G. & J. 87. But where land is so sold by the act of the legislature, though the proceeds go to the personal representatives, (*Snowhill v. Snowhill*, ut supra,) they remain real estate as regards the guardian. *Genet v. Tallmadge*, 1 J. C. R. 564.]

however, now no longer exists; for the late Will Act (1 Vict. c. 26, s. 7), expressly does away with the power of an infant to make any valid disposition of property by will. *And hence it may be matter of doubt, whether the court would in future adhere [*397] with the same strictness to the old rule for the benefit of the infant's heir. The observations which fell from Lord Eldon in *Ware v. Polhill*,^(g) seem to favor the inference, that the rule in question was established for the protection of the relative interests of the real and personal representatives of the infant; but in *Pierson v. Shore*,^(h) Lord Hardwicke said, that the reason was, its being for the benefit of the infant, "and not out of favor to any one representative more than another." And in *Oxenden v. Lord Compton*,⁽ⁱ⁾ it was laid down, that there was no equity for the court to interfere as between real and personal representatives, they being both equally volunteers. In *Ex parte Grimstone*,^(k) the court refused to interfere as between the two classes of representatives of a lunatic, on the ground that a lunatic has precisely the same power of disposition over real as over personal estate, which was not the case with an infant: and this distinction between infants and lunatics was admitted by Lord Loughborough in *Oxenden v. Lord Compton*,^(l) and was also recognised by Lord Eldon, and followed as the principle of his decision in the case of *Ex parte Phillips*.^(m) This distinction has now ceased to exist in consequence of the late alteration in the law, and these last cases are therefore authorities for holding, that *if an infant's real estate have been actually converted*, the court will not interpose on behalf either of his real or personal representatives to restore it to its original state; although, in directing the conversion to be made, it might still be considered an open question, whether the court would so far recognise the rights of the two classes of representatives, as to modify the conversion according to the rule, which we have seen to have been established and acted upon for the benefit of the infant himself.⁽¹⁾

It is almost superfluous to add, that if the instrument, creating the trust for the infant, contain any express direction as to the disposition of the estate, the express trust will override any general rule of

(g) 11 Ves. 278; and see *Rook v. 3 J. C. R. 347; Lloyd v. Hart*, 2 Barr, Worth, 1 Ves. 461. 477.]

(h) 1 Atk. 480.

(k) *Ambl. 706; S. C. 4 Bro. C. C.*

(i) 2 Ves. jun. 69, 70; *S. C. 4 Bro. 235, n.*

C. C. 201. [See *Matter of Salisbury*, (l) 2 Ves. jun. 75.

(m) 19 Ves. 122, 3.

(1) From the cases referred to in a note to the preceding page, it seems that the jurisdiction of the court to direct the conversion of an infant's estate *at all* cannot be maintained [in England].

construction, which will prevail only in the absence of any positive declaration on the point in question.(n)

In some instances the infancy of the *cestui que trust* necessarily invests the trustees with a more extensive and absolute power over the trust estate than they would take under ordinary circumstances. Thus where an estate is vested in trustees in trust to sell, and apply the money for the benefit of particular persons, the trustees in ordinary cases, prior to the late act 7 & 8 Vict. c. 76, could not give a valid discharge for the purchase-money without the concurrence of the parties beneficially interested.(o) If, however, the *cestui que trusts* were infants, or otherwise incapacitated, the trustees would [*398] necessarily take by implication the power *of giving a discharge to the purchaser; for the power of sale would otherwise be nugatory.(p)

Where an infant is absolutely entitled to a legacy or other sum of trust-money, the trustee in whose hands it is vested, cannot safely pay it over either to the infant himself, or to his father or any other person on his behalf, without the sanction of the court;¹ and should he do so, he will be liable to pay it over again on the infant coming of age.(q) And a release taken from the infant will be wholly inoperative.(r) If, however, the infant on coming of age do any act clearly confirmatory of the payment made during his minority, he will be estopped from afterwards claiming a repayment.(s) But the intention to confirm the payment must be clear, and it will not necessarily be inferred merely from the acquiescence of the party after attaining his full age, though continued for as long a period as fourteen or fifteen years.(t) However, if an infant by means of fraudulent misrepresentations induce a trustee to pay over to him the trust fund, he cannot take advantage of his own fraud and compel a repayment on coming of age.(u)

By the statute 36 Geo. III. c. 52, s. 32, an executor is enabled

(n) See *Ashburton v. Ashburton*, 6 Ves. 6; *Terry v. Terry*, Prec. Ch. 273. [*Rogers v. Dill*, 6 Hill, N. Y. 415.]

(o) 2 Sugd. V. & P. 45, 9th ed.

(p) *Lavender v. Stanton*, 2 Mad. 46; *Sowarshy v. Lacy*, 4 Mad. 142; *Breedon v. Breedon*, 1 R. & M. 413.

(q) *Dagley v. Tolferry*, 1 P. Wms. 285; *Phillips v. Paget*, 2 Atk. 80; *Davies v. Austen*, 3 Bro. C. C. 178; *Lee v. Brown*, 1 Ves. 369; *Overton v. Banister*, 8 Jur. 996; S. C. 3 Hare, 503.

(r) *Overton v. Banister*, 8 Jur. 996; S. C. 3 Hare, 503.

(s) *Cooper v. Thornton*, 3 Bro. C. C. 97; *Lee v. Brown*, 4 Ves. 368; 1 Rep. Legs. 771, 3d ed.; 2 Wms. Executors, 869; 1 Rep. Legs. 771; *Cory v. Gertchken*, 2 Mad. 40. [See post, 526, note.]

(t) *Dagley v. Tolferry*, 1 P. Wms. 285; see *Lee v. Brown*, 4 Ves. 362.

(u) *Cory v. Gertchken*, 2 Mad. 40; *Overton v. Banister*, 8 Jur. 996; S. C. 3 Hare, 503. [See ante, 144, note 2.]

¹ *Furman v. Coe*, 1 Caines' Cas. 96; *Sparhawk v. Buck*, 9 Verm. 41. Not even to guardian, without security. *Hoyt v. Hilson*, 2 Edw. Ch. 202.

to discharge himself from all responsibility with respect to the payment of legacies due to infants, by paying the amount, after deducting the legacy duty, into the Bank with the privity of the Accountant-General of the Court of Chancery to the account of the party entitled to it; and it is directed, that the money shall be invested by the Accountant-General in the three per cents., a transfer of which may be obtained by the party entitled, on application to the court by petition, or motion, in a summary way.(v)¹

Where the trust is for the payment of the money not to the infant himself, *but to a guardian or trustee for him*, the executor or trustee, by whom the payment is to be made, will be justified in making over the money to the infant's guardian or trustee, whose receipt, according to the principle already considered, will be a good discharge for the money so paid.(x) And on this principle, where there is a bequest of 100*l.* to A. to be equally divided between himself and his family, or for his and his children's use, A. is a trustee for the benefit of his children, and a payment to him by the executors will be good against the claims of the infant children.(y)

It is the settled rule of the court, that trustees for infants ought never of their own authority to break in upon the capital of the trust fund *even for the advancement of the infant, and still less [*399] merely for his maintenance.(z)

Therefore if the instrument creating the trust do not authorize an application of the *corpus* of the fund in advancement and maintenance, however advantageous it may be for the infant to make such payments, this can be done with safety only under the sanction of the court.² In *Walker v. Wetherell*(a) a doubt was expressed by Sir

(v) 2 Wms. Executors, 867, 8; 1 96, & 186; *Robinson v. Tickell*, 8 Ves. Rop. Legs. 767. 142.

(x) 2 Wms. Executors, 866; 1 Rop. (z) *Walker v. Wetherell*, 6 Ves. 474. Legs. 771. Anon. Mosley, 41.

(y) *Cooper v. Thornton*, 3 Bro. C. C. (a) 6 Ves. 474. [See *Williams's case*, 3 Bland. 186.]

¹ In *Farrance v. Viley*, 9 Engl. L. & Eq. 219, the shares of infants in an estate, under 20*l.* each, were directed to be paid at once to the parties maintaining them, to save the expense of the above proceeding. So in *How v. Ruxton*, 11 Engl. L. & Eq. 223, legacies of 10*l.* given to two infants for mourning, were directed to be paid to the father, who had always maintained them, he undertaking to apply it for the purpose.

² In general, the trustees or guardian can only apply the income of the infant's estate to his maintenance and support. *Davis v. Harkness*, 1 Gilm. 173; *Prince v. Logan*, Spear's Eq. 29; *McDowall v. Caldwell*, 2 McCord, Ch. 43; *Davis v. Roberts*, 1 Sm. & M. Ch. 343; *Hester v. Wilkinson*, 6 Hump. 219; *Villard v. Chovin*, 2 Strob. Eq. 40; *Bybee v. Thorp*, 4 B. Monr. 313; *Carter v. Rolland*, 11 Humph. 339; *Cornwise v. Bourgum*, 2 Geo. Dec. 15; *Hargood v. Wells*, 1 Hill's Eq. 59. But in cases of necessity, payments out of the capital have been allowed

Wm. Grant, M. R., whether even the court upon petition could order the capital of an infant's fund to be broken in upon for mere *maintenance*, although it had frequently been done for the purpose of *advancement*. However, such an order was made in the earlier case of *Barlow v. Grant*,^(b) on the ground of the small amount of the fund. And Sir Thomas Plumer, M. R., for the same reason made a similar order on petition in *Ex parte Green*.^(c) And *Ex parte Chambers*,^(d) which was decided by Lord Lyndhurst, C., is an authority to the same effect.^(e) So that there appears to be no doubt as to the jurisdiction of the court to make such an order merely for the *maintenance* of an infant upon a proper case being shown for its exercise. And where the object is the *advancement* of the infant, there are frequent instances, in which the court has directed the application of the capital of his fortune for that purpose.^(f) Indeed, payments for such a purpose out of the capital have been allowed to trustees in passing their accounts, *though made of their own authority, and without the sanction of the court*.^(g) These, however, were earlier decisions, which scarcely admit of being reconciled with the later authorities.

If trustees transgress the strict line of their duty by applying the capital of the fund or any part of it to the maintenance or advancement of the infant of their own authority, they will be decreed to pay the whole amount of the fund without any deduction to the infant or his assignee, upon his coming of age, notwithstanding they may have acted *bona fide* and for the infant's benefit: for such payments ought to be discouraged upon principles of general convenience.^(h) But the court will not in every case fix the trustees with interest or the costs of the suit although the decree be against them.⁽ⁱ⁾ And there seems to be authority for stating that a payment out of the capital of an infant's fortune might be allowed to trustees; though made by

(b) 1 Vern. 255. [See *Ex parte Hays*, 13 Jur. 762; 3 De G. & Sm. 405; *Ex parte Allen*, 14 Jur. 324; *Matter of Bostwick*, 4 J. C. R. 100.]

(c) 1 J. & W. 253.

(d) 1 R. & M. 577.

(e) And see *Ex parte Knott*, 1 R. & M. 499; *Ex parte Swift*, Ib. 575; *Evans v. Massey*, 1 Y. & J. 196; *Bridge v. Brown*, 2 N. C. C. 181.

(f) *Barlow v. Grant*, 1 Vern. 255;

Franklin v. Green, 2 Vern. 137; In re England, 1 R. & M. 499; *Ex parte Chambers*, Ib. 577.

(g) *Barlow v. Grant*, 1 Vern. 255; *Franklin v. Green*, 2 Vern. 137.

(h) *Davies v. Austen*, 3 Bro. C. C. 178; *Lee v. Brown*, 4 Ves. 362; *Walker v. Wetherell*, 6 Ves. 473. [See ante, note to page 395.]

(i) *Lee v. Brown*, 4 Ves. 369; vide post, Remedies for Breach of Trust.

Ex parte Potts, 1 Ash. 340; *Ex parte Bostwick*, 4 J. C. R. 100; *Long v. Norcom*, 2 Ired. Eq. 354; see *Haygood v. Wells*, Hill's Eq. 79; *Maupin v. Dulany*, 5 Dana, 593. Where the expenditure is for the purpose of education or advancement, it will be more readily allowed. *Maclin v. Smith*, 2 Ired. Eq. 371; *Carter v. Roland*, 11 Humph. 339. See this subject ably discussed in the notes to *Eyre v. Countess of Shaftesbury*, 2 Lead. Cas. Eq. pt. ii. 267, &c.

them of their own authority; if made for *actual necessities* for the infant's use.(k)

It is almost unnecessary to remark, that where there is a discretionary power in the settlement for the trustees to make advancements to the children out of the capital, such an application of the trust fund may be properly made. But the terms and restrictions annexed to the power must be strictly observed; and where the author of the trust intended that the power *should be exercised only [*400] with the concurrence of the two trustees, an advancement made by *one of them* only was not allowed in passing the accounts, although that one had alone acted in the trust.(l)

Where the trust fund is given over for the benefit of another person in case of the death of the infant under twenty-one, no part of the capital can be applied for the infant's advancement even by the court, in the absence of an express power created by the trust instrument, still less can the trustees so apply the fund of their own authority.(m) However, an advancement may be made in such cases, if the parties entitled in remainder being competent, appear and give their consent.(n)

Trustees cannot safely apply even the *income* of an infant's fortune for his maintenance or benefit without the sanction of the court, unless they are expressly authorized to do so by the trust instrument.(o)¹ And even if the instrment contain a power or trust for maintenance, yet if the direction be general, without specifying how much is to be so applied, the uncertainty of amount will render an application to the court requisite for the security of the trustees.(p) And the court in such cases will fix the amount of maintenance with regard to the fortune and circumstances of the infant.(q)

These observations apply to those cases, where the property in question is held simply for the absolute benefit of the infant. Where, however, the infant does not take an absolute vested interest, or there are other parties contingently or otherwise entitled in remainder, or there is a direction for the accumulation of the income during the

(k) See *Davies v. Austen*, 3 Bro. C. C. 178.

(l) *Palmer v. Wakefield*, 3 Beav. 227.

(m) *Lee v. Brown*, 4 Ves. 362. [*Van Vechten v. Van Veghten*, 8 Paige, 104.]

(n) *Evans v. Massey*, 1 Y. & Jerv. 196.

(o) 1 *Rop. Legs.* 768, 3d ed.; 2 *Wms. Executors*, 868.

(p) 1 *Rop. Legs.* 768.

(q) 2 *Rop. Legs.* 241, and cases cited. [*Owens v. Walker*, 2 *Strob. Eq.* 289; *Ex parte Williams*, 2 *Coll. Ch.* 740.]

¹ See *Van Vechten v. Van Veghten*, 8 Paige, 104, that the trustee may either apply it themselves, or pay it to guardian or parent. But the trustee must exercise a discretion, and is not to place the funds directly in the hands of a beneficiary who from his mental or moral condition is incapable of using it beneficially himself. *Mason v. Jones*, 2 Barb. S. C. 248; *Gott v. Cook*, 7 Paige, 538.

minority of the infant, the existence of such circumstances affords an additional reason why a trustee should refuse to apply the income or any part of it in maintenance except under the direction of the court.¹

However, where the gift has proceeded from *the parent of the infant*, or a person *in loco parentis*,^(r) and the subject of the trust is a residuary personal estate, the court upon application has frequently directed an allowance for maintenance in the absence of any power in the will, although the infant had a contingent interest only in the property in question;^(s) and notwithstanding an express direction for accumulation.^(t) And this has also been done even where the property is given over to the other children on the death of the infant under twenty-one, if the chance of survivorship be equal;^(u) although if that be not the case, maintenance will not be given without the consent of the parties entitled in remainder.^(x)

[*401] *But maintenance in such cases will only be given where the subject of the trust is a *residuary personal estate*. For where the infant's interest in *real estate*,^(y) or in a *particular trust fund*^(z) is *contingent*, the intermediate income, until the happening of the contingency, will belong to the testator's heir, in the one case, and to his residuary legatee in the other. And it cannot be applied for the infant's benefit, unless that application is directed or sanctioned by the will.^(a)

(r) *Archerly v. Vernon*, 1 P. Wms. 783; *Rogers v. Southen*, 2 Keen, 598. [Corbin v. Wilson, 2 Ashm. 208.]

(s) *Inclendon v. Northcote*, 3 Atk. 433, 438; *Harvey v. Harvey*, 2 P. Wms. 22; *Lambert v. Parker*, Coop. 143; *Brown v. Temperley*, 3 Russ. 263; *Mills v. Roberts*, 1 Russ. & M. 555; *Ex parte Chambers*, 1 Russ. & M. 577; *Boddy v. Dawes*, 1 Keen, 362; *Fairman v. Green*, 10 Ves. 45; but see *Lomox v. Lomox*, 11 Ves. 48.

(t) *Mole v. Mole*, 1 Dick. 310; *Greenwell v. Greenwell*, 5 Ves. 194; *Cavendish v. Mercer*, Ib. 195, n.; *Collis v. Blackburn*, 9 Ves. 470; *Fairman v. Greene*, 10 Ves. 45; *M'Dermot v. Kealy*.

3 Russ. 264, n.; *Stretch v. Watkins*, 1 Mad. 253. [*Corbin v. Wilson*, 2 Ashm. 208; *Newport v. Cook*, Id. 342.]

(u) *Fairman v. Green*, 10 Ves. 48; *Ex parte Kebble*, 11 Ves. 604; *Turner v. Turner*, 4 Sim. 434. [*Newport v. Cook*, 2 Ashm. 332; see *Matter of Ryder*, 11 Paige, 125.]

(x) *Erratt v. Barlow*, 14 Ves. 202; *Kime v. Welpitt*, 3 Sim. 533; *Turner v. Turner*, 4 Sim. 430; *Cannings v. Flower*, 7 Sim. 523.

(y) *Green v. Ekins*, 2 Atk. 476; *Bullock v. Stones*, 2 Ves. 521.

(z) *Leake v. Robinson*, 2 Mer. 384.

(a) See *Bullock v. Stones*, 2 Ves. 521.

¹ Now, however, in Pennsylvania, by the Act of April 18, 1853, notwithstanding any direction to accumulate rents, issues and profits for the benefit of any minor or minors, the court may on the application of their guardian, where there shall be no other means for maintenance and education, decree an adequate allowance for such purpose, making an equal distribution amongst those who have equal interests. A similar provision exists in New York, Rev. St. part II. Ch. 1, tit. 2, § 38; Id. tit. 4. § 5.

And the gift for the infant's benefit must proceed from its *parent*, or a person who has placed himself *in the place of a parent*. And maintenance will be refused out of a contingent interest, or where the fund is given over, if the gift proceeds from a *stranger*, or even from a grandfather to his grandchild,^(b) or where the infant is a natural child, if not recognised and adopted by the father.^(c)

Where an infant has an interest in two or more funds, but his interest in one of them is more certain and indefeasible than that in the other, it is the settled rule of the court to give the maintenance in such manner as is most for the infant's advantage. And with this view it will direct the income of that fund to be first applied, in which the infant has the least certain interest. For instance, if the infant be entitled to one fund absolutely, and to another fund contingently on reaching twenty-one, or on any other contingency, the maintenance will be given first out of the income of the contingent fund where it can be done consistently with the rules of the court. Or, if he be entitled to one fund at twenty-five, and to another at twenty-one, the income of the first-mentioned fund will first be applied for his maintenance.^(d)¹

If the infant be absolutely entitled to the fund, and no adverse question can arise for decision, the order for maintenance will be made on petition without suit.^(e)² But if the interest of other parties be implicated, the court will not act, except in a suit regularly instituted.^(f)

If the father of the infant be alive, and able to support his child, trustees will not be justified in applying the income of the infant's fortune for his maintenance, though a general power for maintenance be given them by the trust instrument. For the father is by law bound to support his children, and if their income were applied in exoneration of his legal liability to maintain them, it would, in effect,

(b) *Errington v. Chapman*, 12 Ves. 20. [See *Corbin v. Wilson*, 2 Ashmead, 208.] But see *Greenwell v. Greenwell*, 5 Ves. 194.

(c) *Lowndes v. Lowndes*, 15 Ves. 301.

(d) *Rawlins v. Goldfrap*, 5 Ves. 440; *Foljambe v. Willoughby*, 2 S. & St. 165; see re *Ashley*, 1 R. & M. 371; but see *Wynch v. Wynch*, 1 Cox, 433.

(e) *Ex parte Whitfield*, 3 Atk. 315; *Ex parte Kent*, 3 Bro. C. C. 88; *Ex*

Parte Salter, 3 Bro. C. C. 500; *Ex parte Mountfort*, 15 Ves. 445; *Ex parte Star- kie*, 3 Sim. 339; *Ex parte Chambers*, 1 R. & M. 577; *Ex parte Green*, 1 J. & W. 253; *Ex parte Myerscough*, lb. 151. [See *Ex parte Hays*, 13 Jur. 762; 3 De G. & Sm. 405; *Matter of Bostwick*, 4 J. C. R. 105; *Rice v. Tonnele*, 4 Sandf. Ch. 571.]

(f) *Fairman v. Green*, 10 Ves. 45.

¹ See *Methold v. Turner*, 3 Eng. L. & Eq. 168.

² In *Crop v. Brown*, 7 Eng. L. & Eq. 58, an order for maintenance was made on the appointment of a guardian, without petition.

amount to a gift to the father of so much as is necessary for their maintenance.(g)¹

Therefore, wherever it is intended that the power of maintenance should be exercisable in the lifetime of the father, and without reference to his capability of supporting his children, this should be expressly stated by the power.(h) However, this doctrine will not be [*402] applied to a *positive trust for the application of the children's income for their maintenance, where the trust is created by the marriage settlement of the parents. For this will be treated as a benefit, of which the father became the purchaser on his marriage; in such cases, therefore, the father will be entitled to have the income arising from his children's fortune applied according to the trust for their maintenance, without regard to his own ability.(i) However, if the settlement contain no *positive trust*, but only a *discretionary power* for the trustees to apply the children's income for their maintenance, the father cannot *compel* the trustees to exercise this power in exoneration of his own liability.(k)

Where the interest of the children's fund is expressly given to the father for their maintenance, the application of the general doctrine is excluded by the terms of the trust; and in that case the income will be properly paid to the father by the trustees for the purpose expressed; such a gift is, in fact, one *pro tanto* for the benefit of the father.(l)²

(g) *Andrews v. Partington*, 3 Bro. C. C. 223; *Meacher v. Young*, 2 M. & K. C. 60; *S. C.*, 2 Cox, 223; *Thompson v. 490*; *Stocken v. Stocken*, 4 Sim. 152; 4 *Griffin, Cr. & Phill.* 317; but see *Hoste M. & Cr.* 95.

v. Pratt, 3 Ves. 730. (k) *Thompson v. Griffin, Cr. & Ph.* 322.

(h) See *Stephens v. Lawry*, 2 N. C. C. 87.

(i) *Brown v. Casamajor*, 4 Ves. 498; (l) *Mundy v. Lord Howe*, 4 Bro. C. Hammond *v. Neame*, 1 Swanst. 35.

¹ *Cruger v. Heyward*, 2 Desaus. 94; *Matter of Kane*, 2 Barb. Ch. 375; *Bethea v. McColl.* 5 Alab. 312; *Sparhawk v. Buell*, 9 Verm. 41; *Walker v. Crowder*, 2 Ired. Eq. 478; *Chaplin v. Moore*, 7 Monr. 173; *Dupont v. Johnson*, 1 Bail. Eq. 279. This does not apply, it would seem, to a step-father; *Gay v. Ballou*, 4 Wend. 403; *Freto v. Brown*, 4 Mass. 675; but in *Booth v. Sineath*, 2 Strob. Eq. 31, an allowance for maintenance and education of his ward, was refused to a step-father, though she had lived with him, it appearing that he had expended nothing therein.

² Where the interest of legacies given to the parent, or the rents and proceeds of shares of minor children are directed to be paid to the parent "for" or "towards" their respective maintenance and education; though with a direction that, in case of death under twenty-one, the share of each, with accumulations, if any, shall go over to the survivors; the parent, having maintained the children, is entitled to the proceeds without an account. *Brown v. Paull*, 1 Eng. L. & Eq. 130, 15 Jur. 5; *Hadow v. Hadow*, 9 Sim. 438; *Rainsford v. Rainsford, Rice's Eq.* 343. But where a life estate was given to parents under a marriage settlement for the maintenance of their children, and they became bankrupt, on petition, the court directed the whole of the income of the trust estate to be applied to the maintenance and support of children. *Dalton's Settlement*, 10 Eng. L. & Eq. 97.

It seems, that the doctrine in question does not apply to the *mother* of the infants, for the mother is under no legal obligation to maintain the children; therefore, if the father be dead, or be unable to support the children, their income will be properly applicable for that purpose, although the mother be living and has a competent separate estate.¹ However, the point is not altogether free from doubt.(*m*)

Upon an application for an allowance for maintenance out of children's fortunes in the father's lifetime, the court usually, in the first place, refers it to the Master to ascertain the father's ability.(*n*) And in determining that question, the circumstances of the parties must, of course, be taken into consideration.(*o*) However, the order for maintenance has occasionally been made at once without any reference, in consideration of the poverty of the parties.(*p*) Where the father is unable to maintain the children, an order may be made for payment of the children's income to him, though he be resident abroad.(*q*)²

A trustee, who makes payments out of the income of the infants' property for their maintenance upon his own responsibility, will be liable to have such payments disallowed, if the court should be of opinion that they were improperly made.(*r*) If, however, the circumstances are such that the court, upon application, would have directed a similar payment, the act of the trustee will be supported, although made without authority, and he will not be called upon to account, and undo what had been done, merely because it was done without application.(*s*)

(*m*) *Billingsby v. Critchett*, 1 Bro. C. C. 268; *Haley v. Bannister*, 4 Mad. 275, 280; but see *Smee v. Martin*, Bunb. 131.

(*n*) *Hughes v. Hughes*, 1 Bro. C. C. 386. [*Lucknow v. Brown*, 12 Jur. 1017.]

(*o*) *Jervoise v. Silk*, Coop. 52.

(*p*) *Payne v. Low*, 1 R. & M. 223.

(*q*) *De Weever v. Rochfort*, 6 Beav. 391, and cases cited. [See *Carmichael v. Hughes*, 6 Eng. L. & Eq. 71.]

(*r*) *Andrews v. Partington*, 3 Bro. C. C. 60; *Cotham v. West*, 1 Beav. 381; *Bridge v. Brown*, 2 N. C. C. 187.

(*s*) *Lee v. Brown*, 4 Ves. 369; see *Barlow v. Grant*, 1 Vern. 255; *Franklin v. Green*, 2 Vern. 137; 1 Rop. Legs. 768; 2 Wms. Executors, 869; *Sisson v. Shaw*, 9 Ves. 288; *Maberly v. Turton*, 14 Ves. 499; *Ex parte Darlington*, 1 Ball & B. 241.

¹ *Heyward v. Cuthbert*, 4 Desaus. 445; *Matter of Bostwick*, 4 J. C. R. 100; *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Mass. 97; *Douglass v. Andrews*, 12 Beav. 310, 14 Jur. 73; *Bruin v. Knott*, 1 Phill. 573, *accord*.

² Where the father is unable to support his child, the trustees are authorized to apply the income without express power. *Rice v. Tonnele*, 4 Sandf. Ch. 571; *Bethea v. McColl*, 5 Alab. 312; *Corbin v. Wilson*, 2 Ash. 178; *Newport v. Cook*, Id. 337; *Matter of Burke*, 4 Sandf. Ch. 617. In some cases, allowances to the father for past maintenance have been made. *Corbin v. Wilson*; *Newport v. Cook*; *Carmichael v. Hughes*, 6 Eng. L. & Eq. 71. So of the mother. *Matter of Bostwick*, 4 J. C. R. 100; *Bruin v. Knott*, 1 Phill. 573. But, in England, it is considered, that the father cannot have past maintenance, except there are special circumstances; *Reeves v. Brymer*, 6 Ves. 454; and *Sherwood v. Smith*, Id. 454, were doubted. Lord Cranworth in *Carmichael v. Hughes*, ut *supr*.

Where the annual amount to be paid for the infant's maintenance is fixed by the trust instrument, that amount cannot be exceeded by [*403] the *trustees,^(t) unless they are invested with a power for that purpose.^(u) But if the infant be absolutely entitled to the fund, and the circumstances of the case require it, as where the prescribed amount is insufficient, the court, on a proper application, will increase the allowance.^(x) And this, though the infant's interest is contingent, and there is an express direction for accumulation.^(y)

A power for the maintenance of a daughter until twenty-one, is not determined by her marriage during her infancy.^(z)

Where there was a devise of lands to trustees to apply the rents, &c., for the "maintenance, education and bringing up" of the children of A. *during* A.'s life, the interest of the children is not confined to their minority, but continues during A.'s life.^(a) However, it would be otherwise, if the trust were merely for the maintenance, &c., of the children, without limiting the period during which the payment was to continue; for in that case it would be held to have reference only to their minority.^(b)

An infant will be entitled to the same remedies against the trustee for a breach of trust, as if he were of full age. Therefore, where a trustee employs the infant's money in his own business, the infant will have the option of taking the profits made, or the interest:^(c) or in case of an investment on any improper security, the trustee will be liable to make good to the infant any loss which may ensue:^(d) and so in case of any other neglect or violation of duty on the part of the trustee.

It appears to have been considered at one time that, as between infants and third parties, the infant should not be prejudiced by the *laches* of his trustee. For instance, where a stranger had entered upon an infant's trust estate, and levied a fine, and the trustees suffered five years to pass without claim, and the right of bringing an ejectment was thus barred at law; on a bill filed by the infant on coming of age against the disseisor, the court decreed the possession and an account of profits, declaring that the fine and non-claim should not run upon the trust in the infant's minority, nor he suffer for the

(t) See *Hearle v. Greenbank*, 2 Atk. 697, 716; *Long v. Long*, 3 Ves. 286, n.

(u) See *Rawlins v. Goldfrap*, 5 Ves. 440.

(x) *Aynsworth v. Pratchett*, 13 Ves. 321; *Allen v. Coster*, 1 Beav. 202; *Josselyn v. Josselyn*, 9 Sim. 63; *Stretch v. Watkins*, 1 Mad. 253. [*Newport v. Cook*, 2 Ashm. 373; *Corbin v. Wilson*, Id. 178.]

(y) *Aynsworth v. Pratchett*, 13 Ves. 321; *Stretch v. Watkins*, 1 Mad. 253; *Josselyn v. Josselyn*, 9 Sim. 63.

(z) *Chambers v. Goldwin*, 11 Ves. 1.

(a) *Badham v. Mee*, 1 R. & M. 631.

(b) 1 R. & M. 632.

(c) *Anon.* 2 Ves. 630.

(d) *Homes v. Dring*, 2 Cox, 1; *Terry v. Terry*, Prec. Ch. 273.

lashes of his trustee.(e) This, however, is now no longer law, and there can be little question but that the acts of the trustee would now bind the infant *cestui que trust's* rights against any third party claiming *bona fide*; although this of course would be without prejudice to the infant's remedy against his trustee on coming of age.¹ Thus in *Wych v. East India Company*,(f) it was held by Lord Talbot, that an infant was bound by the neglect of his trustee to sue for a debt within the time fixed by the Statute of Limitations, and that he had no equity to sue the debtor when he came of age. And in *Earl of Huntingdon v. Countess of Huntingdon*,(g) Lord Parker was of opinion, that a fine and five years' non-claim, should, in favor of a purchaser, bar *the *cestui que trust*, though an infant; an opinion, which, it will be observed, is in direct contradic- [*404] tion of the decision in *Allen v. Sayer*.(h)

Trustees for infants, as well as other trustees, are entitled to be paid all reasonable expenses incurred in the conduct of the trust, without any order of the court for that purpose;(i) although they cannot claim any compensation for personal trouble or loss of time.(k)

Trustees for infants will not be liable for any accidental loss of the trust property, which happens through no default of theirs; for they are bound but to keep it as their own. Thus where a trustee for an infant plaintiff was robbed of 40*l.* in money, which he had received for the infant, and also at the same time of a larger sum of his own, the 40*l.* was allowed to him in his accounts upon his own affidavit.(l)

A trustee of an infant's real estate, *who is invested with general powers of superintendence and management*, will be allowed all expenses of repairs and other improvements of the property.(m) And this though the payments be made out of the surplus rents which are directed to be accumulated:(n) and although the allowance be opposed by the first tenant in tail *in esse*.(o) But there might be a serious question, whether such payments could be allowed to a trustee, who is not invested with any authority, either general or special, for so applying the fund.(p)

Every carefully drawn trust instrument contains an express direction to accumulate the income of the infant's trust fund, which may not be required for maintenance. But in the absence of such a

(e) *Allen v. Sayer*, 2 Vern. 368.

(f) 3 P. Wms. 309.

(g) 3 P. Wms. 310, n.

(h) Vide *supra*, p. 253.

(i) *Brocksopp v. Barnes*, 5 Mad. 90;
see *Fearn v. Young*, 10 Ves. 184.

(k) *Brocksopp v. Barnes*, 5 Mad. 90;
re *Ormsby*, 1 Ball & B. 189.

(l) *Morley v. Morley*, 2 Ch. Ca. 2.

(m) *Bowes v. Earl of Strathmore*, 8
Jur. 92.

(n) *Ibid.*

(o) *Ibid.*

(p) Vide *post*, Div. II., Ch. V. p. 570,

[ante, note to page 395.]

¹ *Williams v. Otey*, 8 Humph. 563; *Smilie v. Biffle*, 2 Barr, 52.

positive direction, it will be equally the duty of the trustees to make this accumulation. And where the subject of the trust is a *residue* of a testator's *personal* estate, the intermediate income, until the period of payment, must be accumulated for the infant's benefit, although the infant has only a *contingent* interest in the fund in the event of his attaining twenty-one. As where the trust is for a child, *if* or *when* it should reach twenty-one.(q) But this rule will not be extended to a *particular* contingent interest, such as a specified sum of money. But the intermediate income will in that case fall into and make part of the residue.(r) Nor will the rule apply to the income of *real estate*, which will belong to the testator's heir-at-law, until the happening of the contingency, on which the infant becomes entitled;(s) unless indeed there is a direction for the application of the intermediate income for the infant's benefit.(t)

Where an infant takes an immediate *vested* interest in the subject of the trust, and the period of payment *only* is postponed, with a direction for accumulation until that time arrives, the infant will be absolutely entitled to the fund upon reaching twenty-one, and the trust for accumulation will then cease; although the testator has fixed any later period—as, for instance, *the age of twenty-[*405] five, for the time of payment, and has directed the income to be accumulated until that time.(u)

It has been already stated, that trustees will be liable to be charged with compound interest, where they misapply the trust fund in contravention of an express trust to accumulate.(x)

VIII.—OF TRUSTEES FOR MARRIED WOMEN.

1ST. OF REAL ESTATE HELD IN TRUST FOR A MARRIED WOMAN [405].—2D, AS TO PERSONAL ESTATE HELD IN TRUST FOR A MARRIED WOMAN [407].

1st. Of Real Estate held in Trust for a Married Woman.

At law, husbands take a qualified interest in the real estate of their wives, and wives have also a qualified power of disposing of their real property, notwithstanding the ordinary disability of coverture. Equity has adopted the same rules with regard to the *equitable* interests of married women in real estate; and the husband

- (q) *Green v. Ekins*, 2 Atk. 473; *Studholme v. Hodgson*, 3 P. Wms. 299; *Trevanion v. Vivian*, 2 Ves. 430; *Bullock v. Stone*, Id. 521. [See *Ware v. McCandlish*, 11 Leigh, 595.]
- (r) *Leake v. Robinson*, 2 Mer. 384.
- (s) *Green v. Ekins*, 2 Atk. 476; *Bullock v. Stones*, 2 Ves. 521; see *Studholme v. Hodgson*, 3 P. Wms. 299; see 305.
- (t) *Bullock v. Stones*, 2 Ves. 521.
- (u) *Saunders v. Vautier*, 4 Beav. 115; S. C. Cr. & Ph. 240.
- (x) Ante, Pl. V. [Of Investment, p. 374, and note]; vide post [Remedies for Breach of Trust, p. 523.]

will take the same amount of interest, and the wife the same power of disposition, as in the case of *legal* interests.

Thus a husband, having had inheritable issue by his wife, will take an estate by curtesy in her equitable estates of inheritance; ^(y)¹ and the act of marriage gives him an estate for the joint lives of himself and his wife in all the freehold estate, whether legal or equitable, to which she is entitled, or may become entitled, during the coverture, provided his interest be not bound by any settlement. ^(z) Therefore, as incident to this estate, he or the parties claiming by conveyance from him, will be entitled to receive the rents and profits during its continuance without making any previous settlement on the wife: and the wife in general has no equity for a provision out of her equitable interest in *real estate*, not consisting of terms for years, although, as we shall presently see, that equity will attach on such parts of her *personalty*, as can be reached only through the medium of a court of equity. ^(a)²

(y) *Watts v. Ball*, 1 P. Wms. 108; *Casborne v. Scarfe*, 1 Atk. 603; *Morgan v. Morgan*, 5 Mad. 408. And it is immaterial that the wife takes an estate for her separate use for life, *Ibid*.
 (z) 1 *Rop. Husb. & Wife*, 3. [2 *Kent's Comm.* 134.]
 (a) *Fitzer v. Fitzer*, 2 Atk. 514; *Lupton v. Tempest*, 2 Vern. 626.

¹ 4 *Kent's Comm.* 30; *Cochran v. O'Hern*, 4 W. & S. 95; *Robinson v. Codman*, 1 Sumner, 121; *Shoemaker v. Walker*, 2 S. & R. 554; *Norman v. Cunningham*, 5 Gratt. 67; *Mullany v. Mullany*, 3 Green, Ch. 16; *Norton v. Norton*, 2 Sandf. Sup. Ct. 298; *Davis v. Mason*, 1 Pet. S. C. 508. So, though the wife takes an estate for her separate use during her life. *Cochran v. O'Hern*, 4 W. & S. 95; *Payne v. Payne*, 11 B. Monr. 139; *Mullany v. Mullany*, 3 Green, Ch. 26; *Rochon v. Lecatt*, 2 Stew. Alab. 429. But where, in addition to the separate use, there is a distinct expression of intention to exclude the husband in the trust, it is otherwise. *McChord's trustees v. Booker*, 6 Dana, 260; *Cochran v. O'Hern*, 4 W. & S. 95; *Rigler v. Cloud*, 14 Penn. St. R. 361; *Stokes v. McKibbin*, 13 Id. 267. See the remarks of Gibson, C. J., in this latter case. In *Mullany v. Mullany*, 2 Green, Ch. 16, however, a different doctrine was held, though that was a case where there was a direct devise of the legal estate to the wife. The statutory provisions, in various States, by which the property of married women has been removed from the control of their husband, have, however, very materially altered the law on this and many of the other doctrines contained in the following pages.

² This distinction seems now overruled in England, and the wife's equity to a settlement sustained, as well against real as personal estate. *Sturgis v. Champneys*, 5 Myl. & Cr. 97. In that case, the assignee of an insolvent debtor, whose wife was entitled to a life interest in real estate, was obliged, on account of the legal estate being in a mortgagee, to come into equity to enforce his title to the rents, and it was held by the Lord Chancellor, that he was bound to make a settlement on the wife. This case was followed reluctantly by *V. Ch. Wigram in Hanson v. Keating*, 4 Hare, 1; but was highly approved by Sir Knight Bruce, *V. Ch.*, in *Newenham v. Pemberton*, 11 Jur. 1071; 1 *De G. & Sm.* 644, where the interest of a wife, tenant in tail in possession, but with a jointure term outstanding, was held to be so far equitable as to entitle the wife to a settlement; see also *Freeman v. Fairlee*, 11 Jur. 447. Where, however, a husband and wife mort-

However, the *assignees of a bankrupt* husband do not stand in so favorable a situation in this respect as a *particular assignee* from him; for it has been decided, that as against the assignees in bankruptcy, the wife's equity for a provision attaches upon all her equitable estate, whether real or personal. (b)

A fine, levied by a husband and wife of her trust real estate, will bind the wife's interest, though she afterwards dissent from the act (unless, indeed, a case of fraud be established), and the trustees will be compelled to convey to the party taking under the fine. (c) And now by the Fines and Recoveries Act (3 & 4 Will. IV. c. 74, s. 77), a disposition by a married woman of her equitable interest in real estate, when acknowledged by her according to the provisions of the statute, will have the same effect as a fine under the old law.¹

[*406] *It was at one time settled, that a husband might dispose of the *trust* of a term of years belonging to his wife to the same extent as if she had the legal estate; and equity would compel the trustees to assign to the assignee of the husband, although it was

(b) *Burdon v. Dean*, 2 Ves. jun. 607; (c) *Penne v. Peacock*, Forr. 41.
Oswell v. Probert, Id. 680; *Freeman v. Parsley*, 3 Ves. 421; [post, 410.]

gaged the freehold estates of the wife in trust, and the husband subsequently took the benefit of the Insolvent Act, his assignees were held entitled to recover the amount beyond what was due to the mortgagee without any settlement; *Sturgis v. Champneys* not applying to the case. *Clark v. Cook*, 3 De G. & Sm. 333.

In the United States, the equity of the wife has been, in general, spoken of as referring to *personal* property. In *Haviland v. Myers*, 6 J. C. R. 25, 136, however, it was held to apply equally to real and personal estate; and this was approved in *Rees v. Waters*, 9 Watts, 90; *Rorer v. O'Brien*, 10 Barr, 212, and seems implied from *Thomas v. Sheppard*, 2 McCord's Eq. 36. But in *Van Duzer v. Van Duzer*, 6 Paige, 368; and *Wickes v. Clarke*, 8 Id. 172, the distinction appears to be asserted, so far, at least, as to deny the wife any equity against the husband's life estate in her land. In the latter case, indeed, where an insolvent husband had made a settlement of his wife's real and personal estate in trust for her, and her children, the Chancellor, on a bill, by creditors, to set aside the settlement, upheld it, as regards the personalty, as being only such as the court would have made; but set it aside so far as regarded the husband's curtesy, without any provision for her. In *Hill v. Hill*, 1 Strob. Eq. 2, it was held, that where the proceeds of a married woman's real estate remained in court, the equity to a settlement attached. See also the remarks in *Carleton v. Banks*, 7 Alab. 35; and *Story on Equity*, § 1409, &c.

¹ This statute has not narrowed the previous rights of married women. They may bar, or convey in all cases in which they could bar or convey, before the Act. But a deed, duly acknowledged and recorded under that act, will not pass a married woman's interest in a fund to be raised out of real estate on the death of a tenant for life. *Hobby v. Allen*, 15 Jur. 835; 3 Engl. L. & Eq. 166. For the mode of conveyance by deed, separately acknowledged, in use in the United States, see 2 Kent's Comment. 115, &c.; 1 Greenl. Cruise. 171.

objected that he had made no settlement or provision for his wife.(d) And the rule was the same, though the wife had but a contingent reversionary interest in the trust term.(e) However, this rule is now altered, and it has been settled, by recent decisions, that the wife's equity for a settlement attaches on her chattels real as well as on her other personal estate.(f)

Where a judgment is given to a trustee for a woman, who marries, and enters into possession of the land extended upon the judgment, the husband may alone make a valid assignment of the extended interest.(g)

But in equity, the right of the husband to his wife's real estate, whether legal or equitable, may be effectually excluded by a limitation to her separate use: and according to the terms of the limitation, this exclusion may either extend to the whole of the husband's interest, whether in the lifetime of the wife, or after her death;(h) or it may be confined to the life of the wife, in which last case he may, notwithstanding, be entitled to an estate by curtesy after her death.(i)

However, the intention to exclude the husband must appear distinctly from the terms of the limitation, and a simple gift or settlement upon her, or trustees for her, will not have that effect.(k) The sufficiency of particular expressions to create such a separate interest in the wife will be discussed presently in treating of the wife's personal estate.(l)

Real estate, limited to separate use of a married woman, is more usually and properly secured to her by vesting it in trustees. This, however, is not absolutely necessary; and if there be a clear trust for the separate use of a feme, although the property be given to her directly without the interposition of trustees, and the husband thus becomes entitled at law, equity will consider his conscience affected by the direction, and will treat him as a trustee for his wife.(m)¹ And

(d) *Sir Ed. Turner's Case*, 1 Vern. 7; *Pitt v. Hunt*, Id. 18; *Tudor v. Samyre*, 2 Vern. 207; *Parker v. Wyndham*, Prec. Ch. 419; *Sanders v. Page*, 3 Ch. Rep. 223; *Bates v. Dandy*, 2 Atk. 208; *Jewson v. Moulson*, Id. 421; *Lord Carteret v. Wyndham*, 3 P. Wms. 200; *Macaulay v. Phillips*, 4 Ves. Jr. 19.

(e) *Donne v. Hart*, 2 R. & M. 360.

(f) *Sturgis v. Champneys*, 5 M. & Cr. 97; *Hanson v. Keating*, 14 Law Journ. N. S. Chanc. 14; [4 Hare, 1; *Carleton v. Banks*, 7 Alab. 35; *Story*, Eq. Jur. § 1410. Where, however, the husband mortgages the legal interest in the term, on foreclosure, the wife has no equity; *Hill v. Edmonds*, 16 Jurist, 1133.] Vide post, p. 410.

(g) *Lord Carteret v. Wyndham*, 3 P. Wms. 200.

(h) *Bennet v. Davis*, 2 P. Wms. 316; ante, 405 n.

(i) *Roberts v. Dixwell*, 1 Atk. 606; *Morgan v. Morgan*, 5 Mad. 408, overruling *Hearle v. Greenbank*, 3 Atk. 715.

(k) *Lamb v. Milnes*, 5 Ves. 517; *Tyler v. Lake*, 4 Sim. 144; *S. C.* 2 R. & M. 183.

(l) Post, p. 420, and note.

(m) *Bennet v. Davis*, 2 P. Wms. 316; *Lee v. Prieaux*, 3 Bro. C. C. 383; *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, Id. 375; *Darley v. Darley*, 3 Atk. 399; *Baggett v. Meux*, 13 Law Journ. N. S. Chanc. 228. [1 *Phillips*, 627.]

¹ *Shirley v. Shirley*, 9 Paige, 364; *Jamison v. Brady*, 6 S. & R. 466; *Trenton*

it is no objection to a trust for the wife's separate use, that the husband is himself appointed one of the trustees for her.(n) However, it may be remarked that in the first case that occurred on this subject, Lord Cowper expressed some doubt, whether a devise of real estate directly to a *feme coverte* for her separate use would raise an equity against the husband to deprive him of his legal right to the enjoyment of the property.(o) The husband himself may, by a clear [*407] act or *declaration constitute himself a trustee for his wife's separate use,(p) and it is also unquestionably competent for him to make a valid gift of property to trustees for the same purpose.(q)

However, it is undoubtedly the more proper, as well as the more usual course, to vest the property in trustees, instead of making a direct gift to the wife herself. And where there is a limitation to trustees to the separate use of a married woman, the courts will strive to adopt the construction which is most for her advantage, by holding it a trust vesting the legal estate in them, and not a use executed by the statute in her.(r)

Where the legal estate is vested in trustees for a married woman for life, with limitations over in remainder after her death, the trust for the benefit of the wife constitutes an additional reason why the trustees should retain the possession and management of the estate, rather than deliver it over unprotected to the control of the husband.(s)

The powers and duties of trustees with regard to the management and disposition of real estate, held in trust for a married woman, will be considered more conveniently in discussing their powers and duties as to her personal estate.

(n) *Kensington v. Dollond*, 2 M. & K. 184.

(o) *Harvey v. Harvey*, 1 P. Wms. 125; S. C. 2 Vern. 659; and see *Burton v. Pierpont*, 2 P. Wms. 79.

(p) *Maclean v. Longlands*, 5 Ves. 71; *Walter v. Hodge*, 2 Sw. 104. [*Sledge's Adm'rs. v. Clopton*, 6 Alab. 599; *Sheppard v. Sheppard*, 7 J. C. R. 57.]

(q) *Ibid.* [See *Rigler v. Cloud*, 14 Penn. St. R. 361.]

(r) *Harton v. Harton*, 7 T. R. 652; see *Nevill v. Saunders*, 1 Vern. 415; *Bush v. Allen*, 5 Mod. 63; *Oswell v. Probert*, 2 Ves. jun. 680; *Hawkins v. Luscombe*, 2 Sw. 391; vide supra, Pt. II. Ch. I.

(s) *Tidd v. Lister*, 5 Mad. 432, 3; ante, Pt. II. Ch. III.

Banking Co. v. Woodruff, 1 Green, Ch. 118; *Steel v. Steel*, 1 Ired. Eq. 452; *Boydin v. Ciples*, 2 Hill's Eq. 200; *Hamilton v. Bishop*, 8 Yerg. 33; *Franklin v. Creyon*, 1 Harp. Eq. 243; *McKenna v. Phillips*, 6 Wharton, 571; *Porter v. Bank of Rutland*, 14 Verm. 410; notes to *Hulme v. Tenant*, 1 Lead Cas. Eq., 1st Am. Ed. 378; 2 Kent's Comm. 152. See *Blanchard v. Blood*, 2 Barb. S. C. 352.

A husband, who has charge of his wife's separate estate, comes within the ordinary rule which prevents a trustee from obtaining any advantage from his management of the trust property, and he, therefore, cannot traffic therewith, buy in incumbrances, or the like, except for her benefit. *Methodist Church v. Jaques*, 3 J. C. R. 77; *Dickinson v. Codwise*, 1 Sandf. Ch. R. 214.

2d. As to Personal Estate held in Trust for a Married Woman.

The act of marriage operates at law as an absolute gift to the husband of all *chattels personal* belonging to the wife: and also of her chattels real and *choses in action*, if reduced into possession in his lifetime: (t) and where he can recover the possession of the property at law, equity will not in general control him in the exercise of his legal rights. (u) And if the husband have once acquired *actual possession* of the personal property to which his wife was entitled in equity, the court will not afterwards undo what has been done, or compel the husband to refund any part of the property, or to make a settlement out of it in favor of his wife. (x)

Therefore, if a sum of stock or money be vested in trustees for a married woman, or a bond or other debt be assigned to her, the trustees, or the obligee, or debtor, may safely pay or transfer the fund to the husband alone, if no suit has been instituted for the administration of the trust. And such a payment or transfer cannot afterwards be questioned by the wife, though she survive her husband. (y)

But it has long been an established doctrine of equity, that where a husband is obliged to come to the court to obtain possession of the personal property of his wife, he will not in general receive the assistance of the court for that purpose, except on the terms of making an adequate *provision for her, (z)² and for this purpose [*408]

(t) Co. Litt. 300; 1 Rep. Husb. & Wife, 166, 201; Langham v. Nenny, 3 Ves. 469. [4 Kent's Comm. 1341, 43; see Murphy v. Grice, 2 Dev. & Batt. Eq. 199.]

(u) Burdon v. Dean, 2 Ves. Junr. 608, 9; Oswell v. Probert, Id. 682; Murray v. Lord Elibank, 10 Ves. 90; Att.-Gen.

v. Whorwood, 1 Ves. 539; 1 Rep. Husb. & Wife, 271, 2.

(x) 1 Rep. Husb. & Wife, 270.

(y) Murray v. Lord Elibank, 10 Ves. 90; Glaister v. Hewer, 8 Ves. 206.

(z) Langham v. Nenny, 3 Ves. 469; Franco v. Franco, 4 Ves. 515; Blount v. Bestland, 5 Ves. 515; Elibank v. Montolieu, Id. 737.

¹ Carter v. Carter, 14 Sm. & M. 59; Carleton v. Banks, 7 Alab. 34; Van Duzer v. Van Duzer, 6 Paige, 368; Rees v. Waters, 9 Watts, 90; Thomas v. Sheppard, 2 McCord's Ch. 36; Whitesides v. Dorris, 7 Dana, 107. But where a fund arising from a decedent's estate is in court, a payment by a commissioner or master to the husband of one of the distributees of his wife's share, is wrongful, and will not defeat her equity. Wardlaw v. Gray's Heirs, 2 Hill's Ch. 651. So of a payment by the trustee or executor in whose hands the property is, pending a litigation for the purpose of obtaining a settlement. Crook v. Turpin, 10 B. Monr. 243. And where a husband has actually reduced his wife's property to possession, but suffered it, under an invalid deed of separation, to go into the hands of a third person, to be kept for her, and then afterwards instituted a suit to recover it, it was held that her equity attached. Carter v. Carter, 14 Sm. & M. 59. So in general where the husband obtains possession of the property by fraud. 2 Spence, Eq. Jur. 488, citing Colmer v. Colmer, 2 Atk. 98; Moseley, 113; Watkyns v. Watkyns, 2 Atk. 96.

² The equity of a wife to a settlement out of her personal property (as to real

it is immaterial that she is separated from her husband.(a)¹ And the same equity will be enforced against all persons claiming under the husband—whether assignees claiming by operation of law on his bankruptcy,(b) or taking under some particular disposition or assignment, either made voluntarily,(c) or for valuable consideration:(d) although the doctrine of the court appears at one time to have been somewhat unsettled as to the effect of an assignment for valuable consideration.(e)

The trustees may therefore refuse to make over the wife's fund to the husband, until he has made some settlement upon her; for by insisting on such a condition, they would be doing only what the

(a) *Eedes v. Eedes*, 10 Law Journ. N. S. Chanc. 199; [11 Sim. 569.]

(b) *Oswell v. Probert*, 2 Ves. jun. 680; *Mitford v. Mitford*, 9 Ves. 87; *Wright v. Morley*, 11 Ves. 101. [*Dunkley v. Dunkley*, 13 Engl. L. & Eq. 318; *Napier v. Napier*, 1 Dr. & Warr. 410; *Mumford v. Murray*, 1 Paige, 620; *Shaw v. Mitchell, Davies*, 216; *Crook's Ex'rs. v. Turpin*, 10 B. Monr. 244; see notes to *Murray v. Lord Elibank*, ut supra.]

(c) *Burnet v. Kynaston*, 2 Vern. 401; *Mitford v. Mitford*, 9 Ves. 99; *Johnson*

v. Johnson, 1 J. & W. 487; *Jewson v. Moulson*, 2 Atk. 420.

(d) *Earl of Salisbury v. Newton*, 1 Ed. 370; *Like v. Beresford*, 3 Ves. 506; *Macauley v. Philipps*, 4 Ves. 19; *Pryor v. Hill*, 4 Bro. C. C. 139; *Johnson v. Johnson*, 1 J. & W. 476, 7. [This is clear in the United States; *Kenny v. Udall*, 5 J. C. R. 464; 3 Cowen, 591, and see the cases collected in the note to *Murray v. Lord Elibank*, ut supra, 352.]

(e) See *Worrall v. Marlar*, and *Bushnan v. Pell*, 1 P. Wms. 459, n.; et vide post.

estate, see ante, 405), is recognised in most of the United States; as New York, Maryland, South Carolina, Georgia, Kentucky, Maine, Vermont, Tennessee, Alabama (see cases collected in the note of Mr. Wallace to *Murray v. Lord Elibank*, 1 Lead. Cas. Eq. 348, 1st Am. Ed.), Mississippi, *Carter v. Carter*, 14 Sm. & M. 59; New Jersey, *Stevenson v. Brown*, 3 Green's Ch. 503; Pennsylvania (though formerly thought not to exist, for want of a Court of Chancery, *Yohe v. Barnett*, 1 Binn. 358); *Rees v. Waters*, 9 Watts, 90; *Rorer v. O'Brien*, 10 Barr, 262; *Tyson's App.*, 10 Barr, 224; the mode there being in the common law courts, to impose terms on the recovery by the husband or his assignee; *ibid.* (and see as to share of wife on proceedings in partition, Act of 1832, § 48; of 1847, § 1; *Dunlop*, 483, 982; where security is to be given; though this does not apply to legacies; *Lowman's Appeal*, 3 W. & S. 350); Massachusetts, as far as the equity powers of the court will admit, *Davis v. Newton*, 6 Metcalf, 537; *Gassett v. Grout*, 4 Id. 486; and Virginia, see notes to *Murray v. Lord Elibank*, ut supra. In New Hampshire and North Carolina, this equity is not recognised. *Parsons v. Parsons*, 9 N. H. 309; *Bryan v. Bryan*, 1 Dev. Eq. 47; *Lassiter v. Dawson*, 2 Id. 383, reconsidered and affirmed in *Allen v. Allen*, 6 Ired. Eq. 293. Upon this subject of the origin and extent of the wife's equity generally, see notes to *Murray v. Lord Elibank*, ut supra; *Story's Eq.* § 1403. It is to be remembered, that in those States where there is a "Married Woman's Act," the husband not being in general entitled to any interest in, or control over, his wife's estate, her equity to a settlement is no longer of importance.

¹ *Greedy v. Lavender*, 13 Beavan, 62, where both the parties were separated, and living in adultery. So in *Carter v. Carter*, 14 Sm. & Marsh. 59, where the wife was living in adultery.

court itself would do, if a suit were instituted. And if a bill be once filed, the trustees have no longer any discretionary power to pay over the fund to the husband unconditionally; and such a payment, if made, would be disallowed by the court.(f)

However, this equitable doctrine is not without its exceptions: for if the husband be the *purchaser* of all his wife's fortune by a previous settlement upon her, he will not be required to make an additional settlement upon coming to the court to recover possession of her equitable property.(g)

But the consideration of a settlement will apply *prima facie* only to the purchase of the wife's *then present* fortune; and if she *subsequently* become entitled to any *additional* property, the husband will not be held to have become a purchaser by settlement of the *additional* interest, unless the instrument expresses, or clearly imports, such an intention.(h) Thus, where the settlement was expressed to be in consideration of such fortune, as the wife "is *or may be*" entitled to, it has been held, that if anything come afterwards during the coverture to the wife, the husband is to be considered a purchaser, and will take it.(i) But if the instrument did not in terms extend to the wife's future interests, but, on the contrary, it appeared that her existing fortune only was in contemplation at the time, it has been decided that the husband will have purchased nothing more than her present property, and according to the general rule, the wife will be entitled to an additional provision out of any future fortune.(k) And where the provision for the wife by the settlement *is very inadequate in consequence of her subsequent accession of fortune, [*409] that will be an additional reason for the court to hold, that the future property was not within the contemplation of the settlement, and on that ground to compel him to make a further provision for her.(l) However, it is settled, that a settlement, or even an agreement for a settlement,(m) made by the husband previously to the marriage, and expressed to be in consideration of his wife's fortune, will entitle him

(f) *Macauley v. Phillips*, 4 Ves. 18; *Murray v. Lord Elibank*, 10 Ves. 90; *De la Garde v. Lempiere*, 6 Beav. 344, 347. [*Crook v. Turpin*, 10 B. Monr. 243.]

(g) *Druce v. Denison*, 6 Ves. 395; *Carr v. Taylor*, 10 Ves. 579; *Garforth v. Bradley*, 2 Ves. 677; *Mitford v. Mitford*, 9 Ves. 96. [See *Martin v. Martin*, 1 Comst. 473.]

(h) *Garforth v. Bradley*, 2 Ves. 677; *Druce v. Denison*, 6 Ves. 395; *Mitford v. Mitford*, 9 Ves. 95, 6; *Carr v. Taylor*,

10 Ves. 579. [See *Matter of Beresford*, 1 Desaus. 263.]

(i) *Garforth v. Bradley*, 2 Ves. 677; *Mitford v. Mitford*, 9 Ves. 96; *Carr v. Taylor*, 10 Ves. 579.

(k) *Druce v. Denison*, 6 Ves. 385; *Mitford v. Mitford*, 9 Ves. 87; *Carr v. Taylor*, 10 Ves. 578.

(l) *March v. Head*, 3 Atk. 720; *Tomkyns v. Ladbroke*, 2 Ves. 595; *Stackpole v. Beaumont*, 3 Ves. 98; *Elibank v. Montolieu*, 5 Ves. 737.

(m) *Adams v. Cole*, 2 Atk. 449, n.; *Forr*. 168; *Brett v. Forcer*, 3 Atk. 405.

as a purchaser to the unconditional possession of all the property to which the wife was *then* equitably entitled, without reference to the sufficiency or insufficiency of the provision so made for her.(n) And this would doubtless be also the case with respect to the *future* property of the wife, if expressly referred to in the settlement. However, it may be remarked that the wife's equity will not be bound by an adequate provision made by a *voluntary* settlement after marriage.(o)¹

It is not essential, that the settlement made by the husband on marriage should be *expressed* to be made in consideration of, or even that it should refer to, the wife's fortune. Although the settlement may be silent on that point, the husband will, notwithstanding, be held to have become the purchaser of the whole of the equitable property of the wife, if the settlement be *equivalent*; for the wife shall not have her jointure and fortune both.(p)

Where a settlement is made in consideration of *part* only of the wife's fortune, its effect will not be extended beyond the express terms, and her equity for a further provision will attach upon the remainder of her property, as if no settlement had been made.(q)

The title of a husband, as the purchaser by settlement of his wife's equitable property, is not complete of itself, so as to bar her right by survivorship. Such a purchase operates merely as a power for him to acquire possession of the fund by taking a transfer from the trustee, and if he neglect to reduce it into his actual possession, it will survive to the wife on his death in her lifetime.(r)

Equity will not interpose in favor of the wife, and compel a settlement out of her equitable property, unless the amount of the property in question is of sufficient magnitude.(s) And it was the rule of the court, at one time, not to interfere where the amount did not exceed 100*l.*;(t) and that sum has since been increased to 200*l.*, or 10*l.* per annum.(u)² And where the property does not exceed that

(n) *Lanoy v. Duke of Athol*, 2 Atk. 448; see 3 P. Wms. 199, n. (d)

(o) 2 Atk. 448.

(p) *Blois v. Hereford*, 2 Vern. 502; see *Salwey v. Salwey*, Ambl. 692.

(q) *Cleland v. Cleland*, Prec. Ch. 63; *Burdon v. Dean*, 2 Ves. jun. 607.

(r) *Rudyard v. Neirim*, Prec. Ch. 209; *Lister v. Lister*, 2 Vern. 68; *Mit-*

ford v. Mitford, 9 Ves. 96; *Salwey v. Salwey*, Ambl. 692; *Heaton v. Hassell*, 4 Vin. Abr. 40, Pl. II.

(s) *March v. Head*, 3 Atk. 721.

(t) *Bourdillon v. Adair*, 3 Bro. C. C. 237.

(u) 5 Ves. 742, n. (c); 8 Ves. 201, 512, 524; 1 Mad. Ch. Pr. 609.

¹ In *Dunkley v. Dunkley*, 13 Engl. L. & Eq. 350, before Lord St. Leonards, the whole residue of the wife's fortune was settled on her by the court, under the circumstances; though the husband had settled after marriage a considerable portion of his property on her; and see *Matter of Beresford*, 1 Desaus. 263.

² This is now overruled, and a settlement will be compelled, though the amount

value, the court will order the trustees to pay it over to the husband, or his assignee, without any settlement or condition; although it is alleged, that such a payment is without *the wife's concurrence, or consent;(x) and though she had been deserted by him and opposed the application.(y) But if the amount at all exceeds 200*l.*, the court will not make an order for its payment to the husband without the wife's consent in court, although the payment of the necessary costs will reduce the amount of the fund below 200*l.*(z)

The equitable interest of a wife in chattels real was, at one time, an exception to the general right of a wife to a settlement out of all her equitable personal property.* For it has been already stated, that according to the old law the husband might have disposed absolutely of such interests in right of his wife.(a) But this distinction was disapproved of on more than one occasion,(b) and was at length overruled by Lord Cottenham in the late case of *Sturgis v. Champneys*,(c) in which his Lordship decided, that the wife was entitled to the same provision out of her equitable interest in chattels real, as in other personal property. This decision has since been followed, though reluctantly, by Vice-Chancellor Wigram, in the case of *Hanson v. Keating*,(d) where the same question called for decision. The law, therefore, must now be considered as finally settled in the manner stated above.

Where the wife's equitable interest is *for life* only, her equity for a settlement will not attach as against a *purchaser* for valuable consideration from the husband, if the purchase were made when the husband was maintaining the wife, and before circumstances had raised any present equity for an actual settlement out of the property for her benefit.(e)¹ Although as against the husband's *general as-*

(x) *Elworthy v. Wickstead*, 1 J. & W. 69.

(y) *Foden v. Finney*, 4 Russ. 428.

[Overruled, see ante, note to 409.]

(z) *Beaman v. Dodd*, 13 Law Journ. N. S., Chanc. 141.

(a) *Sir E. Turner's case*, 1 Vern. 7; and cases cited in note supra, p. 407.

(b) *Pitt v. Hunt*, 1 Vern. 18; *Jewson v. Moulson*, 2 Atk. 417.

(c) 5 M. & Cr. 97.

(d) 8 Jur. 949; S. C., 14 Law Journ. N. S., Chanc. 14. [4 Hare, 1; see ante, 406.]

(e) *Elliott v. Cordell*, 5 Mad. 156; *Stanton v. Hall*, 2 R. & M. 175, 182; *Burdon v. Dean*, 2 Ves. jun. 608.

be under 200*l.* *Cutler's Trust*, 6 Eng. L. & Eq. 96; *Kincaid's Trust*, 22 Law Journ. Ch. 375, where, it is said, the rule as to the 200*l.* applies only as to taking the wife's consent.

¹ *Vaughan v. Buck*, 7 Jur. 338; 13 Sim. 404; and this was also approved by Lord Cranworth, V. Ch., in S. C., 3 Eng. L. & Eq. 137. But in *Wilkinson v. Charlesworth*, 10 Beavan, 327, Lord Langdale held, notwithstanding that decision, that the wife was entitled as against her husband, as a purchaser for value, to a settlement out of her life estate, and repudiated the distinction. See 2 Spence, Eq. Jur. 482; and see *Udall v. Kenney*, 3 Cowen, 607.

signee claiming by act of law—as by his bankruptcy or insolvency—the wife will, in all cases, be entitled to a provision out of her equitable life interests.(f)

The ground of this distinction is, that a husband, in equity as well as at law, is entitled to the receipt of the income of his wife's property, as a compensation for his liability to maintain her.(g) Consequently, he will be entitled to the uncontrolled beneficial enjoyment of her life interests, unless he desert her, or otherwise fail to discharge the obligation of maintaining her. In case of the husband's bankruptcy or insolvency, his incapacity to maintain his wife will have already raised an equity in her favor at the time, when the title of his assignees vests; but the case of a *particular* assignee is not open to the same objection where the assignment to him is made before the husband had deserted, or ceased to maintain, his wife.(h)

Where the wife has already an adequate provision made for her by settlement, she will not be entitled to any further provision out of a mere life interest, either against the husband upon his desertion or [*411] refusal to support *her, or against his general assignees upon his bankruptcy, or insolvency.(i)(1) It is to be observed, that the husband's assignment of his wife's life interest will be good only during the continuance of the coverture, and will not bind her, if she survive.(k)

The wife's equitable right to a settlement may be waived by her on examination in court at any time before the settlement is actually executed.(l) Unless indeed the children have acquired an actual interest by contract or agreement, in which case they would be entitled to enforce the execution of the settlement.(m)

Again, this right may be forfeited by the improper conduct of the wife; as where she lives in adultery and apart from her husband. In

(f) 5 Mad. 156; see *Brown v. Clark*, 3 Ves. 166; *Pryor v. Hill*, 4 Bro. C. C. 139; *Lumb v. Milnes*, 5 Ves. 517; *Brown v. Amyatt*, 1 Mad. 376, n.; *Wright v. Morley*, 11 Ves. 12, 21. [*Sturgis v. Champneys*, 5 My. & Cr. 97.]

(g) *Carter v. Anderson*, 3 Sim. 370; 1 Rep. Husb. and Wife, 273.

(h) *Elliott v. Cordell*, 5 Mad. 156; *Stanton v. Hall*, 2 R. & M. 182. [*Vaughan v. Buck*, 3 Eng. L. & Eq. 136.]

(i) *Aguilar v. Aguilar*, 5 Mad. 414.

(k) *Stiffe v. Everett*, 1 M. & Cr. 37, 41; see *Purdew v. Jackson*, 1 Ross. 71, n.; Com. Dig. [Baron and Feme, K.]

(l) *Rowe v. Jackson*, 2 Dick. 604; *Murray v. Lord Elibank*, 10 Ves. 84; *Martin v. Mitchell*, 10 Ves. 89, cited; *Steinmetz v. Halthin*, 1 Gl. & J. 64; *Hodgens v. Hodgens*, 11 Bligh, 103, 4, 5. [*Ferris v. Brush*, 1 Edw. Ch. 572; *Pastell v. Skirving*, 1 Desaus. 158; *Tevis v. Richardson*, 7 Monr. 644; *Ex parte Warfield*, 11 & J. 23; see *Sawyer v. Baldwin*, 20 Pick. 378; *Taylor v. Anderson*, 7 B. Monr. 552.]

(m) *Ex parte Gardiner*, 2 Ves. 671; see *Fenner v. Taylor*, 1 Sim. 169; S. C. 2 R. & M. 190.

(1) There is no distinction in this respect between the rights of the assignees of a "bankrupt" or an "insolvent" husband. *Napier v. Napier*, 1 Dr. & W. 410.

such cases the court will not interpose in her favor, for she is unworthy of its protection; neither on the other hand will it direct the fund to be delivered over to the husband without his making any settlement; but it will leave the parties in *statu quo*.⁽ⁿ⁾ However, there is an exception to this rule, where the wife is a ward of court, and enters into a clandestine marriage; for in that case whatever may be the irregularity of the wife's conduct, the court will compel the husband to make a settlement out of her property in consequence of his contempt in procuring such a marriage.^(o)

But where there is no imputation against the moral conduct of the wife, her equity for a settlement will be enforced in her favor, although she may be living apart from her husband.^(p)

And where the husband's cruelty or improper conduct is the cause of the wife's separating from him, she will *à fortiori* be entitled to a provision out of her equitable property.^(q) Indeed we shall see presently that this may be a reason for inducing the court to settle the *whole* of the property on the wife.^(r)

The court rarely requires the husband, or the parties claiming under him, to settle the *whole* of the wife's equitable property on her and her children; it is sufficient, that a reasonable part is secured.^(s)¹ And where it has been referred to the Master to approve of a proper settlement, it will be a good ground for exception to his report, that the settlement includes the *whole* of the fund.^(t) The question in most cases has been, *how much* the wife shall have; and in deter-

(n) *Ball v. Montgomery*, 2 Ves. jun. 191; *Carr v. Eastabrooke*, 4 Ves. 146.

(o) *Ball v. Coutts*, 1 V. & B. 302, 4; see *Like v. Beresford*, 3 Ves. 506. [*Martin v. Martin*, 1 Comst. 473; but see ante, 408, note.]

(p) *Eedes v. Eedes*, 10 Law Journ. N. S. Chanc. 199. [11 Sim. 569; see ante, p. 408.]

(q) *Oxenden v. Odenden*, 2 Vern. 463; *Ball v. Montgomery*, 4 Bro. C. C. 339.

(r) Vide post.

(s) *Wright v. Morley*, 11 Ves. 21, 22; see *Burdon v. Dean*, 2 Ves. jun. 607; *Green v. Otte*, 1 S. & St. 250.

(t) *Beresford v. Hobson*, 1 Mad. 362; *Goose v. Davis*, lb. 375, cited. [But see *Barrett v. Oliver*, 11 Gill & J. 191.]

¹ In *Dunkley v. Dunkley*, 13 Eng. L. & Eq. 318, before Lord St. Leonards, it was held that there was no rule or practice which prevents the wife from having the whole of the fund; but that it was a matter purely in the discretion of the court. In that case, the husband had received a large portion of the wife's estate, and subsequently deserted her, and the whole of the residue was directed to be settled on her and her children, as against his assignees in bankruptcy. See also *Ex parte Pugh*, 12 Eng. L. & Eq. 350; *Kincaid's trust*, 22 L. J. Ch. 395; *Gardner v. Marshall*, 14 Sim. 587; *Scott v. Pashett*, 9 Eng. L. & Eq. 268, in which case, where two-thirds had previously been transferred to the husband, the wife was allowed to retain the residue against an assignee for value. In the United States, also, it is said that under proper circumstances, the whole would be given. *Helms v. Franciscus*, 2 Bland, Ch. 545; *Kenny v. Udall*, 5 John. Ch. 464; 3 Cow. 591; *Napier v. Howard*, 3 Kelly (Geo.), 205; *Bowling v. Winslow's Adm.*, 5 B. Monr. 31; *Browning v. Headley*, 2 Robin. Va. 340.

mining that, the court has exercised a discretion, and has not tied itself down to any precise rule.(u) However, in several instances, [*412] half of the fund has been considered a fair proportion *as between the wife, and the assignees of a bankrupt husband.(x) The husband, or those claiming in his place, after making the required settlement, will be absolutely entitled to the remainder of the property, as far as it can be reduced into possession in the husband's lifetime, and subject to the wife's title by survivorship in case it is not so reduced into possession.

However, the general rule against settling the whole of the wife's fund admits of exceptions. For if the husband have been guilty of acts of gross misconduct, as where he has received and squandered great part of his wife's fortune, and has been guilty of cruelty and ill-treatment, and left her totally unprovided for; the court will secure for the wife's benefit the *whole* of her equitable property, which it can find still remaining and available for that purpose.(y) And if the husband have committed a contempt by running away with and marrying a ward of the court;(z) or by contumacious disobedience to the orders of the court,(a) the court has refused to give him any part of the wife's fortune, and has directed *the whole* to be settled on her. A distinction has also been taken in this respect between a bankrupt and an *insolvent* husband, on the ground that all the future property of an insolvent is liable to the claims of his creditors, while the bankrupt, after he has obtained his certificate, is a free man. And in consequence of this distinction in a late case in the Court of Exchequer, Alderson, B. directed the *whole* of an equitable fund, belonging to the wife of an *insolvent*, to be settled on her and her children to the entire exclusion of the assignees of the husband.(b)

It is to be observed that this equitable right of a wife to a settlement, applies only to married persons, who are subject to the law of England. If the parties are foreigners, and according to the law of their country the husband is entitled to receive his wife's fortune without making any settlement on her, the court will give effect to his legal right by ordering the property to be made over to him with-

(u) 1 Mad. 379, 380; *Napier v. Napier*, 1 Dr. & W. 409.

(x) *Worrall v. Marlar*, 1 P. Wms. 459, n.; S. C. 1 Cox, 158; *Brown v. Clark*, 3 Ves. 166; *Carr v. Taylor*, 10 Ves. 578; *Beresford v. Hobson*, 1 Mad. 362. [*Bagshaw v. Winter*, 11 Engl. L. & Eq. 274, where the costs were thrown on the assignees' half.]

(y) See *Elliott v. Cordell*, 5 Mad. 156; *Bond v. Simmons*, 3 Atk. 21; *Oxenden v. Oxenden*, 2 Vern. 493; *Nichols v.*

Danvers, Ib. 691; *Coster v. Coster*, 9 Sim. 597, where three-fourths of the fund were settled on the wife. [*Vaughan v. Buck*, 1 Sim. N. S. 204, 3 Engl. L. & Eq. 135; and *Ex parte Pugh*, 12 Engl. L. & Eq. 350, where two-thirds were settled.]

(z) Like *v. Beresford*, 3 Ves. 506. [See *Helm v. Franciscus*, 2 Bland, 545.]

(a) *Kent v. Burgess*, 10 Law Journ. N. S. Chanc. 100. [11 Sim. 361.]

(b) *Brett v. Greenwell*, 3 Y. & Coll. 230.

out any condition.(c)¹ And in such a case if the trustee decline to transfer the fund to the husband, and thus drive him to file a bill, where his right is perfectly clear, the court might have some difficulty in allowing the trustee his costs of the suit.(d)

The court has no power to compel a husband to make any settlement on his wife and children out of her equitable property; but if he refuse to do so, he will not be suffered to possess himself of the *corpus* of the fund, which will be preserved for her, together with the full benefit of her title to it by survivorship in case she outlive him. However, the court will not take from the husband the *income* of his wife's fortune, on account of his refusal to make a settlement on her. The law gives him that income in consideration of his liability to maintain his wife; and as *long as he is willing to live with [413] her, and maintain her, he will be entitled to the receipt of the income;(e) and this although she refuse to live with him, if her refusal be without sufficient reason.(f) And the same doctrine applies also to the husband's assignees, who will be entitled to the annual income of the wife's property subject to an allowance out of it for her support.(g)²

But where the husband deserts his wife without having made any provision for her, or refuses to maintain her, the reason for giving him the income of her property wholly fails, and the court will itself direct its application for her maintenance to the exclusion of the husband.(h)

It has been already stated, that the trustees would be justified in transferring to the husband without reserve the *capital* of the wife's trust fund, where no suit had been instituted respecting it; therefore *a fortiori* a payment of the *income* to him, will in general be a proper payment. But if a bill be once filed, the discretionary power of the trustees is gone, and they could not afterwards be advised to

(c) *Sawyer v. Shute*, 1 Anstr. 63; *Campbell v. French*, 3 Ves. 321; *Dues v. Smith*, Jac. 544; *Anstruther v. Adair*, 2 M. & K. 513. (g) *Burdon v. Dean*, 2 Ves. jun. 607; *Oswell v. Probert*, Ib. 680; *Lumb v. Milnes*, 5 Ves. 517; *Wright v. Morley*, 11 Ves. 20, 21.

(d) *Anstruther v. Adair*, 2 M. & K. 516. (h) *Ball v. Montgomery*, 2 Ves. jun.

(e) *Sleech v. Thorington*, 2 Ves. 562; 191; S. C. 4 Bro. C. C. 339; *Sleech v. 11* *Rop. Husb. and Wife*, 274. *Thorington*, 2 Ves. 562; *Wright v.*

(f) *Bullock v. Menzies*, 4 Ves. 798. *Morley*, 11 Ves. 12.

¹ In *Hitchcock v. Clendennin*, 12 Beav. 534, it was held that where the wife by the law of her domicil can claim no equity, her husband is entitled to the proceeds of her real estate in England, absolutely; and if the estate be yet unsold, may take a conveyance to himself in fee.

² *Dumond v. Magee*, 4 J. C. R. 318; *Kenny v. Udall*, 5 Id. 464, 3 Cow. 591; *Helms v. Franciscus*, 2 Bland, 545; Note to *Murray v. Lord Elibank*, *ut supra*.

make any payment to the husband, even out of the *income* of the fund, except under the direction of the court.(i)

It has been already stated, that the wife has the power of waiving her right to a settlement out of her equitable fund.(k) If, therefore, upon a proper examination she consent to have the property made over absolutely to her husband, the court cannot refuse to make an order to that effect.(l) So if the property have been assigned by the husband, the wife's consent may be given in favor of the assignee, who will then take the property discharged from her equity.(m)

But the court will not direct the transfer of the fund, unless it be satisfied, that the consent is the free and voluntary act of the wife; and for this purpose she must either appear personally in court, when the judge himself will examine her;(n) or if she cannot appear personally, a commission will be issued to take her examination apart from her husband.(o)

An application for the transfer of a fund belonging to a married woman, must be made by petition in a cause,¹ and the court requires an affidavit of the parties that there was no settlement on their marriage.(p) Or if there was a settlement it must be produced, in order that the court may see whether it affected the fund in question.(q)

A woman cannot divest herself of her right to a settlement out of her equitable property, otherwise than by her consent upon a proper examination, taken either in court or by commission; and any agreement or disposition made by her in any other manner is altogether [*414] inoperative, and *will be totally disregarded by the court, if she afterwards insist upon her claim.(r)

The court will not take the consent of a married woman to the transfer of her fund, until the amount has been ascertained; for though she may not think 500*l.* a proper subject of a settlement, she may think differently of 600*l.*(s) And for this reason a residue, or share of a residue, will not be transferred upon the wife's separate examination and consent,(t) and the produce of a wife's reversionary

(i) 4 Ves. 18; 10 Ves. 90. [See ante, 405, note.]

(k) Ante; and see *Hodgens v. Hodg-ens*, 11 Bligh, 103, 5.

(l) *Dimmock v. Atkinson*, 3 Bro. C. C. 195; *Willatts v. Cay*, 2 Atk. 67. [Ante, 411.]

(m) *Johnson v. Johnson*, 1 J. & W. 472.

(n) *Macaulay v. Phillips*, 4 Ves. 18. [Ante, 411.]

(o) *Parsons v. Dunne*, 2 Ves. 60; *Bourdillon v. Adair*, 3 Bro. C. C. 237;

Campbell v. French, 3 Ves. 322; *Re Tasburgh*, 1 V. & B. 507.

(p) *Minet v. Hyde*, 2 Bro. C. C. 663; *Binford v. Bawden*, 2 Ves. jun. 38; *Elliott v. Remington*, 9 Sim. 502. The affidavit may be made by the wife only if the husband be abroad, *Ib.*

(q) *Rose v. Rolls*, 1 Beav. 270.

(r) *Macaulay v. Phillips*, 4 Ves. 18; see *Maitland v. Bateman*, 13 Law Journ. N. S., Chanc. 274, 5; and post.

(s) *Jarnegan v. Baxter*, 6 Mad. 32.

(t) *Sperling v. Rochfort*, 8 Ves. 178.

¹ *Mumford v. Murray*, 1 Paige, 620; *Duvall v. Farmers' Bank*, 4 Gill & John. 283.

interest in stock, which has been contracted to be sold, is open to the same objection.(u) However, in a late case, where the residuary fund, to which a married woman was entitled, had been ascertained to consist of the sum of 714*l.* 11*s.*, and there had been a decree for the taxation of costs and for their payment out of this sum, Sir K. Bruce, V. C., after some hesitation, and after communication with the registrar, took the wife's consent to the payment of the fund out of court, *minus* the costs; although the costs had not been taxed, and consequently the sum eventually payable under the decree was still unascertained.(x)

The wife by her consent can only depart with that interest which is the creature of the court of equity, viz., her equitable right to the provision out of that property, of which, if it were a legal interest, the husband could take actual and immediate possession in her right. Therefore, she has no power to consent to the transfer of an interest in remainder or reversion, either in favor of her husband or any other person.(y)¹ For such an interest cannot be reduced into immediate possession. And although some decisions of a contrary tendency are to be met with,(z) they cannot now be considered of any authority.(a)

Where a female ward of court has married without the consent of the court, she will not be suffered by her consent to transfer her property absolutely to her husband, but a settlement will be directed.(b)

Until recently it was doubtful from the authorities, whether the court could take the consent of a married woman, being *an infant*, to the transfer of her equitable fund. In *Gullin v. Gullin*,(c) a married woman under twenty-one presented a petition, praying that a sum in court, to which she was entitled, might be paid to her hus-

(u) *Woollands v. Croucher*, 12 Ves. 174; *Godber v. Laurie*, 10 Price, 152.

(x) *Packer v. Packer*, 1 Coll. 92.

(y) *Socket v. Wray*, 2 Atk. 6, n.; *Frazer v. Bailie*, 1 Bro. C. C. 518; *Richards v. Chambers*, 10 Ves. 508; *Woollands v. Croucher*, 12 Ves. 175; *Ritchie v. Broadbent*, 2 J. & W. 456; *Packard v. Roberts*, 3 Mad. 384.

(z) *Macarmick v. Buller*, 1 Cox, 357; *Howard v. Damiani*, 2 J. & W. 458, n.

(a) See *Honnor v. Morton*, 3 Russ. 63; *Pickard v. Roberts*, 3 Mad. 384; *Purdew v. Jackson*, 1 Russ. 48.

(b) *Stackpole v. Beaumont*, 3 Ves. 89.

(c) *Gullin v. Gullin*, 7 Sim. 236.

¹ *Whittle v. Henning*, 2 Phill. 731; 12 Jur. 1079; *Greedy v. Lavender*, 13 Beav. 612; *Cunningham v. Antrobus*, 16 Sim. 436; *Hobby v. Allen*, 3 Engl. L. & Eq. 166; *Brandon v. Woodthorpe*, 10 Beav. 463; *Rogers v. Acaster*, 11 Engl. L. & Eq. 300; overruling *Hall v. Hugonin*, 14 Sim. 595. But as to chattels real, see *Duberly v. Day*, 12 Eng. L. & Eq. 277. See full discussions on this subject in 10 Jurist, pt. ii. 474, 482; 7 Engl. Law Magazine, 234; 8 Id. 215; and, for American cases, post, 416. However, where a reversionary interest is transferred, the wife's equity attaches only when the interest falls into possession, and cannot be claimed before. *Osborn v. Morgan*, 8 Engl. L. & Eq. 192.

band; Sir L. Shadwell, V. C., said, he thought that the consent of a married woman, though a minor, had been taken on a former occasion, and on the lady appearing and consenting, his Honor made the order.(c) However, in a subsequent case at the Rolls, in which a similar application was made on the authority of *Gullin v. Gullin*, Lord Langdale, M. R., said he felt considerable difficulty in acting on that authority, and refused to make the order.(d) Indeed it does not seem easy to reconcile the order of the Vice-Chancellor in *Gullin v. *Gullin* with the general principles which govern the court [*415] in dealing with the property of infants under its protection. And in a subsequent case, upon the point being again submitted to the Vice-Chancellor, his Honor decided that the infant's consent could not be taken.(e)

If the husband fail to reduce into possession his wife's equitable property in his lifetime, she will take the whole by survivorship at his death.(f) And in this respect, any distinction between equitable interests and legal *choses in action* is entirely exploded.(g)¹

(c) *Gullin v. Gullin*, 7 Sim. 36.

(d) *Stubbs v. Sargon*, 2 Beav. 496.

(e) *Abraham v. Newcombe*, 12 Sim. 566. [See accord, *Ex parte Warfield*, 11 Gill & J. 23; *Udall v. Kenney*, 3 Cow. 590.]

(f) *Twisden v. Wise*, 1 Vern. 161;

Hutchings v. Smith, 9 Sim. 137; *Mitford v. Mitford*, 9 Ves. 98.

(g) *Twisden v. Wise*, 1 Vern. 161; *Hornsby v. Lee*, 2 Mad. 16; *Purdew v. Jackson*, 1 Russ. 1; *Honnor v. Morton*, 3 Russ. 65.

¹ It is now well settled, that the *choses in action*, including legacies and distributive shares of the wife, survive to her on her husband's decease, unless they have been in some manner, *constructive or actual*, reduced to possession in his lifetime. *Krumbhaar v. Burt*, 2 Wash. C. C. 406; *Schuyler v. Hoyle*, 5 J. C. R. 196; *Searing v. Searing*, 9 Paige, 283; *Snowhill v. Snowhill*, 1 Green Ch. 30; *Dane v. Allen*, Id. 419; *Pike v. Collins*, 33 Maine, 43; *Poor v. Hazleton*, 15 Verm. 568; *Legg v. Legg*, 8 Mass. 99; *Stanwood v. Stanwood*, 17 Mass. 57; *Hayward v. Hayward*, 20 Pick. 517; *Parsons v. Parsons*, 9 N. Hamp. 309; *Lodge v. Hamilton*, 2 S. & R. 49; *Bohn v. Headley*, 7 H. & J. 257; *Browning v. Headley*, 2 Rob. Va. 340; *Revel v. Revel*, 2 Dev. & Batt. 272; *Whitehurst v. Hacker*, 2 Ired. Eq. 292; *Pointdexter v. Blackstone*, 1 Id. 452; *Terry v. Branson*, 1 Rich. Eq. 178; *Bibb v. McKinley*, 9 Port. 636; *Sayre v. Flournoy*, 3 Kelly, 541; *Keller v. Keller*, 5 Monr. 573; *Clarke v. McCreary*, 12 Sm. & M. 347; *Pickett v. Everett*, 11 Missouri, 568; though the contrary was held in *Griswold v. Penniman*, 2 Conn. 564.

It seems generally admitted in the United States, that a transfer for value, or release of a *chose*, in which the wife has a *present* interest, will bar her survivorship. *Schuyler v. Hoyle*, 5 J. C. R. 190; *Lowry v. Houston*, 3 How. Miss. 396; *Thomas v. Kelsoe*, 7 Monr. 521; *Snowhill v. Snowhill*, 1 Green Ch. 30; *Parsons v. Parsons*, 9 N. Hamp. 309; *Forrest v. Warrington*, 2 Desaus. 254; *Weeks v. Weeks*, 5 Ired. Eq. 111; *Siter's Est.*, 4 Rawle, 468; *Tucker v. Gordon*, 5 New H. 564. In Pennsylvania, it is held that though a wife's *chose in action* will not pass by general words in the assignment of an *insolvent* debtor, so as to bar survivorship (*Eshelman v. Shuman's Adm*, 13 Penn. St. R. 561), yet it will, if specifically included: *Richwine v. Keim*, 1 Pa. R. 373; *Shuman v. Reigart*, 7 W. & S. 168,

An actual payment or transfer by the legal holder to the husband himself,^(h) or in general to his assignee or other person authorized by

(h) *Doswell v. Earle*, 12 Ves. 473; *Ryland v. Smith*, 1 M. & Cr. 53.

explained in 13 Penn. St. R. 563; the latter being considered the voluntary act of the husband, and for the consideration of his recovery of liberty. *Siter's Case*, 4 Rawle, 481. But in *Van Epps v. Van Deusen*, 4 Paige, 64; *Outcalt v. Van Winkle*, 1 Green Ch. 513; and *Poor v. Hazleton*, 15 Verm. 568, it was held, on the other hand, that insolvent assignees take the *choses*, subject to survivorship, though it be specified in the schedule: *Poor v. Hazleton*, 15 Verm. 568; and indeed in this last case, it was doubted whether it would pass at all. However, even in Pennsylvania, it is held that the proceedings in *bankruptcy* being in *invitum*, the assignees there will not take absolutely. *Shaw v. Sessaman*, 10 Barr, 434; *Krumbhaar v. Burt*, 2 Wash. C. C. 405; see *Shaw v. Mitchell, Daveis*, 261. So, under general words in a *voluntary* assignment for creditors, the *choses* will not pass. *Skinner's App.*, 5 Barr, 263; *Slaymaker v. The Bank*, 10 Barr, 373. The husband may, however, assign it, by express words in payment of his debts, *Barnes v. Pearson*, 6 Ired. Eq. 482; but a transfer as collateral security alone, will not be enough: *Hartman v. Bowdal*, 1 Rawle, 279; *Latourelle v. Williams*, 1 Barb. Ch. 9; that not being a transfer for value. See *Siter's Case*, 4 Rawle, 468. In some of the States, the wife's present interest in her *choses* may be reached by her husband's creditors, and legacies and distributive shares may therefore be attached: *Wheeler v. Bowen*, 20 Pick. 563; *Holbrook v. Waters*, 19 Id. 354; *Vance v. McLaughlin*, 8 Gratt. 289; see *Dold v. Geiger*, 2 Gratt. 98; though if the husband die before judgment, the wife's survivorship will nevertheless arise: *Strong v. Smith*, 1 Metcalf, 476. But in others, it is held that the husband is not bound to exercise his power for the benefit of creditors: *Skinner's Appeal*, 5 Barr, 263; *Sayre v. Flournoy*, 3 Kelly, 541; and hence that the wife's legacy cannot be attached: *Dennison v. High*, 2 Watts, 90; *Robinson v. Woelpper*, 1 Wharton, 179; *Wheeler v. Moore*, 13 N. Hamp. 478; or reached in equity by creditors: *Andrews v. Jones*, 10 Alab. 400. A debt due to the estate by the husband may, however, be set off by the executor against the wife's legacy: *Yohe v. Barnet*, 1 Binn. 358; *Flory v. Becker*, 2 Barr, 471; though not after his death, without the wife's assent: *Kreider v. Boyer*, 10 Watts, 58; *Stout v. Levan*, 3 Barr, 235; *Flory v. Becker*. Nor can the executor apply the legacy to a debt of the husband to a third person, without authority: *Frauenfeldt's Est.*, 3 Whart. 415. However, notwithstanding this power of the husband to transfer his wife's *choses*, a fraudulent assignment of them, as after desertion, and pending proceedings for a divorce, will not be supported: *Krupp v. Scholl*, 10 Barr, 174.

Upon the question of the assignment of a wife's *choses*, the modern authorities in England are at variance with those just stated. It is clear, in the first place, that an assignment in bankruptcy, in insolvency, or one merely voluntary, will not have the effect of barring the wife's survivorship, unless they are actually reduced to possession by the assignee: see post, page 416. Then as to an assignment for value, it also appears established, that the purchaser acquires no greater power. This was the doctrine of *Purdew v. Jackson*, 1 Russ. 1; and (though in *Honnor v. Morton*, 3 Russ. 86, there is a dictum to the contrary), it was approved and followed in *Hutchings v. Smith*, 9 Sim. 137; *Elwin v. Williams*, 7 Jur. 338; 12 L. J. Ch. 440; S. C. under name *Ellison v. Elwin*, 13 Sim. 309 (see post, 417); *Ashby v. Ashby*, 1 Coll. 554; *Wilkinson v. Charlesworth*, 10 Beav. 328; *Le Vasseur v. Scrutton*, 14 Sim. 118; *Borton v. Borton*, 13 Jur. 247; 16 Sim. 552. This conclusion is approved in *Macqueen, Husband & Wife*, 54; 2 *Spence's*

him to receive the fund, (i) will be a reduction into possession, and will defeat the wife's title by survivorship; and this though she be an infant. (k)

(i) *Glaister v. Hewer*, 8 Ves. 207; (k) *Hansen v. Miller*, 8 Jur. 209.
Johnson v. Johnson, 1 J. & W. 472;
Hansen v. Miller, 8 Jur. 209.

Eq. Jur. 476; 4 Law Review, 249; but see the remarks of Mr. Bell, *Property of Husband and Wife*, 73. *Contra*, it seems, as to terms for years: *Duberly v. Day*, 12 Eng. L. & E. 277; but see ante 406. In *Siter's Case*, 4 Rawle, 461, this subject was discussed, and *Purdew v. Jackson* strongly disapproved. The doctrine of *Siter's Case*, and of the American decisions, generally, is that an assignment for value by the husband amounts to a contract which equity would execute against him, by compelling a reduction, and therefore will treat as executed, after his death. But this reasoning appears open to several objections. In the first place, as was indeed shown in *Siter's Case*, the husband has not a property in, but only a naked power over, his wife's *choses*, which power arises from the blending of persons in the marriage state; and he cannot transfer to his assignee more than he himself possesses, which is only the right of reduction during coverture. Hence, to apply to this case the usual rule in equity with regard to specific performance, would be to convert a limited into an absolute power. Next, the equitable principle referred to is admissible only as between the purchaser, and the assignor and his representatives. But the wife does not claim through her husband, but on a distinct title. Finally, the legal title in the wife must prevail, if the equities are equal, and undoubtedly the wife has, as owner, an equal equity with the purchaser. Indeed, considering the peculiar favor with which *femes covertes* are regarded in a court of Chancery, and its strongly marked doctrines with regard to their separate estate, it might well be doubted whether her equity should not be considered to be the superior one.

What will constitute an *actual* reduction into possession, is not susceptible of exact definition, but depends on intention. There must be in the first place some distinct *act*, evincing a determination to take as husband. Thus a mere possession by him as executor or administrator, will not bar the wife's survivorship. *Elms v. Hughes*, 3 Desaus. 155; *Ross v. Wharton*, 10 Yerg. 190; *Wallace v. Taliaferro*, 2 Call, 376; *Mayfield v. Clifton*, 3 Stew. 375; *Kintzinger's Estate*, 2 Ashm. 45; see *Miller's Estate*, 1 Id. 323. But if the husband in such case charges his wife's legacy in his account as paid, and the charge is allowed, it is a reduction. *Pierce v. Thompson*, 17 Pick. 391. So where he dies without settling an account, having previously appropriated the property of the estate to his own use; *Ellis v. Baldwin*, 1 W. & S. 253; or where he sells it, taking notes therefor, which he converts to his own use. *Wardlaw v. Gray*, 2 Hill's Eq. 644. On the same ground, the mere joining in a suit with his wife, with regard to her property, is insufficient. *Pike v. Collins*, 33 Maine, 43; *Thompson v. Ellsworth*, 1 Barb. Ch. 624; *Arnold v. Ruggles*, 1 Rhode Isl. 165; *Bell v. Bell*, 1 Kelly, 637. Thus, where on a bill in equity for a division of the wife's property, commissioners were appointed, who acted, but did not report, it was held that the wife took by survivorship. *Gregory v. Marks*, 1 Rand. 353. So in *Bennett v. Dillingham*, 2 Dana, 436, where in a suit for distribution, the commissioners made sale, and then the husband died. A judgment in a joint suit is not enough; there must be also execution. *Pike v. Collins*, 33 Maine, 43. So, even, a receipt of the money in such suit is not, it seems, enough. *McDowell v. Potter*, 8 Barr, 191. The same principle applies to a joint *recognisance* in the Orphans' Court, for the wife's

And so in the case of mortgages belonging to, or held in trust for, a *feme covert*; if the husband *have received the money* in his lifetime,

legacy. *Lodge v. Hamilton*, 2 S. & R. 49; *Hake v. Fink*, 9 Watts, 336. So a mere receipt in the name of husband and wife, on the wife's bond, without proof of payment of the money to the husband, is insufficient. *Timbers v. Katz*, 6 W. & S. 290. Merely taking possession of a bond or mortgage, will not bar the wife. *Hunter v. Hallett*, 1 Edw. Ch. 388; *Pickett v. Everett*, 11 Missouri R. 568. So, even where the husband of one of two mortgagees had purchased the equity of redemption at sheriff's sale, and had paid off a part of the incumbrance to the co-mortgagee, the wife's survivorship was held not to have been barred. *Miller's Est.*, 1 Ashm. 332. So in *Durant v. Salley*, 3 Strobb. Eq. 159, where a mother and daughter were entitled to certain slaves as co-distributees, but the slaves were never divided, and the husband of the daughter, residing on the mother's plantation, worked the slaves together, it was held that the marital rights of the husband had not attached. See, also, *Rogers v. Bumpay*, 4 Ired. Eq. 384.

As, moreover, the question thus depends on the husband's intention, an act *prima facie* a reduction, may be shown by other circumstances, or by his declarations at the time, or subsequently, to have been intended for the benefit or in trust for the wife. *Hind's Estate*, 5 Wharton, 138; *Gray's Est.*, 1 Barr, 327; *McDowell v. Potter*, 8 Barr, 191. But to create a disclaimer, subsequent admissions must be "deliberate, positive, precise, clear, and consistent." *Gray's Est.*, *ut supra*.

Not only must the intention to appropriate appear distinctly, but the act of reduction must be complete at the husband's death. Thus, where a husband gave an order in favor of a creditor on a solicitor, who had recovered for the wife in a separate suit, this was held an insufficient reduction. *Riley's Eq.* 47. So where the land on which a legacy to a married woman was charged, had been sold on execution, and the proceeds paid into court, and her husband had so far made the legacy his own as to let in a set-off for his proper debt, but died before distribution, it was held that the widow was not disappointed of her survivorship. *Donaldson v. West Branch Bank*, 1 Barr, 286. And where a husband attempts to reduce the *chose*, and but part is actually received, the remainder will survive. *Schuyler v. Hoyle*, 5 J. C. R. 190.

Where, however, the requisites enumerated concur, the survivorship is excluded. Thus, taking bond from an executor for a legacy, and judgment thereon, is a reduction: *Stewart's App.*, 3 W. & S. 476; see *Yerby v. Lynch*, 3 Gratt. 460; or taking a new security for the old debt: *Searing v. Searing*, 9 Paige, 283; so taking a bond from the devisee of land, subject to a legacy. *Dewitt v. Eldred*, 4 W. & S. 422. So in *Siter's Case*, 4 Rawle, 461, a deed of wife's *choses* by husband to a trustee for the benefit of the wife and child, excludes the wife's survivorship. Where the money is received by the husband, it is of course sufficient: see *Latourette v. Williams*, 1 Barb. 9; and a receipt given for the amount of his wife's *choses*, though she be an infant, is good, and will discharge the debtor. *Starke v. Starke*, 3 Richard. R. 438.

With regard to the husband's power over reversionary interests and possibilities, the authorities are at variance. In England, it is now finally established, that the husband can neither assign, release, or transfer them in any way, nor can she consent to such appropriation, either under a separate examination, or the Fines and Recoveries Act; not even where all the other parties surrender their interest to her, so that there would otherwise be a merger. See the authorities cited in the note to page 414. This doctrine has been followed in the United States, in *Browning v. Headley*, 2 Rob. Va. 340; *Moore v. Thornton*, 7 Gratt. 99; *Terry v.*

but die before the security with the legal estate is released or transferred, the receipt of the debt by the husband will be treated as a sufficient reduction into possession, and the wife or her trustee will be bound to release or assign the legal estate to the party by whom the money has been so paid. For in equity a mortgage is regarded only as a debt.^(l) So a settlement of the wife's equitable fund made by the husband, and perfected by an actual transfer to the trustees of that settlement, will be binding on the wife surviving; for the transfer to the trustees *by the direction of the husband*, was a reduction into possession by him.^(m)

But a payment or transfer to the husband as a trustee for the benefit of his wife, will not be considered a reduction into possession by him.⁽ⁿ⁾

Nor in general will any dealing with the fund amount to such a reduction, which does not vest the *legal* title to it in the husband, or the person claiming under him. For instance, where an executor has set apart a sum for the payment of a legacy given to a married woman;^(o) or the fund has been paid into court by the trustee;^(p) (1) or has been transferred by the existing trustees to other persons as trustees for the wife's benefit;^(q) in none of these cases will the wife's title by survivorship be defeated: for in all of them the husband's interest is still such as could only be enforced by a suit in equity; or

(l) Rees v. Keith, 10 Law Journ. N. S. Chanc. 46. [Siter v. McLanahan, 2 Grattan, 280.]

(m) Hansen v. Miller, 8 Jur. 209.

(n) Wall v. Tomlinson, 16 Ves. 413; see Baker v. Hall, 12 Ves. 497.

(o) Blount v. Bestland, 5 Ves. 515.

(p) Macaulay v. Phillips, 4 Ves. 17, 18.

(q) Wall v. Tomlinson, 16 Ves. 413;

Fort v. Fort, Forrest, 171; Ryland v. Smith, 1 M. & Cr. 53.

(1) Unless indeed it be paid in to the account of the *husband alone*; Re Jenkins, 5 Russ. 183.

Brunson, 1 Rich. Eq. 78; Goodwin v. Moore, 4 Humph. 221; Caplinger v. Sullivan, 2 Id. 548. But in Pennsylvania the rule is different. Siter's Case, 4 Rawle, 461; Woelpper's App., 2 Barr, 71. So in Kentucky; Merriwether v. Booker, 5 Litt. 254; see Turner v. Davis, 1 B. Monr. 157; Davenport v. Prewett's Adm., 9 Id. 95; Jackson v. Sublett, 10 Id. 467; see, also, Scott v. James, 2 How. Miss. 307. In North Carolina, it is held that the husband may transfer a vested remainder in a chattel, as slaves; but not an equitable interest. Knight v. Leake, 2 Dev. & Batt. R. 123; Howell v. Howell, 3 Ired. Eq. 528; Weeks v. Weeks, 5 Ired. Eq. 81.

The same general rules as have been stated as to the separate interest of the wife in her *choses*, apply to a bond or legacy given to husband and wife jointly, which will also survive to the wife. Pike v. Collins, 33 Maine, 43; Hayward v. Hayward, 20 Pick. 517; Atcheson v. Atcheson, 11 Beav. 485; Laprimaudaye v. Teissier, 12 Beav. 206. A payment in such case to the husband would be good; but if the fund be before the court, it will be retained, with a direction to pay dividends to the husband during the joint lives; with liberty to the survivor to apply. Atcheson v. Atcheson, ut supra.

in other words, it still remains an equitable *chose in action*. So the mere filing of a bill by the husband or his assignees against the legal holder of the property, to obtain a transfer or payment;(r) or a decree in a *joint* suit for the *joint* benefit of the husband *and wife*, *will not affect her rights by survivorship.(s) Although it [*416] will be otherwise, where the fund is ordered to be paid, or declared to belong to the *husband alone*; and in that case, his executors will be entitled, although he die in her lifetime.(t) And an award, directing the payment of money to the *husband alone*, will have the same effect.(u)

It is clear, that receipt by the husband of the *interest or dividends* of the fund, is no reduction into possession by him.(x) And even the receipt by him of *part* of the *capital* will not have that effect as to the *whole* fund, so as to bar the wife's title to the remainder, if she survive.(y)

So it has long been settled, that the general assignment by operation of law upon the bankruptcy or insolvency of the husband, will not operate to defeat the wife's title to her equitable property, or *choses in action*, whether they are reversionary or not, if the assignees shall not have acquired actual possession in the husband's lifetime.(z) And still less will a mere *voluntary* assignment by the husband have that effect.(a) So where the wife's equitable interest or *chose in action* is *reversionary*, and is therefore incapable of being reduced into actual possession, it is clearly settled, that the assignment by the husband, although for *valuable consideration*, will not have the effect of a reduction into possession, so as to defeat the wife's title by survivorship, *if the interest remain in reversion until the husband's death*.(b)

Whether an assignment by the husband for valuable consideration will have that effect, where the property *is capable of being reduced into possession by the husband*, either at the time of the assignment, or at any time before his death, is not so free from doubt. There is a series of cases, which have decided that such an assignment will

(r) *Pierce v. Thornely*, 2 Sim. 167, 180.

(s) *Nanney v. Martin*, 1 Eq. Ca. Abr. 68; 3 Atk. 726; *Forbes v. Phipps*, 1 Ed. 502; *Nightingale v. Lockman*, Fitzgibb. 148; *Hore v. Woulfe*, 2 Ball & B. 424; *Adams v. Lavender*, 1 McClel. & Y. 41; *Re Jenkins*, 5 Russ. 183.

(t) *Packer v. Wyndham*, Prec. Ch. 412; *Heygate v. Annesley*, 3 Bro. C. C. 362; see *Re Jenkins*, 5 Russ. 183.

(u) *Oglander v. Baston*, 1 Vern. 396.

(x) *Nash v. Nash*, 3 Mad. 133.

(y) *Ibid*.

(z) *Gayner v. Wilkinson*, 2 Dick. 491; 1 Bro. C. C. 50, n.; *Mitford v. Mitford*, 9 Ves. 87, 97; *Hornsby v. Lee*, 2 Mad. 16; *Pierce v. Thornely*, 2 Sim. 167, 177.

(a) *Lord Carteret v. Pascal*, 3 P. Wms. 199; *Burnet v. Kynaston*, 2 Vern. 401; *Mitford v. Mitford*, 9 Ves. 99; *Johnson v. Johnson*, 1 J. & W. 472.

(b) *Hornsby v. Lee*, 2 Mad. 16; *Purdew v. Jackson*, 1 Russ. 1; *Honor v. Morton*, 3 Russ. 65; *Dalbiac v. Dalbiac*, 16 Ves. 122. [See *Duberly v. Day*, 12 Eng. L. & Eq. 268, and ante, 414, note.]

have the effect of reduction into possession, on the ground, that the transaction amounts to an agreement by the husband to reduce the property into possession, which agreement being for valuable consideration ought to be performed.(c) And although the principle of those decisions was disapproved of by several eminent judges, who considered it as somewhat unintelligible, how the husband's assignee could be in a better situation than the husband himself,(d) the doctrine which they established, appears notwithstanding to have been recognised and admitted,(e) until the Vice-Chancellor's observations* in the recent case of *Hutchings v. Smith*(f) raised [*417] considerable doubt as to its authority.

In that case a husband and wife (pending a suit for the administration of an estate, to a residuary share of which the wife was entitled), joined in an assignment of her share *as a security for a debt of the husband*. The husband died, and subsequently to his death a decree was made in the suit for the payment of the residuary share of the estate *to the wife*. The widow claimed to take the whole share by survivorship to the exclusion of the particular assignee, and the Vice-Chancellor decreed in her favor, but on the ground, that the decree was for payment *to her alone*. In the view of the case taken by his Honor, it became unnecessary to enter into the general question as to the effect of the assignment for valuable consideration by the husband. "But," said his Honor, "when it becomes necessary to decide that question, the Court will have to consider whether the cases of *Bates v. Dandy*, and *Lord Salisbury v. Newton*, can be considered as authorities, which absolutely and conclusively establish the position, that where the wife has survived her husband, the assignee for value of the wife's *choses in action* can be entitled to any portion of it."(g) This case has since been followed by that of *Elwin v. Williams*,(h) before the same learned judge. There, A. was entitled under a will to part of the testator's residuary estate, which was given to trustees for her benefit. Upon A.'s marriage, she and her husband covenanted to settle this interest upon certain trusts; and after the marriage, *and after a great part of A.'s interest under the will, had become capable of being reduced into possession by the husband,*

(c) *Duke of Chandos v. Talbot*, 2 P. W. 608; *Lord Carteret v. Paschall*, 3 P. Wms. 197; *Bates v. Dandy*, 2 Atk. 207; S. C. 1 Russ. 33, n., and 3 Russ. 72 n.; *Wright v. Morley*, 11 Ves. 20, 21; *Grey v. Kentish*, 1 Atk. 280; *Hawkins v. Obyn*, 2 Atk. 549; *Pascall v. Thurston*, 2 Bro. P. C. 19; *Honnor v. Morton*, 3 Russ. 68, 9.

(d) See *Mitford v. Mitford*, 9 Ves. 99; *Johnson v. Johnson*, 1 J. & W. 476;

Honnor v. Morton, 3 Russ 65; *Purdew v. Jackson*, 1 Russ. 60.

(e) *Johnson v. Johnson*, 1 J. & W. 476; *Honnor v. Morton*, 3 Russ 68.

(f) 9 Sim. 137, 146, 7.

(g) *Hutchings-v. Smith*, 9 Sim. 137, 146.

(h) *Elwin v. Williams*, 12 Law Journ. N. S., Chanc. 440. [7 Jur. 335; S. C. *sub nom. Ellison v. Elwin*, 13 Sim. 309; see ante, p. 415, note.]

an assignment was made of her interest to trustees upon the trusts declared previously to the marriage. The husband died before the whole of the wife's equitable property which had been settled had been reduced into possession by the trustees of the settlement; and a bill was then filed by the trustees to have their rights under the settlement declared. The Vice-Chancellor held that the husband's assignment in this case did not affect any part of the wife's interest, *which was not reduced into possession in his lifetime.*⁽ⁱ⁾ It is therefore settled by this decision, that an assignment for valuable consideration by the husband of his wife's equitable property, which is not accompanied or followed by any act reducing it into possession in his lifetime is inoperative as against her title by survivorship.

But although the wife's title by survivorship should be held to be defeated by the husband's assignment for valuable consideration, it is clear, at all events, that her *equitable right to a settlement* out of the property would still remain, and would be enforced against the persons claiming under the assignment, whenever they came to the court to obtain possession of the fund.^(k)

It is immaterial, that the wife herself joins with her husband in executing any assignment of her equitable interests, which is inoperative to bind her title by survivorship. For any deed executed by her during the coverture is merely inoperative, and it will be competent for her or for her representatives *after his death, to dissent from it, and to enforce her claim to the property, as if ^[*418] she had made no such deed.^(l)

If the husband survive his wife, then he, as her administrator, will be absolutely entitled to all her personal estate, though it continued in action or unrecovered at his death.^(m)¹ And although he die before the property is got in, his representatives, and not the wife's

⁽ⁱ⁾ Lord Salisbury v. Newton, 1 Ed. 370.

^(k) Vide supra.

^(l) Wright v. Rutter, 2 Ves. jun. 673; Macaulay v. Phillips, 4 Ves. 16; Hornsby v. Lee, 2 Mad. 18; Purdew v. Jack-

son, 1 Russ. 1; Honnor v. Morton, 3 Russ. 65; Hutchings v. Smith, 9 Sim. 137. [Ante, 415, note.]

^(m) Squib v. Wyn, 1 P. Wms. 378; 1 Rep. Hus. & Wife, 203.

¹ Accord, Whitaker v. Whitaker, 6 John. R. 112; Hunter v. Hallett, 1 Edw. Ch. 388; Hoskins v. Miller, 2 Dev. R. 360; Lockwood v. Stockholm, 11 Paige, 87; Biggert v. Biggert, 7 Watts, 563; Clay v. Irvine, 4 Watts & Serg. 232; Hatton v. Weems, 12 G. & J. 83; Glasgow v. Sands, 3 G. & J. 96; Donnington v. Mitchell, 1 Green, Ch. 243; Dawson v. Dawson, 2 Strob. Eq. 34; Lea v. Wheeler, 4 Geo. 541; Wilkinson v. Perrin, 7 Monr. 214; Jackson v. Sublitt, 10 B. Monr. 469; Lowry v. Houston, 4 How. Miss. 224. Contra, Curry v. Falkington, 14 Ohio, 100; Baldwin v. Carter, 17 Conn. 201; Byrne v. Stewart, 2 Desaus. 135. See 2 Kent's Comm. 135.

The husband is also entitled to personal property settled to her separate use for life, unless there be limitations over. See post, note to page 425.

next of kin, will be entitled.(n) Hence, an assignment by the husband of his wife's *choses in action* or equitable interest in personalty, is good against every one except her, surviving; for it will, of course, be binding on himself, and all parties claiming under him.(o)

In enforcing the equity of the wife for a settlement, the interests of her children will always be considered and protected by the court.(p)¹ But the equity, notwithstanding, belongs personally to the wife, and it cannot be enforced by her children *after her death* in opposition to the husband's title by survivorship.(q) And we have already seen, that the wife *herself* will be at liberty to waive her right to a settlement, and so to defeat her children's interest at any time before the instrument is *actually executed*, and this though the Master have actually approved of a settlement under a decree.(r) However, the title of the *husband* by survivorship is not favored in equity to the same extent as that of the wife; and it is settled, that *where there has been a decree or order* in a suit, referring it to the Master to approve of a proper settlement out of the wife's equitable property, the equity of the children for a settlement will prevail against the husband's right by survivorship, though the wife died before the settlement is made, or any further proceedings are taken.(s)

(n) *Cart v. Rees*, 1 P. Wms. 381, cited; *Humphrey v. Bullen*, 1 Atk. 458; *Elliott v. Collier*, 3 Atk. 526.

(o) *White v. St. Barb*, 1 Ves. & B. 405; see *Ranking v. Bernard*, 5 Mad. 32.

(p) *Murray v. Ld. Elibank*, 10 Ves. 84; *Lloyd v. Williams*, 1 Mad. 450; *Groves v. Clark*, 1 Keen, 132. [*Howard v. Moffatt*, 2 J. C. R. 206; *Udall v. Kenney*, 3 Cow. 609; *Groverman v. Dffen-derfer*, 11 Gill & John. 22; *Napier v. Howard*, 3 Kelly, 193; *Andrews v. Jones*, 10 Alab. 401; notes to *Murray v. Lord Elibank*, ut *supr.*]

(q) *Scriven v. Tapley*, 2 Ed. 337; S. C. Ambl. 509; *Lloyd v. Williams*, 1 Mad. 450. [*Martin v. Sherman*, 3 Sandf. Ch. 341; *Bell v. Bell*, 1 Kelly, 637; *Barker v. Woods*, 1 Sandf. Ch. 129.]

(r) *Ante*, and see *Rowe v. Jackson*, 12 Dick. 604; *Murray v. Ld. Elibank*, 10 Ves. 84; *Martin v. Mitchell*, 10 Ves. 89, cited; *Steinmetz v. Halthin*, 1 Gl. & J. 64.

(s) *Murray v. Ld. Elibank*, 10 Ves. 84; *Lloyd v. Williams*, 1 Mad. 450; *Groves v. Clarke*, 1 Keen, 132. [*Mumford v. Murray*, 1 Paige, 621; *Helms v. Franciscus*, 2 Bland. Ch. 581.]

¹ Where there are no children, the husband's next of kin are entitled to the fund. The proper form of settlement, therefore, is to the wife for life, remainder to her children as she should appoint, remainder to the children in default of appointment, and in default of children, if the wife survive, to her absolutely, or if the husband survive, to him or those claiming under him. *Carter v. Taggart*, 9 Eng. L. & Eq. 167; 1 De G. Mac. & Gord. 286; *Bagshaw v. Winter*, 11 Eng. L. & Eq. 274. Circumstances may exist, however, in a particular case, which would make a power of disposal by will in the wife, with a limitation in default of appointment to her next of kin, a proper limitation, instead of the ultimate one to the husband; but a special case must be made out. That the wife's relatives are in needy circumstances is not enough. *Carter v. Taggart*, ut *supr.*

And it is immaterial, that the decree or order is for a settlement on the *wife alone*, without mentioning the children.(t)

It was decided by Sir J. Leech, in *Steinmetz v. Halthin*,(u) that this equity attaches in favor of the children *immediately upon the filing of the bill*, and that although the wife dies before any further proceedings are taken, the husband will be precluded from taking the whole as her administrator; and this view of the law appears to have been supported by the observations of Lord Langdale, M. R., in the recent case of *Groves v. Clarke*.(x) However, in the subsequent case of *De la Garde v. Lempriere*,(y) the same learned judge refused to follow the decision in *Steinmetz v. Halthin*, and after examining the principles on which the wife's equity for a settlement depended, and was dealt with by the court, his Lordship held, in opposition to that case, that the wife's equity did *not* attach merely upon **the filing of the bill*, and that upon her death, *before* [*419] *decree*, her husband became absolutely entitled to her equitable property as her personal representative.(y) And this, as the latest decision, must be treated as now governing the law on the point in question.

Where there are no children, the right of survivorship, as between the husband and wife, will not be affected by a decree or order of reference to approve of a settlement, even though the husband may have carried in proposals for a settlement under the order.(z) But if the proposal had been approved of by the court, and a settlement ordered to be made in accordance with it, and the wife then died, this would, in all probability, be considered to bind the husband as much as if the settlement were actually executed.(a)

It has been hitherto assumed, that the interest of the husband in his wife's property has not been modified or excluded by any trust or limitation, giving her the sole and exclusive enjoyment of it. At law a married woman, during the coverture, is in general incapacitated from acquiring or holding property separately from her husband.(b) But in equity it has been long settled, that a trust by deed or will of real or personal property, for the separate enjoyment of a *feme covert*, is valid, and will be enforced in her favor, to the exclusion of the husband's title in his marital right.(c)

It is now settled, that a trust for a woman's separate use may be effectually created, although she be unmarried at the time, and no

(t) *Groves v. Clarke*, 1 Keen, 132; *Groves v. Perkins*, 6 Sim. 584. [See Hill v. Hill, 3 Strobh. Eq. 94.]

(u) 1 Gl. & J. 64.

(x) 1 Keen, 132.

(y) *De la Garde v. Lempriere*, 6 Beav. 344.

(z) *Macaulay v. Phillips*, 4 Ves. 19.

(a) *Ibid.*

(b) 1 *Rop. Husband & Wife*, 3, 53; and 2 *Ib.* 151.

(c) 2 *Rop. Husband & Wife*, 151. [2 *Kent's Comm.* 162; note to *Hulme v. Tennant*, 1 *Lead. Cas. Eq.* 370.]

particular marriage is in contemplation; and if she marry at any time afterwards, the trust will immediately attach upon the property, so as to exclude the husband's title, although no further settlement be executed. (d) This doctrine was shaken to the foundation by Lord Cottenham, when Master of the Rolls. It was laid down by that learned judge in the case of *Massey v. Parker*, (e) that where property is given, or settled to the separate use of a woman *who was unmarried at the time*, it vests, on her marriage, in her husband absolutely in his marital right.¹ But in the subsequent cases of *Tollett v. Armstrong*, (f) and *Scarborough v. Bowman*, (g) in which it became necessary to adjudicate on the point, Lord Langdale, M. R., decided in favor of the validity of the trust for the separate use; and in affirming those decisions on appeal, Lord Cottenham, when Chancellor, formally overruled his own *dictum* in *Massey v. Parker*, and finally established the doctrine as stated above. (h)

And it is settled, that the trust for the separate use, though suspended by the cessation of coverture,² will re-attach on a subsequent marriage,³ if a future marriage be contemplated by the terms of the [*420] trust. (i) But, *if the trust be confined in its terms to the *first* coverture, it will not be extended to a *subsequent* marriage. (k)⁴

(d) *Anderson v. Anderson*, 2 M. & R. 427; *Davies v. Thornycroft*, 6 Sim. 420; *Tullett v. Armstrong*, 1 Beav. 1; 4 M. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 34; and 4 M. & Cr. 377.

(e) 2 M. & K. 174.

(f) 1 Beav. 1.

(g) 1 Beav. 34.

(h) 4 M. & Cr. 377. [*Gaffee's Trust*, 14 Jur. 277; 1 McN. & Gord. 541.]

(i) *Clark v. Jacques*, 1 Beav. 36; *Dixon v. Dixon*, Ib. 40. And although the wife was an *infant* at the period of the first settlement. *Ashton v. M'Dougall*, 5 Beav. 56.

(k) *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, Ib. 126. [Overruled, see below.]

¹ *Accord*, *Hamersley v. Smith*, 4 Whart. 126; *Lindsay v. Harrison*, 3 Eng. Arkan. R. 311; see *Dick v. Pitchford*, 1 Dev. & Batt. Eq. 480. But in *Beaufort v. Collier*, 6 Hump. 487; *Shirley v. Shirley*, 9 Paige, 363; *Fellows v. Tann*, 9 Alab. 1003; *Fears v. Brooks*, 12 Geo. 197, the later English doctrine in *Tollett v. Armstrong* was followed.

² *Hamersley v. Smith*, 4 Whart. 126; *Smith v. Starr*, 3 Id. 62; see *Clarke v. Wyndham*, 12 Alab. 800.

³ *Contra*, *Hamersley v. Smith*, ut supr.

⁴ But in the case of *Gaffee's Trust*, 14 Jur. 277; 1 Mac. & Gord. 541 (overruling S. C. 13 Jur. 74; 6 Hare, 101), the wife's property, by a post-nuptial settlement, was vested in trustees in trust to pay the income "to such persons, and for such purposes, as she should appoint; but not so as to dispose of the same by way of anticipation; and, in default of appointment, into her own hands, for her separate use, notwithstanding her coverture, independent of the said G." (her then husband), "who is not to intermeddle therewith; neither is the same to be subject or liable for his debts, contracts, or engagements." No express estate

As this separate interest of a married woman is the subject only of equitable cognizance, the interposition of trustees was at first deemed essential for its creation.^(l) And where property is intended to be settled to the separate use of married women, it is doubtless the more proper and more convenient course to vest it in trustees.^(m) However, it has been long settled, that a separate estate may exist without the intervention of trustees, and although the husband will in that case take the legal interest, yet he will be treated in equity as a trustee for the separate benefit of his wife.⁽ⁿ⁾

It is clear that no particular form of words is necessary to create a trust for a *feme's* separate use.¹ Such a trust may either be de-

(l) *Harvey v. Harvey*, 1 P. Wms. 125; *Prideaux*, 3 Bro. C. C. 383; *Parker v. S. C.* 2 Vern. 659; *Barton v. Pierpoint*, 2 P. Wms. 79; *Brooke*, 9 Ves. 283; *Baggett v. Meux*, 13 Law Journ. N. S., Chanc. 228; [1

(m) 2 Rep. Husb. & Wife, 152.

(n) *Bennet v. Davis*, 2 P. Wms. 316; *Major v. Lansley*, 2 R. & M. 355. [See *Darley v. Darley*, 3 Atk. 399; *Lee v. ante*, p. 406, and note.]

for life was limited to the wife; but an estate for life was given to the husband after the decease of the wife; and, after the decease of the survivor, the trust property was limited to the children of the marriage. It was held by Lord Ch. Cottenham, that the clause against anticipation was not confined to the then existing coverture; but extended to a subsequent marriage. The cases of *Knight v. Knight*, *Benson v. Benson*, cited above, and *Bradley v. Hughes*, 8 Sim. 149, were said to proceed on "a supposed rule of equity which does not now exist;" and it was remarked, "It being now settled, that a gift to the separate use, without power of anticipation, will operate on all the covertures of a woman, unless these provisions are destroyed while she is discovert, these cases cannot be considered as applicable to this case, which must therefore depend on the construction to be put on the words used, namely, whether the provisions for the separate use, and against anticipation, are applicable to the whole of the life estate given, or only during the then existing coverture;" and the rule was laid down, "that if the restriction against anticipation forms part of the only sentence, which gives any estate, and is made part of such gift, then the estate and the restriction must be commensurate." 14 Jur. 279.

¹ *Perry v. Boileau*, 10 S. & R. 208; *Lewis v. Adams*, 6 Leigh, 320; *Ballard v. Taylor*, 4 Desaus. 550; *Stewart v. Kissam*, 2 Barb. S. C. 494; *Heathman v. Hall*, 3 Ired. Eq. 414; *Fearn v. Brooks*, 12 Geo. 197; *Beaufort v. Collier*, 6 Humph. 487; note to *Hulme v. Tenant*, 1 Lead. Cas. Eq. 1st Am. Ed. 376; but the intention to exclude the husband must be manifest, *Evans v. Knorr*, 4 Rawle, 66; *Ashcraft v. Little*, 4 Ired. Eq. 236; *Williams v. Clairborne*, 7 Sm. & M. 488; *Carroll v. Lee*, 3 G. & John. 505; *Cook v. Kennedy*, 12 Alab. 42; *Fearn v. Brooks*, ut supra; note to *Hulme v. Tenant*, ut supra. It is impossible, however, to reconcile all the decisions, under this principle. The following expressions have been held to be sufficient to create a separate use. A conveyance to a married woman "and her heirs, to have and to hold the same to and for her use, benefit, and right, and of the heirs aforesaid, without let, hindrance, or molestation whatever," *Newman v. James*, 12 Alab. 29; or "in trust for the proper use and benefit of the *feme covert*, and her heirs for ever;" *Warren v. Haley*, 1 Sm. & Marsh. 647; "for the use and benefit for the wife and her heirs," *Good v. Harris*, 2 Ired. Eq. 63; "for

clared in express terms, or it may be inferred from the provisions or directions as to the mode of enjoyment or management of the pro-

the entire use, benefit, profit, and advantage" of the wife, *Heathman v. West*, 3 Ired. Eq. 44; "for her own proper use and benefit," *Griffith v. Griffith*, 5 B. Monroe, 103; "to the use and benefit of A. and children, to remain in possession of A.," *Hamilton v. Bishop*, 8 Yerg. 33; "for her use and benefit, as the trustee may think proper and best; without being subject to her debts and contracts in any way whatsoever, or her husband, or any future husband, only for her support and maintenance," *Clarke v. Windham*, 12 Alab. 798; "for her only use and benefit," *Collins v. Rudolph*, 19 Alab. 616; "for her use and benefit during her life," *Strong v. Gregory*, Id. 146; "as her separate and distinct property," *Petty v. Boothe*, Id. 633; bequest to a married woman, for "her own use;" *Jamison v. Brady*, 6 S. & R. 468; "for her own use during her natural life," *Heck v. Clippingier*, 5 Barr, 385; "to be at her own disposal in true faith," *Bridges v. Wood*, 4 Dana, 610; "for her own and sole use for ever," *Fisher v. Filbert*, 6 Barr, 61; "for her own proper use during her lifetime," *Snyder v. Snyder*, 10 Barr, 424; so a declaration of trust for Mrs. S.; and that the trustee would account for, and pay over to her individually all the moneys that might be received thereon; *Stuart v. KISSAM*, 2 Barb. S. C. 494. So in *Tyson's App.*, 10 Barr, 224, where a direction to pay the interest of a fund half yearly, to a *feme covert*, seems to have been held to create a separate use, *sed qu.* So in *Williams v. Maull*, 20 Alab. 721, where slaves were given in trust for a married woman, with a provision that "the labor and increase of the negroes should in no manner be liable for the debts of her present or any future husband," it was held that, as against the personal representatives of the husband, it constituted a separate estate. And in the recent case of *Fears v. Brooks*, 12 Geo. 195, where a testator, after providing that the shares of his daughters in the residuum of his estate should be paid over to a trustee for their use, directed the trustee to receive from, and receipt to, his executors, for the shares, "to be vested by him in such property as in his judgment may be most conducive to their (his daughters) comfort and interest, and to have the title to such investment made to him as trustee for their use and benefit," it was held that a separate estate was created in the daughters; and that their power of alienation was restrained. A conveyance by a husband, in trust for his wife, will also be necessarily for her separate use, otherwise the disposition would be futile, *Steel v. Steel*, 1 Ired. Eq. 452. It has been held, that where there is a gift to a separate use in a will, and "in addition to the legacy," another sum is given to the same trustee, the latter is also separate estate. *Warwick v. Hawkins*, 13 Eng. L. & Eq. 174; *Davis v. Cain*, 1 Ired. Eq. 304, *accord*; but see *Evans v. Knorr*, 4 Rawle, 66.

Gifts, or conveyances, in the following terms, have been held *not* to create a separate use: "For the joint use" of husband and wife, *Bender v. Reynolds*, 12 Alab. 441; *Geyer v. Branch Bank*, 21 Alab. 414; "the gift not to extend to any other person," *Ashcraft v. Little*, 4 Ired. Eq. 236; "all to be for her and her heirs' proper use," *Rudisell v. Watson*, 2 Devereux Eq. 430; "for her use, benefit, and behoof," *Torbert v. Twining*, 1 Yeates, 432; or in "trust for the use" of the *feme*, *Tenant v. Stoney*, 1 Rich. Eq. 222. And in *Fears v. Brooks*, 12 Geo. 198, it was conceded that the words "to her use and benefit" would not create a separate estate. So in *Clevenstine's App.*, 15 Penn. St. R. 499, of a legacy to a *feme*, "she to have the use of the same during her life," and after her death, to her children. It is clear, too, that the mere intervention of a trustee, will not create a separate use. *Williams v. Maull*, 20 Alab. 727; *Hunt v. Booth*, 1 Freem. Ch. 215; *Mayberry v. Neely*, 5 Hump. 339 and *a fortiori*, a direct gift to a married woman

perty.(o) Thus a limitation to the "separate" use of the wife,(p) or what has been decided to be the same thing, to her "sole" use,(q) will be clearly sufficient. And so will any direction or limitation, which is incompatible with the existence of the husband's title, as if the property be given to be at the wife's "own disposal,"(r) or to be enjoyed "independent of the husband,"(s) or for her own use and benefit "independent of any other person,"(t) or if it be declared, that "her receipts shall be a good discharge,"(u) or that "the husband should not dispose of it without her consent."(x) So a declaration, that the estate is for the "livelihood" of the wife,(y) or that she shall "enjoy and receive" the rents and profits,(z) has been held sufficient to create a trust for her separate use; although from the tone of the modern cases, it might possibly be a question whether these last decisions would be recognised as authorities at the present day.

However, the intention to create a separate estate, must be clearly and unequivocally expressed, in order to deprive the husband of his marital rights. And in modern times the judges have required much more stringent expressions for this purpose, than were once considered sufficient. It was said in a late case by Lord Brougham, that the expressions must be such as "leave no doubt of the intention, and which forbid the court to speculate on what the probable object of the donor might have *been."(a) Thus it has been held, [*421] that a simple trust to pay an annuity or interest to a married woman,(b) or "for her own use and benefit,"(c) or "into her own

(o) *Stanton v. Hall*, 2 R. & M. 180; *Tyler v. Lake*, Id. 188.

(p) *Scarborough v. Borman*, 1 Beav. 34; 4 M. & Cr. 377.

(q) *Adamson v. Armitage*, Coop. 283; S. C. 19 Ves. 416; *Ex parte Ray*, 1 Mad. 199; *Wills v. Sayers*, 4 Mad. 409; *Ex parte Killick*, 8 Jurist, 67; [3 Mont. Deac. & De G. Bank. Cas. 480.]

(r) *Pritchard v. Ames*, T. & R. 222; *Stanton v. Hall*, 2 R. & M. 180; *Tyler v. Lake*, Id. 188.

(s) *Wagstaff v. Smith*, 9 Ves. 420; *Dixon v. Olmius*, 2 Cox, 414; *Simmons v. Horwood*, 1 Keen, 7; *Newlands v. Paynter*, 4 M. & Cr. 408; *Tullett v. Armstrong*, 1 Beav. 1; 4 M. & Cr. 377.

(t) *Margetts v. Barringer*, 7 Sim. 482. [See *Ashcraft v. Little*, 4 Ired. Eq. 236.]

(u) *Lee v. Prideaux*, 3 Bro. C. C. 381;

Stanton v. Hall, 2 R. & M. 180; *Tyler v. Lake*, Id. 188.

(x) *Johnes v. Lockhart*, 3 Bro. C. C. 383, n.

(y) *Darley v. Darley*, 3 Atk. 399. [See, however, *Hawkins v. Coulter*, 2 Port. Alab. 476; 2 *Spence's Eq. Jur.* 508, n. (d).]

(z) *Tyrrell v. Hope*, 2 Atk. 561; and see *Atcherley v. Vernon*, 10 Mod. 531.

(a) *Tyler v. Lake*, 2 R. & M. 189. [Fears v. Brooks, 12 Geo. 196.]

(b) *Dakins v. Beresford*, 1 Ch. Ca. 194; *Lumb v. Milnes*, 5 Ves. 520; see *Brown v. Clark*, 3 Ves. 166; *Stanton v. Hall*, 2 R. & M. 175.

(c) *Wills v. Sayers*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; [See 2 Port. Alab. 475]; *Kensington v. Dol-lond*, 2 M. & K. 184; *Beales v. Spencer*,

2 N. C. C. 651.

is not. *Fitch v. Ayer*, 2 Conn. 143; *Moore v. Jones*, 13 Alab. 296; *Hall v. Sayre*, 10 B. Monr. 46. See, further, note to *Hulme v. Tennant*. And for the separate use now in New York, see *Noyes v. Blakeman*, 3 Sandf. S. C. 538, and post.

proper hands for her own use and benefit,"(d) will not create a trust for her separate use. Although it was held on one occasion by Lord Alvanley, that the use of the word "*proper*" would be sufficient.(e) In a very recent case,(f) Sir J. Wigram, V. C., decided that the same word would not create a trust for a separate use, although his Honor appears to have come to that determination with considerable reluctance, and solely on the authority of the decision in *Tyler v. Lake*.

The trust must be for the benefit of the wife exclusively of any other person: and a gift for the benefit of the *children* as well as the wife, has been held not to create a trust for her separate use; although the terms of the gift would otherwise have had that operation.(g)

In equity a married woman is considered as a *feme sole* in respect of her separate property.(h) Therefore, where *personal estate* is given simply to her separate use, without restricting her power of disposing of it, or prescribing the mode in which that power is to be exercised, she will take the property with all its incidents, and amongst others with an absolute power of alienation.(i)¹ However,

(d) *Tyler v. Lake*, 4 Sim. 144; S. C. 2 R. & M. 183; and see *Massey v. Parker*, 2 M. & K. 181; *Blacklow v. Laws*, 2 Hare, 49.

(e) *Hartley v. Hurle*, 5 Ves. 545.

(f) *Blacklow v. Laws*, 2 Hare, 49, 53.

(g) *Wardle v. Claxton*, 9 Sim. 524. [*Ashcraft v. Little*, 4 Ired. Eq. 236; *Inge v. Forrester*, 6 Alab. 418; but see *Jasper v. Howard*, 12 Alab. 652; *Good v. Harris*, 2 Ired. Eq. 630; *Hamilton v. Bishop*, 8 Yerger, 33.]

(h) *Hulme v. Tennant*, 1 Bro. C. C. 21 [1 Lead. Cas. Eq. 355, and notes]; *Sockett v. Wray*, 4 Bro. C. C. 486; *Peacock v. Monk*, 2 Ves. 190; *Pybus v. Smith*, 4 Bro. C. C. 346; *Lillia v. Ayre*, 1 Ves. jun. 278; *Wagstaff v. Smith*, 9 Ves. 524; *Witts v. Dawkins*, 12 Ves. 501. *Sturgis v. Corp.*, 13 Ves. 190. [2 Kent's Comm. 162.]

(i) *Fettiplace v. Gorges*, 3 Bro. C. C. 10.

¹ The authorities in the United States are divided on this point. On the one hand, a *feme covert* is held to possess only such power over her separate estate as is expressly given to her. This is the rule in Pennsylvania (*Lancaster v. Dolan*, 1 Rawle, 231), South Carolina (*Ewing v. Smith*, 3 Desaus. 417; *Reed v. Lamar*, 1 Strobb. Eq. 27; *Calhoun v. Calhoun*, 2 Id. 231); Mississippi (*Doty v. Mitchell*, 9 Sm. & M. 435); Tennessee (*Marshall v. Stephens*, 8 Hump. 159; *Sutton v. Baldwin*, 8 Hump. 209). In New York, a similar doctrine was held by Ch. Kent in *Jaques v. The Meth. Epis. Church*, 3 J. C. R. 78; but this was overruled by the Court of Appeals in 17 John. 548; and *Dyott v. N. A. Coal Co.*, 20 Wend. 570; and the English rule established. Some recent decisions in that State, however, have placed a construction on the Revised Statutes, which limits the power of a wife over her separate estate (where the trust is to pay over the rents and profits to her for life) in the most stringent manner. Her interest is declared to be inalienable, and she cannot, in any way, charge the estate, without the assent of the trustee; and that assent must be expressly authorized by the trust. *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34; *Rogers v. Ludlow*, 3 Sandf. Ch. 538; *Leggett v. Perkins*, 2 Comst. 297; *Noyes v. Blakeman*, 3 Sandf.

where *real estate* is limited absolutely to the separate use of a married woman, she can only dispose of it in the manner prescribed by law, viz., by a conveyance duly acknowledged, *(k)* (1) unless indeed a power of disposition be expressly reserved to her by settlement, or ante-nuptial agreement, or by the instrument of gift, in which case she may unquestionably pass her interest by a due exercise of that power. *(l)* And an agreement for valuable consideration to exercise such a power will be binding on her in equity. *(m)*

So even with regard to her separate *personal* estate, if a particular mode of disposition be prescribed by the settlement or instrument of gift, she cannot dispose of it in any other manner, *(n)* not even by means of her examination in court. *(o)* Unless, indeed, she take the absolute interest *in default of exercising the power so given her, in which case she may of course dispose of that interest in [*422] accordance with the general rule, and irrespectively of the particular

(k) Peacock v. Monk, 2 Ves. 192, cases cited; Dillon v. Grace, 2 Sch. & Lef. 462, 4; Wright v. Cadogan, 2 Ed. 257; Ambl. 468; 2 Rop. Husb. and Wife, 185; 2 Story Eq. Jur. § 1391; sed vide Major v. Lansley, 2 R. & M. 355; [and Albany Fire Ins. Co. v. Bay, 4 Comst. 9. See Shipp v. Bowman, 5 B. Monr. 163.]

(l) Rippon v. Dawding, Ambl. 565; Rich v. Beaumont, 3 Bro. P. C. 308; Tomlinson v. Dighton, 1 P. Wms. 149; Peacock v. Monk, 2 Ves. 191; Downes v. Timperon, 4 Russ. 334; Wright v. Cadogan, 2 Ed. 239.

(m) Dowell v. Dew, 12 Law Journ. N. S., Chanc. 158. [1 Younge & Coll. C. C. 345, 355; affirmed 12 L. J. Ch. 164; 7 Jur. 117.]

(n) Ross v. Ewer, 2 Atk. 156; Croft v. Slee, 4 Ves. 60, 64; Anderson v. Dawson, 15 Ves. 532; Hopkins v. Myall, 2 R. & M. 86. [Ins. Co. v. Bay, 4 Comst. 9; Fears v. Brooks, 12 Geo. 200; Leaycraft v. Hedden, 3 Green's Ch. 512; Williamson v. Beckham, 8 Leigh, 20.]

(o) Richards v. Chambers, 10 Ves. 580.

(1) However, this rule does not apply to the *income* of real estate, limited to the separate use of a married woman: for the rents and profits of such real estate may be disposed of by her without any express power for that purpose, in the same manner as her separate personal estate. 2 Rop. Husb. and W. 184; 2 Story's Eq. Jur. § 1393 [Vizonneau v. Pegram, 2 Leigh, 183]: and a similar decision has been made in a late case with respect to an *annuity* charged on land, and given to the separate use of a *feme covert*. Major v. Lansley, 2 R. & M. 355.

S. C. 538. On the other hand, in New Jersey (Leaycraft v. Hedden, 3 Green's Ch. 551); Connecticut (Imlay v. Huntington, 20 Conn. 175); Kentucky (Coleman v. Woolley, 10 B. Monr. 320); Shipp v. Bowman, 5 Id. 163); Virginia (Vizonneau v. Pegram, 2 Leigh, 183); North Carolina (Newlin v. Freeman, 4 Ired. Eq. 312); Alabama (Bradford v. Greenway, 17 Alab. 805; Collins v. Lavenburg, 19 Alab. 685); Georgia (Fears v. Brooks, 12 Geo. 200; Wyly v. Collins, 9 Geo. 223); and Missouri (Coats v. Robinson, 10 Mis. 757), the English rule, as is stated in the text, has been adopted. See further, the note to Hulme v. Tenant, ut supra.

power.(p) If a trustee act upon a disposition by a married woman of her separate estate, which is not executed according to her power, he will be liable to replace the fund.(q)

But a married woman may be restrained by the terms of the trust from alienating or anticipating the income of her separate estate during the existing or any future coverture ; and although the court appears at one time to have declined to sanction a practice so directly opposed to the general principle of law,(r) its validity has now long been established.(s)¹ The prohibition against alienation in these cases becomes an essential part of the separate estate, with which it must stand and fall.(t) It will therefore operate only during the continuance of the coverture, and a single woman until marriage, or a married woman after the death of her husband, and until she marry again, will be fully competent to dispose of the property notwithstanding the existence of such a clause.(u) And it is no objection to the validity of the restriction, that the woman is unmarried at the time of the creation of the trust.(x) Nor is the restriction extinguished by the cessation of her coverture on the death of her first husband, but it will be merely suspended during her widowhood, and will re-attach on her second marriage, without any resettlement.(y)(1)

It is settled that an express negative declaration is requisite to deprive a *feme covert* of her *prima facie* right of disposing of her

(p) *Elton v. Shepherd*, 1 Bro. C. C. 532 ; *Anderson v. Dawson*, 15 Ves. 532 ; *Tullett v. Armstrong*, 1 Beav. 23 ; 4 M. & Cr. 393.

Barford v. Street, 16 Ves. 135 ; *Barrymore v. Ellis*, 8 Sim. 1 ; 2 Rob. Husb. 394. (t) *Tullett v. Armstrong*, 4 M. & Cr. 394.

and Wife, 230. (u) *Brown v. Pocock*, 2 R. & M. 210 ; 2 M. & K. 189 ; *Knight v. Knight*, 6 Sim. 121 ; *Tullett v. Armstrong*, 4 M. & Cr. 406.

(q) *Hopkins v. Myall*, 2 R. & M. 86. [But as to the costs, see *Mant v. Leith*, 10 Engl. L. & Eq. 123.] (x) *Tullett v. Armstrong*, 1 Beav. 1 ; 4 M. & Cr. 290 ; *Scarborough v. Borman*, 1 Beav. 34 ; 4 M. & Cr. 377, 390.

(r) *Hulme v. Tennant*, 1 Bro. C. C. 16 ; *Pybus v. Smith*, 3 Bro. C. C. 340 ; 1 Ves. jun. 189 ; see *Jackson v. Hobhouse*, 2 Mer. 487. (y) *Clark v. Jacques*, 1 Beav. 36 ; see 4 M. & Cr. 406. [*Gaffee's Trust*, ante, p. 420, note.]

(1) It is clear that a widow during her discoverture would have the power of absolutely alienating her trust property, notwithstanding a restriction against anticipation during coverture. But it might be a question whether a settlement by her on her second marriage, limiting the property to herself absolutely for her separate use, would remove the previous restriction. The point does not seem to have been decided in practice.

¹ A trust for a *feme covert* for her separate use, declared not to be assignable, is valid ; and an assignment by her thereof will be void, *Rennie v. Ritchie*, 12 Cl. & Fin. 204.

separate estate;(z) and the case of *Hovey v. Blakeman*,(a) which imports a contrary doctrine, cannot now be considered of any authority. Thus it has frequently been determined, that a direction to pay the income from *time to time into the proper hands* of the wife, is sufficient of itself to deprive her of the absolute disposing power over her whole interest.(b)¹

But in a very recent case, where the trust was to pay the income to such persons and for such purposes as the wife should by any writing under her hand, *except in any mode of anticipation*, appoint, and in default of *such appointment, into her hands, it was held by [*423] Sir K. Bruce, V. C., that the words were sufficient to restrict the wife from anticipation.(c) And if the intention to restrain the power of alienation be clearly collected from the several clauses of the will, they will all be construed together, and effect will be given to the general intention.(d)²

In the ordinary form of limitation in these cases, the trustees are directed to pay the income to such persons, &c., as the wife, notwithstanding her coverture, *but not by way of anticipation, &c.*, may appoint, and in default of appointment, *into her own hands*. But it appears from recent decisions, that this form cannot be relied upon as an effectual prohibition of anticipation by the wife. It has been held in two late cases(e)³ by the Vice-Chancellor of England, that under a trust so framed, the restraint against alienation applies only to the *power of appointment*, and that the interest given to the wife

(z) 2 Rop. Husb. and Wife, 236, 240; *Brown v. Bamford*, 11 Sim. 127; *Medley v. Horton*, 8 Jurist, 853; [14 Sim. 422; *Ross's Trust*, 2 Eng. L. & Eq. 148.]

(a) Stated 9 Ves. 524; and see *Mores v. Huish*, 5 Ves. 692.

(b) *Clarke v. Pistor*, stated, 3 Bro. C. C. 568; *Pybus v. Smith*, 1 Ves. jun. 189; 3 Bro. C. C. 340; *Barkes v. White*, 11 Ves. 222; *Witts v. Dawkins*, 12 Ves. 501; *Browne v. Like*, 14 Ves. 302;

(c) *Moore v. Moore*, Coll. 54.

(d) *Baggett v. Meux*, 1 Coll. 138, [affirmed 1 Phill. 627; *Fears v. Brooks*, 12 Geo. 200.]

(e) *Barrymore v. Ellis*, 8 Sim. 1; *Brown v. Bamford*, 11 Sim. 127.

¹ In *Ross's Trust*, 2 Eng. L. & Eq. 148, a gift on trust to pay the interest to the separate use of R., and that the same should remain during her life, under the direction of the said trustees, as a provision for her, and the interest of it given to her, on her personal appearance and receipt, at any bankers, was held by V. Ch. Cranworth not to be in restraint of anticipation, and that Mrs. R. could alien her life interest.

² In *Baggett v. Meux*, 1 Phill. 627, it was held that a court of equity would give effect to the clause against anticipation, whether the subject of the gift were real or personal estate, and whether in fee or for life only; and see *Gaffee's Trust*, 14 Jur. 277; but see *Ins. Co. v. Bay*, 4 Comst. 11.

³ These decisions of the Vice-Chancellor of England (*Brown v. Bamford*; *Barrymore v. Ellis*), are now overruled; *Brown v. Bamford*, 1 Phill. 620, (on appeal) *Harnett v. McDougal*, 8 Beav. 188; *Moore v. Moore*, 1 Coll. 54; *Gaffee's Trust*, 14 Jur. 277; 1 Mac. & Gord. 541.

in default of appointment, may be effectually disposed of by her, unless the restriction be also expressly extended to that interest.(e)

The proviso, usually added in the declaration of trusts of this nature, that the receipts of the wife alone shall be good discharges to the trustees, may, if sufficiently worded, operate to extend the restriction against alienation to the whole of the wife's interest. But in the case of *Brown v. Bamford*,(f) it was laid down by the same learned judge, that in order to deprive the wife of her power of alienation, this proviso should express, "that the receipts of the lady under her own hand, to be given from time to time after the rent or dividends should have actually accrued due, should be, *and that no other receipts should be*, sufficient discharges to the trustees." In that case the trust was, according to the usual form, to pay the dividends, &c., unto such persons, &c., as the wife by any writing under her hand, *when and as the same should become due, but not by way of assignment, charge, or other anticipation thereof*, should notwithstanding coverture direct or appoint, and in default of appointment, *into her proper hands for her sole and separate use*; for which purpose it was declared, that her receipts should be good and sufficient discharges. And his Honor determined, according to the foregoing doctrine, that the restraint against anticipation applied to the power of appointment *only*, and as there were no negative words in the receipt clause, the wife's power of disposition was not curtailed, and a charge created by her on her separate interest was consequently valid.(g)

Again, as the converse of the last proposition, it has been decided by the same learned judge, that if the *power of appointment* be given generally to the wife without any express restriction against alienation, but that restriction is attached in terms only to *the interest given her in default of appointment*, she will be competent to alienate by the exercise of her power.(h)

It has been also held, that the construction now under discussion, will be adopted equally whether the trust be created by deed or will.(i)

This construction, which was introduced by the decision in *Brown v. Bamford*, *has not met with the universal approbation of the [424] profession; and the decision of the Vice-Chancellor K. Bruce, in *Moore v. Moore*,(k) cannot easily be reconciled with those of the Vice-Chancellor of England in *Barrymore v. Ellis*, and *Brown v. Bamford*.

In the late case of *Harrop v. Heaward*,(l) before Vice-Chancellor Wigram, there was a trust for the separate use of a married woman,

(e) *Barrymore v. Ellis*, 8 Sim. 1; (h) *Medley v. Horton*, 8 Jur. 853, 14 *Brown v. Bamford*, 11 Sim. 127. Sim. 422.

(f) 11 Sim. 127, 131.

(i) *Brown v. Bamford*, 11 Sim. 127.

(g) *Brown v. Bamford*, 11 Sim. 127.

(k) 1 Coll. 54.

(l) 3 Hare, 624.

with a clause prohibiting anticipation; the prohibitory clause seems to have applied to the interest, in default of exercising the power, as well as to the power itself. But there *were no such negative words* in the subsequent receipt clause, as the Vice-Chancellor of England stated in *Brown v. Bamford* to be requisite. However, his Honor supported the validity of the restraint against alienation upon the trust so framed, and held, that the absence of the negative words in the receipt clause would not control or negative the prohibition previously imposed. In this state of the authorities, the decision of a superior tribunal is requisite to reconcile the conflicting decisions of the several branches of the court.¹

It is almost needless to remark, that a married woman, who is restrained from anticipation, cannot effectually charge her separate estate with the payment of her debts.(m)

Where a married woman is not restrained from alienating her separate estate, it has been already stated that she will have the power of absolutely disposing of it. She will also have, the same power to make a *partial* disposition by charging or incumbering it.(n) And it has been determined that even a mere general personal security—such as a bond, or promissory note, or bill of exchange—executed by a married woman, will operate *prima facie* as an appointment or charge on her separate estate. For she must have meant such a security to operate in some way, and it could have no operation, unless it charged her separate property.(o)²

(m) *Barnet v. M'Dowall*, Rolls, 27th Feb. 1845, [sub. nom., *Harnett v. McDougall*, 8 Beav. 188; but see the remarks in *Clarke v. Windham*, 12 Alab. 800.]

(n) *Hulme v. Tenant*, 1 Bro. C. C. 16, 20; *Wagstaff v. Smith*, 9 Ves. 521; *Power v. Bailey*, 1 Ball & B. 49; *Essex v. Atkins*, 14 Ves. 542.

(o) *Standford v. Marshall*, 2 Atk. 69; *Norton v. Turville*, 2 P. Wms. 144; *Hulme v. Tenant*, 1 Bro. C. C. 20; *Heatley v. Thomas*, 15 Ves. 596; *Bulpin v. Clarke*, 17 Ves. 365; *Stuart v. Lord Kirkwall*, 3 Mad. 387; *Murray v. Barlee*, 4 Sim. 82; S. C. 3 M. & K. 209.

¹ See ante, 423, note.

² See ante, 421, as to the general rule in the United States, with regard to the power of a *feme covert* over her separate estate. In those States where such power exists, charges of debts, being in the nature of an appointment, are upheld. In New York, however (before the construction of the Rev. Statutes referred to), the English cases cited in the text, have not been so closely followed. The doctrine there was, that a general personal debt of a married woman was not a charge; but that there must be some reference to the separate estate, or the debt be contracted for the benefit of, or on the credit thereof. *N. A. Coal Co. v. Dyott*, 7 Paige, 14; *Gardner v. Gardner*, Id. 112; *Cumming v. Pollock*, 1 Sandf. Ch. 17; *Curtis v. Engel*, 2 Sandf. Ch. 287; though see *Vanderheyden v. Mallory*, 1 Comst. 462. In *Vanderheyden v. Mallory*, p. 453, it was held that a married woman's debt, contracted when sole, did not become a charge on her separate estate by her husband's bankruptcy. So also in Mississippi and Kentucky. *Coleman v. Woolley*,

Where the absolute beneficial interest in a trust fund is given to the separate use of a *feme*, without any restriction as to the mode of possession or enjoyment, she is entitled to require an immediate transfer of the legal interest to herself from the trustees. And if the trustees drive her to file a bill by their refusal to make the transfer, the decree will be made against them with costs.^(p) And it is immaterial that the *feme* was single when the trust was created, and had married subsequently, and that the refusal of the trustees was *bona fide*, and proceeded from their unwillingness to put the fund in the power of the husband.^(q)

In a suit by a married woman against her trustees to obtain a conveyance or transfer of her separate estate, it is not necessary to prove the marriage.^(r)

[*425] *The husband must be joined as a defendant to any suit, instituted by the wife respecting her separate estate.^(s)

The concurrence of the trustees is not necessary to give validity to any disposition by a married woman of her separate estate, unless it be made requisite by the terms of the settlement.^(t)

And the trustees will be compelled to give legal effect to any such disposition, upon a bill filed for that purpose, although they may have given notice to the party taking under it, that they would not act upon it.^(u) Nor is it any objection to the transaction, that it is entirely for the benefit of the husband.^(x)¹ And a direct gift from

(p) Thorby v. Yates, 1 N. C. C. 438.

(q) Ibid. sed vide Taylor v. Glanville, 3 Madd. 179.

(r) Thorby v. Yates, 1 N. C. C. 438.

(s) Thorby v. Yates, 1 N. C. C. 438.

[Bradley v. Emerson, 7 Verm. 369;

Clarkson v. De Peyster, 3 Paige, 336;

Dewalt v. Covenhoven, 5 Paige, 507;

Grant v. Van Covenhoven, 9 Paige, 255;

Stuart v. Kissam, 2 Barb. S. C. 493;

Sherman v. Burnham, 6 Barb. S. C. 453;

Wilson v. Wilson, 6 Ired. Eq. 236.]

(t) Grigby v. Cox, 1 Ves. 518; Essex

v. Atkins, 14 Ves. 552, 7. [Coryell v.

Dunton, 7 Barr, 532.]

(u) Essex v. Atkins, 14 Ves. 542.

(x) Standford v. Marshall, 2 Atk. 69;

Parkes v. White, 11 Ves. 209; Essex v.

Atkins, 14 Ves. 542. [See Hughes v.

Wells, 13 Engl. L. & Eq. 400.]

10 B. Monr. 320; Dickson v. Miller, 11 Sm. & M. 594. And in North Carolina. Frazier v. Brownlow, 3 Ired. Eq. 237. But in Alabama, the English cases in text are followed. Bradford v. Greenway, 17 Alab. 685; Collins v. Ladenberg, 19 Id. 685. So in Missouri. Coats v. Robinson, 10 Missouri, 757. In New York, it appears that the *feme* cannot any longer charge her estate by way of anticipation, but there, and in South Carolina, where the strict doctrine is in general held, the trust estate is liable for debts contracted on its account and for its use. Noyes v. Blakeman, 3 Sandf. S. C. 531; Montgomery v. Everleigh, 1 McCord, Ch. 267; Maywood v. Patterson, 1 Hill's Eq. 225. See, in Pennsylvania, Wallace v. Costen, 9 Watts, 137. And see note to Hulme v. Tennant, ut supr.; Story's Eq. § 1400.

¹ Though a court of equity looks with jealousy and suspicion at gifts from wife to husband, yet they will be supported if done freely and voluntarily. Dallam v. Wampole, 1 Pet. Cir. Ct. 114; Nedby v. Nedby, 11 Engl. L. & Eq. 106; Jaques v. Methodist Church, 17 John. R. 548; Whitall v. Clark, 2 Edw. Ch. 149; Cruger v.

the wife to the husband himself will be supported; (y) although the court looks with some jealousy on such a transaction, and if there be any improper influence exercised by the husband, it will refuse to give effect to it; (z) and if necessary an inquiry will be directed as to the circumstances under which the instrument was executed by the wife. (a)

Where a married woman is resident with her husband, and suffers him without objection to receive the income of her separate estate, or to appropriate any annual payments, such as pin-money, directed to be made to her, it will be intended, that these payments were made to, or appropriated by, the husband with her consent. Consequently, even as against *the husband*, the wife or her representatives will not be entitled to an account for any more than one year's arrears. (b) Indeed, in the case of pin-money it has been decided, that the wife's representatives can have no account of arrears *at all* against the husband, even for a year. (c) And it is immaterial that the wife is *non compos mentis*, and therefore incapable of assenting or dissenting from the payments in question. (d) It is clear, therefore, that *the trustees*, by whom these payments were made or sanctioned, would not be liable to account to the wife or her representatives for any arrears of her income received by the husband, at any rate farther back than the last year; and there is no instance of the relief even to this extent being granted as against *trustees*, whatever might be the equity as against the *husband*, by whom the money was received. However, in every case it would doubtless be advisable for the trustees to obtain from the wife an express direction, authorizing the payment of her separate income to her husband.

Where a wife has allowed her husband to receive the income of her separate estate during his life without objection or interference,

(y) *Freeman v. More*, 1 Bro. P. C. 237; *Frederick v. Hatwell*, 1 Cox, 193; *Peacock v. Monk*, 2 Ves. 190; *Brodie v. Barry*, 2 Ves. & B. 36; *Thrupp v. Harman*, 3 M. & K. 513. [See *Methodist Ch. v. Jaques*, 3 J. C. R. 77; *McGlensey's App.*, 14 S. & R. 64; *Moore v. Ferguson*, 2 Munf. 421.]

(z) *Milnes v. Busk*, 2 Ves. jun. 488. (a) *Pybus v. Smith*, 1 Ves. jun. 189. [Nedby v. Nedby, 11 Engl. L. & Eq. 106.]

(b) *Powell v. Hankey*, 2 P. Wms. 82; *Square v. Dean*, 4 Bro. C. C. 326; *Fowler v. Fowler*, 3 P. Wms. 355; *Ex parte Elder*, 2 Mad. 286, n.; *Smith v. Camelford*, 2 Ves. jun. 698; *Aston v. Aston*, 1 Ves. 167; *Parkes v. White*, 11 Ves. 225; (c) *Howard v. Digby*, 8 Bligh. N. P. 224, 246; S. C. 4 Sim. 588; 2 Cl. & Fin. 665.

(d) *Howard v. Digby*, ubi supra; *sed vide Nettleship v. Nettleship*, 10 Sim. 236. [See, however, the remarks on this case in *Sugden's Law of Prop.* 165, &c.]

Cruger, 5 Barb. S. C. 225; *Hoover v. Samaritan Soc.*, 4 Wh. 445; *Meriam v. Harson*, 2 Barb. Ch. 232. But the mere concurrence of a wife in her husband's receipt of a legacy is not a gift to him. *Rowe v. Rowe*, 2 De G. & Sm. 294; 12 Jur. 909.

it will be presumed, that the fund was placed by her at his absolute disposal; and all past accumulations from that source will belong to him absolutely, and go to his personal representatives at his death.(e)¹

[*426] *As the right of the husband to receive his wife's separate income rests solely on her implied assent, it follows, that the trustees would not be justified in making any payment to the husband, where he lives apart from his wife.(f) Still less where they

(e) *Ld. Beresford v. Archb. of Armagh*, *Ridout*, 1 Mac. & G. 519; 2 H. & Tw. 13 Law Journ. N. S., *Chanc.* 235; *S. C.* 55.]
 8 Jur. 262; [13 Sim. 643; *Caton v.* (f) *Aston v. Aston*, 1 Ves. 267.

¹ It is well settled that where a wife living with her husband permits him to receive the rents and profits of her separate estate, the presumption is that it is with her assent, and by way of gift. *McGlensey's App.*, 14 S. & R. 64; *Tower v. Hagner*, 3 Wharton, 48; *Naglee v. Ingersoll*, 7 Barr, 204; *Yardley v. Raub*, 5 Whart. 123; *Methodist Ch. v. Jaques*, 3 J. C. R. 77. So where the income is laid out in goods, which are placed in a store managed by the husband, *McGlensey's App.*, 14 S. & R. 64; or in furniture, which is mixed with his, *Shirley v. Shirley*, 9 Paige, 363. But if there be an express understanding that the furniture is to be kept separate and held for the wife (*Taggard v. Talcott*, 2 Edw. Ch. 628; see *Shirley v. Shirley*, ut supr.), or the goods or furniture be taken in the name of the wife's trustees (*Yardley v. Raub*, 5 Wharton, 117), it is otherwise, and such property cannot be levied on by the husband's creditors. Where there has been no gift, actual or constructive, to the husband, it is held at law, in England, that the income when paid over to the wife, becomes the absolute property of the husband, *Tugman v. Hopkins*, 4 Man. & Gr. 389; *Carne v. Brice*, 7 M. & W. 183; *Messenger v. Clarke*, 5 Excheq. R. 388; *Bird v. Pegrum*, 22 L. J., C. P. 166; 17 Jur. 577; and where lent by her, may be recovered by the husband, *jure mariti*. *Bird v. Pegrum*; *Messenger v. Clarke*, ut supr. But in a court of equity it would unquestionably be different, see *Macqueen Husb. & Wife*, 289. The accumulations or savings of the separate estate, or purchases with them, belong to the wife, and are subject to the same rules as the principal. *Gore v. Knight*, 2 Vern. 535; *Churchill v. Dibbin*, 9 Sim. 457, note; 3 Keny. Cas. 85; *Moloney v. Kennedy*, 10 Sim. 254; *Messenger v. Clarke*, 5 Exch. 392, 393; *Bird v. Pegrum*, ut supr.; though in *Churchill v. Dibbin*, ut supr., it was held that she had no power of disposition over *real estate* purchased with her separate property. The rule is the same in the United States. *Merrit v. Lyon*, 3 Barb. S. C. 110; *Hort v. Sorrell*, 11 Alab. 386; *Kee v. Vossler*, 2 Ired. Eq. 553; *Rogers v. Fales*, 5 Barr, 154; *Yardley v. Raub*, 5 Whart. 123; *Towers v. Hagner*, 3 Whart. 57; *Young v. Jones*, 9 Hump. 551.

Where the separate use is given for life, and the wife dies without disposing of her property, there being no limitation in default of appointment, the husband, if it be personal estate, will be entitled to it absolutely, and the trust falls to the ground. *Molony v. Kennedy*, 10 Sim. 254; *Johnston v. Lumb*, 15 Id. 308; *Proudeley v. Fielden*, 2 Myl. & K. 57; *Stead v. Clay*, 1 Sim. 294; *Drury v. Scott*, 4 Y. & Coll. Ex. 264; *Bird v. Pegrum*, ut supr.; *Stewart v. Stewart*, 7 John. Ch. 229; *McKennan v. Phillips*, 6 Whart. 576; *Brown v. Brown*, 6 Hump. 197. The same principle has been applied, in New York, to the separate estate created by the Married Woman's Acts of 1848, 1849. *McClosker v. Golden*, 1 Bradf. Surr. R. 64.

have received any notice from the wife, interdicting such an application of her funds.(g)

Deeds of separation between husband and wife, providing a separate maintenance for her, are, to a certain extent, valid at law.(h) And although the agreement to live separate will not be specifically enforced in equity, as being contrary to the policy of the law,(i)¹ yet

(g) See *Ridout v. Lewis*, 1 Atk. 269; 341. [Affirmed, 1 Cl. & Fin. 101; 4 *Thrupp v. Harman*, 3 M. & K. 516; Ba- Mann. & Gr. 1104.]
 got v. Bagot, 10 Law Journ. N.S. Chanc. (i) *Head v. Head*, 3 Atk. 550; *Wilkes*
 116. v. *Wilkes*, 2 Dick. 791; *Worrall v. Wor-*

(h) *Jones v. Waite*, 5 Bing. N. C. rall, 3 Mer. 268.

¹ The law on this subject has been considerably modified in England, by the case of *Wilson v. Wilson*, 1 House of Lords Cases, 538; affirming S. C. 14 Sim. 405, where it was held, that the Court of Chancery, in the exercise of its ordinary jurisdiction, can decree specific performance of articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon. In this case, the husband, in order to stop proceedings in the ecclesiastical court for nullity of marriage on the ground of his impotency, entered into articles of separation. The wife subsequently applied by bill for execution of a deed carrying the articles into effect, which was decreed, and the husband restrained by injunction from further proceeding in the ecclesiastical court to compel his wife to continue the suit. It seems, that the wife would also have been restrained, had it been necessary. This case appears to cover the whole ground, and to authorize the interference of equity in all cases, and not merely in the enforcement of the separate provision. Accordingly, in *Sanders v. Rodway*, 13 Eng. L. & Eq. 463, where a husband entered into a deed of separation, in which he covenanted, that he would permit his wife to live separate from him, and would not molest her, nor visit her without her consent, an injunction was granted, to restrain him from breaking the covenant; see the terms of the injunction in this case, which are very stringent. And in *Green v. Green*, 5 Hare, 400, note, a similar injunction was granted.

In the United States, it appears to be still held, that equity will not decree specific performance of such articles; though, when executed, it will enforce the collateral engagements with the trustees. *Champlin v. Champlin*, 1 Hoff. Ch. 55; *Mansfield v. Mansfield*, Wright, Ohio, 284; *Hutton v. Duey*, 3 Barr, 100; *Simpson v. Simpson*, 4 Dana, 140; *Rogers v. Rogers*, 4 Paige, 518; *Carter v. Carter*, 14 Sm. & M. 59; *M'Kennan v. Phillips*, 6 Wharton, 571; *McCrocklin v. McCrocklin*, 2 B. Monr. 370; *Read v. Beazley*, 1 Blackf. 77; 2 Kent's Comm. 176; see *Mercein v. People*, 25 Wend. 77. Such a deed is no bar to a divorce; *Anderson v. Anderson*, 1 Edw. Ch. 380; nor to a claim for alimony. *Miller v. Miller*, Saxton, 386.

It has been generally ruled, that the intervention of a trustee was necessary to validate deeds of separation. *Bettle v. Wilson*, 14 Ohio, 257; *Carson v. Murray*, 3 Paige, 483; *Tonney v. Sinclair*, 3 How. Miss. 324; *Watkins v. Watkins*, 7 Yerg. 283; *Simpson v. Simpson*, 4 Dana, 140; *Carter v. Carter*, 14 Sm. & M. 59; see 2 Kent's Comm. 176. But in *Hutton v. Duey*, 2 Barr, 100, an agreement for immediate separation, without the intervention of a trustee, having been acted on, was supported; so (apparently) in *Pickett v. Johns*, 1 Dev. Eq. 123.

As to the subsequent discharge of the articles, see *Heyer v. Burger*, 1 Hoff. Ch. 1; *Ratcliff v. Huntley*, 4 Ired. R. 545; *Huntley v. Huntley*, 6 Ired. Eq. 514.

it has been settled, not without some seeming anomaly of principle, that the court will decree a specific execution of the separate provision made for the wife in the event of separation.^(k)

It seems to have been considered by Lord Eldon in the case of *St. John v. St. John*,^(l) that the intervention of a trustee for the wife was essential, in order to give validity to any provisions for her separate maintenance; and this appears, also, to have been the opinion of Lord Loughborough in the previous case of *Legard v. Johnson*.^(m) But decisions are not wanting, in which the court has enforced the provisions of a deed of separation, which was made between the husband and wife, only without the interposition of a trustee.⁽ⁿ⁾ And in the recent case of *Frampton v. Frampton*,^(o) the Master of the Rolls (Lord Langdale), appears to have been disposed to recognise the validity of a trust for the wife in such a deed without any trustee.^(p)

However, it is unquestionably more convenient and proper, in cases of separation, that trustees should be appointed, by whom the provisions for the wife's separate maintenance may be enforced. And where, as is usually the case, the trustees, in consideration of the separate provision covenant to indemnify the husband against the wife's debts, or her other claims on his property, that will create a valuable consideration, and will support the transaction even against the husband's creditors.^(q)

But the absence of such a covenant on the part of the trustees, will not invalidate the deed, which, notwithstanding such an omission, will be binding on the husband himself;^(r) although, for want of a proper consideration, it would not hold good against his creditors.^(s)

It is to be observed, however, that if the provision for the wife

- (k) *Guth v. Guth*, 3 Bro. C. C. 614; *Barr*, 100; *Read v. Beazley*, 1 Blackf. 97; *Lord St. John v. Lady St. John*, 11 Ves. 526; *Pickett v. Johns*, 1 Dev. Eq. 123.]
 526; *Worrall v. Jacob*, 3 Mer. 256; (l) 11 Ves. 526.
Westmeath v. Westmeath, Jac. 126; (m) 3 Ves. 359; and see *Worrall v. Jacob*, 3 Mer. 268.
Westmeath v. Salisbury, 5 Bligh, 375; (n) *More v. Ellis*, Bunb. 205; *Guth v. Guth*, 3 Bro. C. C. 614.
Hoare v. Hoare, 2 Ridg. P. C. 268; *Wilson v. Wilson*, V. C. E. 12 Feb. 1845. (o) 4 Beav. 294.
 [14 Sim. 405, aff. Dom. Proc., see Sugd. Law of Prop. 179, '80.] *Elworthy v. Bird*, 2 S. & St. 372; *Frampton v. Frampton*, 4 Beav. 287; see *Jones v. Waite*, 5 N. C. 341 [affirmed, 1 Cl. & Fin. 101]; *4 Mann. & Gr. 1104*; *Cooke v. Wiggins*, 10 Ves. 191; *Seeling v. Crawley*, 2 Vern. 386; *Angier v. Angier*, Gilb. Eq. Rep. 142; *Prec. Ch. 496*; *Fletcher v. Fletcher*, 2 Cox, 109. [Battle v. Wilson, 14 Ohio, 257; *Hutton v. Duey*, 3 (p) See 2 Rop. Husb. and Wife, 292.
 (q) *Stephens v. Olive*, 2 Bro. C. C. 90; *Compton v. Collinson*, Ibid. 38; *Worrall v. Jacob*, 3 Mer. 256; *Elworthy v. Bird*, 2 S. & St. 381.
 (r) *Fitzer v. Fitzer*, 2 Atk. 511; *Westmeath v. Westmeath*, Jac. 126; *Frampton v. Frampton*, 4 Beav. 287. [Read v. Beazley, 1 Blackf. 98.]
 (s) Ibid.

still rested in *agreement* on the part of the husband, and there were no covenant by *the trustees, or other valuable consideration, [*427] to support the agreement, it would be a mere *nudum pactum*, which could not be enforced in equity.(*t*) But if the trust for the wife be actually created, it is by no means essential that the instrument should be formally executed as a deed.(*u*)

It was at one time considered, that provisions for the separate maintenance of a married woman in case of any *future* separation, might be enforced.(*x*) This doctrine, however, is now clearly overruled, and it is settled, that the agreement must be for an *immediate* separation.(*y*)

A covenant by the husband for the payment of an annuity to the wife in case of *any separation* between them, is within this principle, and cannot be enforced.(*z*)¹

In these cases, if a bond or covenant be entered into by the husband, with a trustee for the wife to secure her separate provision, the trustee is, of course, the party to sue on the instrument at law for the wife's benefit. But, if he refuse to act without an indemnity, a bill may be filed by the wife by her next friend against the husband and the trustee for the payment of the amount secured. And in such a case, though there is a decree for the plaintiff, the trustee will be entitled to his costs, to be paid by the husband.(*a*)

Where property is vested by a separation deed in trustees for the benefit of the wife, she will not have the same equitable power of disposing of this interest, as in the case of property secured *to her separate use*, but she will take it with all the disabilities of coverture: consequently, any assignment, or charge, or other disposition executed by her, will be merely void, and must be wholly disregarded by the trustees.(*b*)

It is the duty of trustees for a *feme covert*, to protect her interests against her husband; and if, in neglect of that duty, they

(*t*) *Elworthy v. Bird*, 2 S. & St. 372. [See, however, *Wilson v. Wilson*, 14 Sim. 405, aff. 1 H. Lds. Cases, 538; *Sugd. Law of Pr.* 179.]

(*u*) *Elworthy v. Bird*, ubi supra; *Angier v. Angier*, Prec. Chan. 496; *Head v. Head*, 3 Atk. 54.

(*x*) *Rodney v. Chambers*, 2 East, 297; *Hoare v. Hoare*, 2 Ridg. P. C. 268; *Chambers v. Caulfield*, 6 East, 244.

(*y*) *Titley v. Durant*, 7 Price, 577; *Hobbs v. Hull*, 1 Cox, 445; *Westmeath v. Westmeath*, Jac. 142. [*Aff. Dom. Proc.*, *Sugd. L. of Pr.* 178.]

(*z*) *Cocksedge v. Cocksedge*, 8 Jur. 659, [5 Hare, 397.]

(*a*) *Cooke v. Wiggins*, 10 Ves. 191; see *Seagrave v. Seagrave*, 13 Ves. 439.

(*b*) *Hyde v. Price*, 3 Ves. 437.

¹ But in *Waring v. Waring*, 10 B. Monr. 331, it was held, that a deed poll in these words, "If my wife M. and myself should ever part, or be separated, or divorced, I will account to her and her heirs for all such advances as may be made to her by her father, F. H.; and in the mean time they are to be kept to her separate use and control," was good.

assist the husband in excluding her from the receipt of her property, and refuse to pay and dispose of her income according to her directions, they will be decreed to pay the costs of a suit, instituted by her to obtain redress.(c)

Where property, *belonging to the husband*, or of which *he is the purchaser*, by settlement, is vested in trustees, in trust to pay the income to the husband *and wife jointly*, during their joint lives, the husband alone will be entitled to receive the whole income.(d) And he will be equally so entitled, although he has obtained a separation and divorce, *a mensa et thoro*, from his wife for adultery, and although the wife has no other means of subsistence.(e) But it would be otherwise where the separation is occasioned by the misconduct of the husband.(f)

But if the property *of the wife* were subject to a similar trust, the husband *would not be entitled to the *whole*, although the [*428] wife were guilty of adultery, and separated from him.(g)

And where the wife is entitled to a provision by virtue of a *contract*, whether contained in marriage articles, or in a covenant or deed of settlement, it is clearly settled, that the trust may be enforced in her favor, notwithstanding her adultery, and although she may be living apart from her husband.(h) And a suit by the trustees against the husband for that purpose may be sustained.(i)

IX.—OF TRUSTEES OF FREEHOLDS.

The powers and duties of trustees of freehold estates have necessarily been in a great measure discussed by anticipation in some of the previous chapters of this work; but it will be convenient here to throw together a few of the most obvious remarks on this subject.

As the owner of the legal estate alone can be recognised in a court of law, it is one of the primary duties of the trustee of freehold estates, to maintain and defend all such actions at law, as are requisite for the assertion or protection of the title.(k)

There has been already occasion to consider the right of trustees to the custody of the title-deeds;(l) and we have seen, that the trustees, having the legal estate, are entitled in general to the custody of the deed of settled property, for the benefit of all the parties benefi-

(c) Bagot v. Bagot, 10 Law Journ. N. 270; Blount v. Winter, Ib. 277, n.; S., Chanc. 116. Moore v. Moore, 1 Atk. 276; Seagrave

(d) Duncan v. Campbell, 12 Sim. 616. v. Seagrave, 13 Ves. 439.

(e) Duncan v. Campbell, ubi supra. (i) Blount v. Winter, 3 P. Wms.

(f) See Duncan v. Campbell, 12 Sim. 277, n.; Moore v. Moore, 1 Atk. 276.

(g) Ball v. Montgomery, 4 Bro. C. C. Pt. II. Ch. III., page 272, and note.

339; S. C. 1 Ves. jun. 191. (l) Ante, Pt. II. Ch. III., and Pl. VI.

(h) Sidney v. Sidney, 3 P. Wms. of this Section, page 272, 284, and note.

cially interested.(m) And that it will even be a breach of their duty to suffer the equitable tenant for life to obtain possession of the deeds.(n) Although the court will not suffer this right to be abused by the trustees for the mere purpose of annoying or controlling the tenant for life, but will order the deeds into court, where such a spirit is shown.(o) A mere dry trustee of course cannot retain the title-deeds against the beneficial owner.

The rights of the trustees to the possession and management of the settled estate, have also been discussed, and we have seen, that that question will be governed materially by the nature of the property, and of the powers and duties which the trustees are called upon to exercise.(p)

Where the trustees are directed to pay annuities or make any other periodical payments out of the estate, it is essential to the due discharge of the trust, that they should have the power of rendering the property productive by leasing it; and in the absence of any express power, there can be little question but that the trustees with such duties to perform would take an implied power to grant leases at rack rent under the ordinary terms and provisions, regard being had to the nature of the property and the custom of the country. Thus in a case, where real estate was devised to trustees to pay certain life annuities, and subject thereto in trust for certain *individuals for life with remainder over, it was held by Sir J. [429] Leach, M. R., that the trustees were able to grant valid leases for ten years.(q) However, there can be no question, but that the trustees would not be justified in leasing for any term of unusual length, as on building leases, or at any other than rack rent, unless they are expressly authorized to do so by the trust instrument. Where no such payments are to be made by the trustees, their power to grant leases is at least very questionable, and could rarely be exercised with any safety.

If the annuities or other payments, which it is the object of the trust to secure, are not duly paid by the person, who is for the time being beneficially entitled subject to those payments, it will be the duty of the trustees to enter into possession of the profits of the estate, by giving notice to the tenants to pay their rents to them.(r) And where the general duties imposed on the trustees require them to be in the actual possession and management of the property, as where

(m) *Doe v. Passingham*, 6 B. & Cr. 305; *Barclay v. Collett*, 4 N. C. 650; *Duncombe v. Mayer*, 8 Ves. 320.

(n) *Evan v. Bicknell*, 6 Ves. 174; see *Meaux v. Bell*, 1 Hare, 82, 98.

(o) See *Denton v. Denton*, 8 Jur. 388. [7 Beav. 388.]

(p) Ante, Pt. II. Ch. III.; and Pl. VI. of this section.

(q) *Naylor v. Arnitt*, 1 R. & M. 501.

(r) *Jenkins v. Milford*, 1 J. & W. 629.

they are required to exercise a general supervision, and to insure, &c., they will be entitled to retain the possession and management to the exclusion of the equitable tenant for life.(s) But if there are no such duties, and the annuities, &c., are regularly paid by the tenant for life, the trustees will not be allowed to disturb him in the receipt of the rents and the management of the estate; especially where they have acquiesced in his having the management and possession for several years.(t)

Trustees, *who are invested with general powers of management*, will be justified in laying out money in the repairs and improvement of the property, such as draining, building farm-houses, &c., manuring, and other similar works.(u) But without any general authority, or a special power, they would run the risk of having the payments disallowed, if they ventured to make such an application of trust funds.(x)¹

And the position and capacity of the *cestui que trusts* will constitute another ingredient for consideration, in determining the nature and extent of the authority of the trustees. For instance, where the estate is held in trust for a *feme covert* or for infants, who are incapable of acting for themselves, the power of management and

(s) Tidd v. Lister, 5 Mad. 433.

337; Bowes v. Earl of Strathmore, 8 Jurist, 92.

(t) Denton v. Denton, Rolls. 8 Jurist, 388. [7 Beav. 388.]

(x) Bowes v. Earl of Strathmore, ubi supra. [Wykoff v. Wykoff, 3 W. & S. 481; Green v. Winter, 1 J. C. R. 26.]

¹ Trustees are authorized to insure, and bound to pay taxes. Burr v. McEwen, 1 Baldw. C. C. 154. Where the trust was to sell the land and pay off incumbrances, &c., and to restore the residue, it was held that the trustee could not be allowed for improvements of the estate, though made *bonafide*, as in building houses, and mills, clearing lands, making roads, &c.; but that he was entitled only for necessary expenditures as repairs and the like. The purchase and sale of stock, hay, grain, and farming utensils will not be taken in account of such trust estate. Green v. Winter, 1 Johns. Ch. 26. In Cogswell v. Cogswell, 2 Edw. Ch. 231, where executors held the residuary real and personal property in trust for a contingent remainderman in fee, with remainder over on failure of the contingency, and two parcels of the land in trust for A. for life, it was held that they could not in the absence of any express power apply the residuary personal estate to the improvement of the one parcel, which remained in the same condition as when devised. But the other parcel in consequence of a municipal improvement had become capable of being leased for a permanent term at a high rent, if warehouses were erected thereon, and the court directed or permitted the executors to apply the residuary personal property to the erection of warehouses on the land, charging the tenant for life with 6 per cent. interest on the investment, a reasonable allowance for the depreciation of the buildings, and taxes and insurances, by way of deduction from the rents. See also L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 34; Amer v. Downing, 1 Bradf. Surr. R. 321; Wykoff v. Wykoff, 3 W. & S. 481; and as to improvements by guardians, ante 395, note.

control will necessarily devolve on the trustees for their protection and benefit.(y)

Where it is incumbent on the trustees to receive the rents either for the purpose of accumulation, or for any other purpose directed by the trust, they will be personally liable, if they suffer the tenants to fall into arrear, and a loss be thus occasioned to the estate.(z)¹

Where the tenant of an estate became insolvent, and the rent was considerably in arrear, a trustee has been held justified in releasing the debt, and even in giving a *bonus* in addition to get the tenant out, as it was for the benefit of the estate.(a)

X.—OF TRUSTEES OF COPYHOLDS.²

Prior to the passing of the late act for amendment of the Law of Forfeiture *and Escheat (4 & 5 Will. IV. c. 23), there appears to have been some risk in vesting copyhold property [*430] in a single trustee, or a small number of trustees. The lord of the manor was not bound by any trust, which he had not consented to, or recognised by entry on the rolls of the manor;(b) and stewards of manors would very rarely accept any surrender, in which the trusts were noticed. The consequence was, that in case of the death of the sole or last surviving trustee without heirs, or of his attainder or conviction for felony, the estate would have escheated to the lord discharged of the trust.(c) However, that risk is obviated by the act above mentioned, which expressly applies to copyhold as well as freehold property, and does away with the escheat or forfeiture in these cases. And it is also retrospective in its operation.

(y) *Tidd v. Leister*, 5 Mad. 433.

Leeds, 2 M. & K. 342; *Weaver v.*

(z) *Tebbs v. Carpenter*, 1 Mad. 290.

Maule, 2 R. & M. 97; ante, p. 50.

(a) *Blue v. Marshall*, 3 P. Wms. 381.

(c) *Peachy v. Duke of Somerset*, 1 Stra. 454; *Burgess v. Wheat*, ubi supra;

(b) *Chudleigh's case*, 1 Co. 122, a;

1 Scriven, Cop. 483, 3d ed.; Att.-Gen.

Burgess v. Wheate, 1 Sir W. Bl. 167; S. C. 1 Ed. 177; Att.-Gen. *v. Duke of*

v. Duke of Leeds, 2 M. & K. 342; ante, p. 50.

¹ A trustee letting a farm originally at a proper rent will not be held personally liable for the difference between that rent, and the rent which at a subsequent period of the tenancy might have been obtained, merely because he neglected to give notice to quit, a few months after there appeared to be a probability that the price of agricultural produce would enable him with propriety as between landlord and tenant to obtain a higher rent. *Ferraby v. Hobson*, 2 Phill. Ch. 255. The neglect must be very gross, and approximating to fraud to constitute such omission a breach of trust. *Ibid.* A trustee is not chargeable for not renting real estate, which was unproductive and unenclosed when it came into his hands, and when the object of the trust was sale and not renting. *Burr v. McEwen*, 1 Bald. C. C. 154; see *Griffin v. Macaulay*, 7 Gratt. 476.

² See the Act for the gradual Emancipation of Copyholds, of 1853.

On the other hand, in case of the death without heirs, or the attainder of the *cestui que trust*, there will be no equitable escheat in favor of the lord, but the trustees will hold for their own benefit discharged from the trust.(d) And although in such a case a court of equity will not interpose against the lord in favor of the heir of the trustee, who claims to be admitted,(e) yet a court of law will compel the lord to admit the heir, in order that he may try his title.(f) However, where the trusts *have been actually consented to by the lord, and are entered on the rolls of the manor*, it might possibly be a question, whether the lord might not have an equity to treat the trustee as holding for his benefit upon the failure of the *cestui que trusts*.(g)

The trustees in whom the legal estate is vested, are regarded by the lord as the real tenants for the performance of the feudal services. It follows, therefore, that the customary fines and heriots will become due on the alienation or death of trustees, and not of the *cestui que trusts*.(h) In case of there being several co-trustees, who are joint tenants, no heriot is due until the death of the last survivor.(i)

Where there is a large number of trustees, as frequently happens in charity cases, the following rule has been laid down for estimating the amount of the fine on admission, viz., to take for the second life half the sum taken for the first, and for the third, half of what was taken for the second, and so on.(k)

The amount of the fines and other expenses necessary for the preservation and continuance of the estate, must unquestionably be raised out of the *corpus* of the trust property. And this may be effected by sale or mortgage, if necessary, unless it appears from the trust instrument that such a mode of raising the requisite funds was not intended. This subject, and also the relative liabilities of the *cestui que trusts* for life and in remainder, *will be considered at length in discussing the analogous case of the renewal of leasehold interests.(l)

And so where the copyholds are for lives, the duty of the trustees to preserve the estate by continued renewals on the expiration of any of the lives, is precisely similar to that of trustees of leaseholds for lives, which will also be presently considered.(m)

Again, where the copyholder for the time being has the preference

(d) Ante, p. 269.

(i) Com. Dig. Copyhold, K. 24; 1

(e) Williams v. Lord Lonsdale, 3 Ves. 756.

Scriven, Cop. 447, 3d ed.

(f) Rex v. Coggan, 6 East, 431.

(k) Wilson v. Hoare, 2 B. & Ad. 350; 1 Scriven, Cop. 389, 3d ed.

(g) See 1 Scriven, Cop. 485, 3d ed.

(l) Vide post [Trustees of Leaseholds], And Playters v. Abbott, 2 M. & K. 97.

(h) Trin. Coll. v. Brown, 1 Vern. 441; Carr v. Ellison, 3 Atk. 73, 77; Earl of Bath v. Abney, 1 Dick. 260; 1 Scriv.

(m) Ibid.

Cop. 416, 3d ed.; ante, p. 269.

of renewing a copyhold held on lives, and a trustee of the copyhold puts in a new life for his own benefit, he will be held to take the renewed estate upon the original trusts, in the same manner as a trustee of leaseholds, who effects a renewal under similar circumstances.(n)

The court rolls are the title-deeds of copyholds, and a purchaser is only bound to look at them in his examination of the title.(o) Consequently, where the admission of trustees is absolute, without reference to any trust, it would be very much in their power to dispose of the property to a purchaser for valuable consideration, without the latter's receiving any notice of the trust. And in that case the title of the purchaser would prevail against that of the *cestui que trusts*. And this risk would be proportionably increased where there is only a single trustee. To obviate this danger, the admission should always notice, that the trustee is admitted on the trusts of the deed (stating the date and parties), or of the will, by which the trusts are created. Such a notice of the trust instrument will be quite sufficient, without stating the trusts at length; and a purchaser taking from the trustee, will in that case be affected with constructive notice of all the trusts contained in the instrument referred to.(p) Such a notice is also binding on any claim by the lord by escheat.(q) The stewards of manors very generally object to entering the particular trusts of an instrument on the rolls, upon the somewhat absurd ground that the lord would in that case be involved in any breach of trust committed by the trustee. But no such objection could possibly be made to admitting the notice of the trust instrument in the manner suggested above.

Where the trustees of copyhold property are not put into possession of the legal estate by admission, they should cause the instrument creating the trusts to be entered or noticed on the rolls of the manor, in order to protect their *cestui que trusts* from any improper disposition which the owner of the legal estate might otherwise have it in his power to make. Any loss occasioned by the neglect of this precaution, would in all probability be visited personally on the trustees.

Trustees ordinarily have no authority to effect an enfranchisement of copyholds, unless an express power for that purpose be conferred upon them by the trust instrument. For such an act would operate to change the nature of the estate, and would interfere with the relative interests of the persons beneficially entitled. However, by the recent act for facilitating the enfranchisement of copyholds,(r) in

(n) Ibid.

(o) Pearce v. Newlyn, 3 Mad. 188.

(p) Pearce v. Newlyn, 3 Mad. 186.

(q) Weaver v. Maule, 2 R. & M. 97.

(r) 4 & 5 Viet. c. 35.

case of the disability of any person beneficially interested in a copyhold, the trustees are empowered to proceed in enfranchising the property instead of the *cestui que trust*.

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*XI.—OF TRUSTEES OF LEASEHOLDS.

In discussing the duties of trustees for tenant for life, we have seen that where part of the settled property consists of leaseholds or other wasting securities, it is in general the duty of trustees to dispose of those perishable interests, and invest the proceeds in the three percents. for the benefit of all the *cestui que trusts* equally.(s)

However, it has been also stated, that the rule does not apply, where there is a *specific* gift of the leasehold or other perishable property; for then the tenant for life would be entitled to enjoy the income *in specie*, as long as it lasts;(t) the same rule applies to *settlements by deed* of similar property.

A trustee, in whom a leasehold interest becomes vested by devise or assignment, is liable as assignee to the performance of the covenants during the continuance of his interest. But unless he is also the executor of the lessee, or has bound himself by a personal covenant to the observance of the covenants in the lease, his liability will continue only as long as he retains possession; and upon the assignment of his interest, he will be exonerated from all responsibility,(u) excepting such as may have been already incurred by a breach of covenant committed during the continuance of his possession.(x) And in this respect a *trustee* differs materially from the *executor* of a lessee, who in respect of the privity of estate will continue liable to the lessor on the covenants in the lease notwithstanding his having assigned the lease.(y)(1)

A person, therefore, who is both executor and trustee, or a trustee only, who has bound himself personally to the performance of the covenants in a lease, will be entitled to an indemnity from the *cestui que trusts* of the rent and covenants, before he can be required to

(s) Ante, Pl. VI. of this section. 2 Ventr. 228; Taylor v. Shum, 1 Bos. & Pull. 21; Rowley v. Adams, 4 M. & Cr. 534; 1 Fonbl. Eq. 361, 2.

(t) Ibid.

(u) Onslow v. Corrie, 2 Mad. 330, (x) Trevele v. Coke, 1 Vern. 165.
340; see Valliant v. Diomede, 2 Atk. (y) Brett v. Cumberland, Cro. Jac. 546; Pitcher v. Toovey, 1 Salk. 81, and 521, 522; 2 Wms. Exors. 1074, et. seq.

(1) Where the leasehold interest is the source of loss to the trust estate, the rent being greater than the value, it is the duty of the trustees to get rid of the liability to pay the rent by assigning the lease, and they have been held personally responsible to the *cestui que trusts* for omitting to do so. Rowley v. Adams, 4 M. & Cr. 534.

assign over the legal estate.(z) And it is immaterial that the trustees may never have been in actual possession of the estate.(a)

It is still somewhat unsettled, how far it is incumbent on trustees of beneficial leases to renew them at the usual periods, where no positive trust to renew is contained in the trust instrument.(b)(1)

However, where a leasehold estate is settled in trust for life with remainders over, it will, in general, be intended, that the settlor must have regarded this as a continuing interest, which was to be preserved for the benefit *of all the objects of the trust includ- [*433] ing the remaindermen; and though there may be no express direction to renew, it will be the duty of the trustees to preserve the estate for the benefit of the parties in remainder by renewing at the usual periods.(c)

On the same principle where the trustees are invested with a discretionary power of renewing, they will not in the exercise of that discretion be permitted to destroy the estate confided to them by neglecting to renew. Thus in *Lord Milsington v. Mulgrave*,(d) it was provided by a settlement of leasehold estates held of the dean and canons of Windsor, that it *should be lawful* for the trustees from time to time, as occasion should require, *and as they should think proper*," during the continuance of the trusts, to apply for renewal, and to do their endeavors to renew the leases. Part of the trust estate consisted of a renewable leasehold for an original term of twenty-one years. The trustees neglected to renew this lease at the usual period for renewal, and there were only six years of the term to run. The bill was filed by the parties entitled in remainder after an estate for life, praying that the trustees might be directed to renew, and to pay the fines. A general demurrer to this bill was overruled by the Vice-Chancellor (Sir J. Leach). And upon the hearing on the merits, his Honor declared, that the tenant for life and the trustees must procure an immediate renewal to make up such a term as would have been then subsisting, if the renewal had been regularly made. "It could not be intended," said his Honor, "that

(z) *Simmons v. Bolland*, 3 Mer. Ves. 428; *White v. White*, 4 Ves. 33; 547; see *Marsh v. Wells*, 2 S. & St. 90. *Milsington v. Mulgrave*, 3 Mad. 491;

(a) *Cochrane v. Robinson*, 11 Sim. 5 Mad. 471; *Hulkes v. Barrow*, Tambl. 264; *Lock v. Lock*, 2 Vern. 666; Lord

(b) See *O'Ferrall v. O'Ferrall*, Rep. *Montfort v. Lord Cadogan*, 17 Ves. 448; temp. Plunk. 79; *Lawrence v. Maggs*, 19 Ves. 638.

1 Ed. 353. (d) *Milsington v. Mulgrave*, 3 Mad.

(c) *Verney v. Verney*, Ambl. 88, 1 491; S. C. 5 Mad. 471.

(1) Where an executory trust is created by marriage articles for the settlement of renewable leaseholds in strict settlement, the court in executing the articles will cause directions for renewal to be inserted. *Graham v. Lord Londonderry*, 3 Bro. C. C. 246, cited; *Pickering v. Vowels*, 1 Bro. C. C. 197.

the trustees should have a discretion, whether they would or would not renew. *They were appointed for the purpose of protecting future interests, and could not abandon them.* The expression 'it should be lawful for them,' meant only that it should be lawful as against the party in possession, and out of his rents and profits to pay the expenses of the renewal."^(e)¹

A fortiori the duty of renewal at the regular periods will be binding on trustees, where an *express trust* is created for that purpose.^(f)

But the trustees will not be liable for their neglect of an *express trust* to renew, where the trust *cannot be carried into effect owing to its illegality*:—as for instance, where certain rents of other property were directed to be accumulated by the trustees until the leaseholds to be renewed were nearly expired, and the trust was thus extended beyond the period allowed by the rules of law against perpetuity—it was held that the trustees could not renew in the manner directed by the trust, and therefore that they were not responsible for their neglect to make the renewal.^(g)

In the absence of any *express trust* to renew, this duty may be *implied* from any expressions used by the settlor, or from the general scope of the trust instrument. For instance where a testator devised a college lease to his wife for life with remainder to her son, and directed her to pay an annuity to the son *during her life*, it was considered that the testator **necessarily contemplated the con-*
[*434] *tinuance of the lease during the wife's life, and that she was therefore bound to renew.*^(h)²

(e) 5 Mad. 472.

238; *Bennett v. Colley*, 5 Sim. 181; 2

(f) *Montfort v. Cadogan*, 17 Ves. M. & K. 225.

485; 19 Ves. 635, and 2 Mer. 3; *Colegrave v. Manby*, 6 Mad. 72; 2 Russ,

(g) *Curtis v. Lukin*, 5 Beav. 147.

(h) *Lock v. Lock*, 2 Vern. 666.

¹ So in *Mortimer v. Watts*, 9 Eng. L. & Eq. 126, where leasehold premises, held for lives, were bequeathed to trustees on trust, out of the rents and profits to pay and perform the rent and covenants; and if *they thought it advantageous*, that they should endeavor to effect renewals of the subsisting leases, or any of them, as they *should think proper*; and if they in their discretion *should think fit or expedient*, but not necessarily or peremptorily, effect and keep on foot insurances on the lives of the *cestuis que vie*, or any of them, and should effect such insurances in such sums as in the opinion of the trustees should be sufficient to enable them whenever a life dropped to effect a renewal, and should set off the rents and profits, or by mortgage thereof, or of any part thereof, raise money to effect the renewal of the leases so often as advisable; it was held that it was the imperative duty of the trustees to renew if reasonable terms could be obtained; that they were not to sacrifice the tenants for life to those in reversion; that they had a discretion to exercise in order to keep the estate in its present condition; that the trustees had a discretion to raise money by insuring lives out of the rents and profits or by mortgage, and were bound to exercise that discretion.

² On a devise of successive interests in leases for lives or years, where the testator directs that the leases are from time to time to be renewed, without more,

And in a recent case, where leaseholds were devised to trustees in trust for A. for life, subject to the rents, &c., reserved and contained or *to be reserved and contained* in the present or future leases, and to all taxes, *fin*es, and expenses attending the premises; the duty of renewing the leases was held to be necessarily implied by those directions.⁽ⁱ⁾

Where a trust for renewal is clearly created, the trustees will be personally responsible to the *cestui que trusts* for any loss occasioned by their neglect to renew at the proper time. Thus if the lease be afterwards renewed by the remainderman at an increased fine, the trustees will be decreed to repay to the remainderman the amount of what he may have laid out in procuring the renewal,^(k) or if necessary they will be decreed to renew at their own expense for his benefit.^(l)

But if the tenant for life have enjoyed the benefit of the non-renewal by receiving the full amount of the rents and profits, during his life, the trustees in their turn will be entitled to recover from his personal estate the amount that they had been compelled to pay.^(m) And if there are two successive tenants for life, the proportions in which their respective estates will be liable to contribute to this re-

(i) *Hulkes v. Barrow*, Tambl. 264.

(k) *Montfort v. Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3. But if the fine so paid be unreasonable, it will be re-

ferred to the Master to settle a proper amount. *Colegrave v. Manby*, post.

(l) *Milsington v. Mulgrave*, 3 Mad. 491; 5 Mad. 472.

(m) 2 Mer. 3; 19 Ves. 635.

the fines and expenses of renewal are to be borne by the tenant for life and remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, and not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities.

There is no difference in the rule as to the apportionment of fines for renewal, between the devisees of successive interests in the estate, whether the leases are for lives or for years.

If the testator provides a specific fund for the renewal, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supersedes the general rule; but if trustees, having power to direct the manner in which the fines shall be raised, do not exercise the power, the court will pursue the general rule which would be adopted in the absence of any direction as to the manner of proceeding for fines.

Where the tenant for life pays the whole fine on renewal, he will have a lien on the estate for the proportion which shall ultimately appear to be chargeable on the remainderman, or parties entitled in succession, and where the remainderman renews, or the renewal is effected by means of a mortgage of the estate, the tenant for life may be required to give security to the remainderman for a proportionate part of the fine, calculated upon the assumed duration of the life interest; and if that interest should endure longer than such assumed period, he may be required to give further security, without prejudice, in either case to the actual amount, which, at the determination of his interest, shall appear to be his due proportion of the fine. *Jones v. Jones*, 5 Hare, 440; 10 Jur. 516; see *Stone v. Theed*, 5 Hare, 451, note (a).

payment to the trustees will depend, not on the duration of their respective possession, but on the proportions in which they would actually have suffered a diminution of income, in case the rents had been properly applied towards the renewal.(n)

However, a *purchaser* from the tenant for life is not liable to exonerate the trustees in such a case, though he purchased with notice of the settlement, unless the deed of assignment to him expressly noticed, that the interest of the tenant for life was subject to the trust for renewal.(o)

The same principle will be also applied, where a *tenant for life* of a beneficial lease is expressly directed to renew; and in such a case, if the tenant for life omit to renew at the regular period, and the expenses of the renewal be consequently borne by the remainderman; or *à fortiori* if the lease be lost by the neglect to renew, the party entitled in remainder will be entitled to compensation out of the estate of the tenant for life.(p)

But if the remainderman effect a renewal of the lease after the death of the tenant for life at an exorbitant and unreasonable fine, the estate of the tenant for life will not be bound by the amount which the remainderman may have chosen to pay, but it will be referred to the Master to determine on the reasonable amount which ought to have been paid for the renewal.(q) The same principle applies equally to trustees for renewal.

The lessor, however, is not compellable to renew, unless there is a covenant or undertaking on his part to that effect; although the [*435] tenant's *right of renewal is so generally acted upon by ecclesiastical and other corporations, that it has become an interest recognised by the court.¹ If, therefore, a renewal become impracticable, either from the direct refusal of the lessor, or from his demanding such terms as could not be conceded with benefit to the trust estate, the obligation to renew will no longer be incumbent on the trustees.(r)

However, in such a case, if there be an express trust for the renewal of the lease, the tenant for life will not be suffered to reap the exclusive benefit of the non-renewal: for the interest *minus* the expenses of renewal is all that is given him, and the remainderman will not be deprived of the benefit of this exception, which was expressly

(n) 2 Mer. 3.

(o) 19 Ves. 641.

(p) *Colegrave v. Manby*, 6 Mad. 72;

2 Russ. 238; *Bennett v. Colley*, 5 Sim. 181; and 2 M. & K. 225.

(q) *Colegrave v. Manby*, 6 Mad. 87;

S. C. 2 Russ. 238.

(r) *Colegrave v. Manby*, 6 Mad. 82,

83; *Tardiff v. Robinson*, *Ib.* 83, note.

¹ *Phyfe v. Wardell*, 5 Paige, 268, where such an interest was held to be the subject of a contract of sale. See *Monro v. Taylor*, 11 Engl. L. & Eq. 181.

reserved for his advantage out of the previous particular estate.(s) In those cases, therefore, where it is impracticable to renew, a sum equal to that usually paid on renewal should be raised by the trustees from the estate, and invested for the benefit of the *cestui que trusts* generally, including those entitled in remainder.(t)(1)

Where the trust is simply to renew the leases, when requisite, and no direction is given as to the mode in which the fine and other expenses of renewal are to be raised, it seems, that the trustees will take the power of selling or mortgaging the estate for that purpose.(u) And it has been decided, that a direction to raise the fine, &c., out of *the rents and profits*, will authorize a *sale or mortgage* by the trustees; for it will not be intended, that the testator meant to confine the fund for renewal to the *annual* rents and profits, unless that be expressly declared or necessarily implied by the will.(x)

And it is immaterial that the trust is expressed in the *alternative* to raise the requisite sum out of the rents and profits, *or* by sale or mortgage.(y)

But if the testator have expressly declared, that the expenses of renewal shall be raised out of the *annual* rents and profits, or if the intention so to confine the trust be otherwise sufficiently manifest, the trustees will be restricted to that fund only.(z)

In *Milles v. Milles*(a) the term "rents and profits" was considered to mean *annual* rents, from the circumstances of the estate, which was *usually renewed *every year*. So in *Stone v. Theed*,(b) a tes- [*436]
tator, after directing his trustees to renew the leases from

(s) *Colegrave v. Manby*, 6 Mad. 87; *Bennett v. Colley*, 2 M. & K. 231.

(t) *Colegrave v. Manby*, 2 Mad. 72; 2 Russ. 238; *Bennett v. Colley*, 5 Sim. 181; 2 M. & K. 225.

(u) See *Meynell v. Massey*, 2 Vern. 1; ante, Pl. IV. of this section. In *Allan v. Backhouse*, Sir Thos. Plumer puts trusts to raise portions, and renewal fines on the same footing. 2 Ves. & B. 75; see *Buckeridge v. Ingram*, 2 Ves. jun. 666; *Earl of Shaftesbury v. Marlborough*, 2 M. & K. 121.

(x) *Ivy v. Gilbert*, 2 P. Wms. 13; *Prec. Ch.* 583; *Allan v. Backhouse*, 2 V. & B. 65; *Jac.* 631; *Green v. Belcher*,

1 Atk. 505; but see *Shaftesbury v. Marlborough*, 2 M. & K. 121.

(y) *Playters v. Abbott*, 2 M. & K. 97, 103; *Greenwood v. Evans*, 4 Beav. 44; see *vide Garmstone v. Gaunt*, 9 Jurist, 78. [See *Mortimer v. Watts*, 9 Engl. L. & Eq. 126.]

(z) *Stone v. Theed*, 2 Bro. C. C. 243; *Milles v. Milles*, 6 Ves. 761; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 122; see *Anon.* 1 Vern. 104; *Allan v. Backhouse*, 2 V. & B. 77; *vide supra*, Pl. IV. of this Section, page 367, and p. 355.

(a) 6 Ves. 761.

(b) 2 Bro. C. C. 243.

(1) In *Tardiff v. Robinson*, which is stated in the note to 6 Mad. 83, a crown lease was settled in trust for one for life, and there was a trust to reserve a fund out of the rents for the purpose of renewal. The renewal of the lease became impracticable, and it was decided, that the trust of the reserved fund ceased for the sole benefit of the tenant for life. But this decision must be considered as overruled by the authorities cited in the text.

time to time, empowered them to invest the *overplus of the rents*, and it was held by Lord Thurlow, that the renewal expenses were to be raised out of the *annual* rents, on the ground that the direction as to the investment of the surplus rents showed that such was the testator's intention. In the late case of *Shaftesbury v. Duke of Marlborough*,^(c) a trust to renew out of the "rents, issues, and profits," was held by Sir J. Leach, M. R., to be confined to the "*annual rents*," on the authority of *Stone v. Theed* in opposition to *Allan v. Backhouse*.

In the recent case of *Garmstone v. Gaunt*, there was a devise of leaseholds for lives to trustees in trust to renew *by and out of the rents and profits*, OR OTHERWISE; and Vice-Chancellor Bruce was of opinion, that this trust authorized a mortgage, but not a sale, of the leaseholds, although the mortgagee might afterwards procure a sale.^(d)

On the whole, the effect of a trust to renew out of "rents and profits," generally is left in a very unsatisfactory state by the authorities, and can only be finally determined by future judicial decision.

Where the leases are *for lives*, and the settlor has created no express fund for their renewal, the court has sanctioned the plan of insuring the lives of the *cestui que vie* to an amount sufficient to cover the usual expense of renewing on the dropping of a life. And in such cases the annual premiums on the policy of insurance must be paid out of the income of the estate;^(e) (1) the trustees, therefore, would doubtless be justified in having recourse to this mode of effecting the renewal of their own authority; and it may be remarked, that it has one peculiar recommendation, viz., that of obviating the difficulty of adjusting the relative liabilities of the tenant for life, and remainderman to contribute to the expenses of the renewal.^(f)

The periods of renewal of leaseholds and copyholds held *on lives*, are necessarily uncertain: consequently the power of the trustees to raise the fines, &c., by sale or mortgage, will be more readily implied than where the trust estate consists of leaseholds for years. For, with respect to the latter, the times of renewal are known and certain, and the trustees may retain annually a portion of the rents from the tenant for life, in order to form a fund for renewal.^(g)

(c) 2 M. & K. 111, 121.

wood v. Evans, 4 Beav. 44; *sed vide*

(d) *Garmstone v. Gaunt*, 9 Jurist, 78.

Grantley v. Garthwaite, 6 Mad. 96.

[1 Coll. 581.]

(f) See *Greenwood v. Evans*, 4 Beav.

(e) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 124; *Green-*

46.

(g) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121.

(1) However, in one case, where the amount of the renewal fine was directed to be raised by sale or mortgage, Sir J. Leach, V. C., held that he had no authority to decree an insurance of the life of the *cestui que vie*, and a mortgage being impracticable, his Honor directed an absolute sale. *Grantley v. Garthwaite*, 6 Mad. 96.

It has also been held, that a *mortgage* for raising the required amount will be more proper than an absolute *sale*.^(h)

Where the amount of the renewal fine is raised out of the *corpus* of the estate, it frequently becomes a matter of considerable difficulty to *arrange the relative liabilities of the tenant for life, and in remainder to contribute to its discharge.⁽ⁱ⁾ The tenant [*437] for life is clearly bound to keep down the interest of this as of other charges,^(k) but the difficulty is to determine whether he is also bound to pay any, and if any, what proportion of the capital.

The old rule was, that the tenant for life should contribute one-third of the principal in addition to keeping down the interest.^(l) But this being considered unreasonable, was soon altered, and the doctrine of the court, both as to leaseholds for lives and for years, unless it be controlled by any direction of the settlor, now is, that the contribution of the tenant for life shall be in proportion to the benefit derived by him from the renewal; and it will be referred to the Master to ascertain and settle this proportion.^(m)¹

However, an exception to this rule has been established, where the lease is on lives, and *the tenant for life is himself one of the lives*, on which the lease depends. For in that case, it is obvious, that the tenant for life would derive no benefit from the renewal, and therefore he will not be liable to contribute to the expense of effecting it.⁽ⁿ⁾ Lord Hardwicke was of opinion that this exception would apply, whether the legal estate in the lease was vested directly in the tenant for life, or in trustees for him;^(o) although Lord Alvanley seems to have entertained some doubt on this latter point.^(p) But where there is an *express direction* by the settlor, that the leases should be constantly renewed by the trustees, it is conceived that the tenant for life, who was so situated, could not successfully urge the exception in question in opposition to his liability to a proportion of the renewal expenses.

(h) *Garmstone v. Gaunt*, 9 Jurist, 78 [1 Coll. 581]; see *Playters v. Abbott*, 2 M. & K. 104.

(i) *Greenwood v. Evans*, 4 Beav. 46.

(k) *White v. White*, 4 Ves. 33; 9 Ves. 562; *Allan v. Backhouse*, 2 V. & B. 79; *Playters v. Abbott*, 2 M. & K. 110.

(l) *Verney v. Verney*, Ambl. 88; S. C. 1 Ves. 428; *White v. White*, 4 Ves. 33; 9 Ves. 554; *Graham v. Lord Londonderry*, 2 Bro. C. C. 246, cited.

(m) *Nightingale v. Lawson*, 1 Bro. C.

C. 440; *White v. White*, 4 Ves. 33; 9 Ves. 554; *Allen v. Backhouse*, 2 V. & B. 79; *Playters v. Abbott*, 2 M. & K. 108; 9; *Randall v. Russell*, 3 Mer. 190; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121; *Greenwood v. Evans*, 4 Beav. 44, 48.

(n) *Verney v. Verney*, Ambl. 88; 1 Ves. 428; *White v. White*, 4 Ves. 33; 9 Ves. 561.

(o) 1 Ves. 429.

(p) 4 Ves. 33.

¹ See ante, p. 395, note.

It is almost unnecessary to state, that the general rule of the court, as to the mode of raising the renewal fines, and the contribution of the tenant for life, will be controlled by the intention of the settlor, as it is to be collected from the trust instrument.(q) And upon this principle, where a testator had expressly created a *particular fund* for the renewal of a lease, it was held that the tenant for life could not be called upon to contribute to the expenses of renewals *ultra* the reserved fund.(r) And in another case, where a testator authorized a sale or mortgage to raise the renewal expenses, and then added a direction for the trustees to pay the *clear* rents of the premises to A., subject to the *annual* interest or deduction to be occasioned by the sale or mortgage, the tenant for life was held not liable to contribute to the discharge of any part of the principal of the debt.(s)

[*438] *So on the other hand, if the testator have clearly shown an intention, that the *interest of the particular tenant for the time being* should be *solely* liable to the expenses of renewals, that intention will be enforced in favor of the remainderman against the tenant for life. For instance, where the first trust declared is, that the trustees out of the rents and profits shall from time to time renew as occasion may require, and the estate is limited in strict settlement, subject to that trust. The trust for renewal overrides all the subsequent beneficial interests, which cannot take effect until it is performed, and the expense of renewing will, therefore, be considered an incident to the estate, which is, from time to time, to fall upon the party in possession under the will; and the tenant for life will have no claim for contribution against the parties entitled in remainder.(t) However, it has been already stated, that a direction to raise the requisite amount out of the *rents and profits*, will not of *itself* be sufficient to throw the charge exclusively on the tenant for life; although such will be the result where the charge is confined expressly or by implication to the *annual* income of the property.(u) Upon the whole it will be seen, that the authorities are so doubtful both as to the mode of raising the expenses of renewal, and the relative liabilities of the tenants for life and in remainder to bear or contribute to those expenses, that a trustee could rarely be advised to take upon himself the responsibility of deciding those questions. And if any such should arise in practice, and they are not clearly

(q) *Playters v. Abbott*, 2 M. & K. 109; *Earl of Shaftesbury v. Duke of Marlborough*, Id. 119.

(r) *White v. White*, 4 Ves. 24; 9 Ves. 554; and see *Stone v. Theed*, 2 Bro. C. C. 243.

(s) *Playters v. Abbott*, 2 M. & K. 110.

(t) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 111, 122.

(u) *Milles v. Milles*, 6 Ves. 761; see *Anon.* 1 Vern. 104; *Stone v. Theed*, 2 Bro. C. C. 246, vide *supra*.

contemplated and provided for by the trust instrument, the trustees could only act with safety under the direction of the court.

A trustee who renews a lease in his own name, and enters into covenants for repairs, &c., is entitled to be indemnified against a breach of such covenants out of the assets of the *cestui que trust*.(x)

On the principle, that the right of renewing a beneficial lease is an interest which will be recognised and protected by the court for the benefit of the trust estate, the trustees will have a title to compensation for the loss of that right, in case they are deprived of it by the act of a third party. Thus, in a recent case, where the renewal of a church lease held in trust was rendered impossible from the property being required for the purposes of an act of parliament, the trustees were authorized by the court to take steps for obtaining the insertion of a clause in the act, giving them compensation for the loss.(y)

Trustees of leaseholds cannot renew in their own names *for their own benefit*; but if any renewal be made, the new lease will be held on the same trust as the old one.(z)¹ And this doctrine is founded on the general equitable principle, that a trustee shall not be allowed to take advantage of his position to obtain any personal advantage to himself out of the trust estate.(a) And it is immaterial, that the lessor had positively *refused to renew for the benefit of the *cestui que trust*, from some personal objection to him, before [*439] the trustee obtained the renewal for himself.(b)

The same rule also applies to tenants for life, or other persons—such as tenants in common, or partners—having a particular estate in a renewable lease: all such persons will be trustees of any new lease, obtained by them for those entitled in remainder.(c) But the

(x) *Marsh v. Wells*, 2 S. & St. 90.

(y) *Jones v. Powell*, 4 Beav. 96.

(z) *Keech v. Sandford*, Sel. Ca. Ch. 61; [1 Lead. Cas. Eq. 47, 54, and Am. note;] *Holt v. Holt*, 1 Ca. Ch. 190; *Rawe v. Chichester*, Ambl. 719; *Griffin v. Griffin*, 1 Sch. & Lef. 352; *James v. Dean*, 11 Ves. 392; 15 Ves. 236; *Fitzgibbon v. Scanlan*, 1 Dow. P. Rep. 269; *Killick v. Flexney*, 4 Bro. C. C. 161; *Parker v. Brooke*, 9 Ves. 583.

(a) *James v. Dean*, 11 Ves. 392; *Nesbitt v. Tredennick*, 1 Ball & B. 29.

(b) *Keech v. Sandford*, Sel. Ca. 61; *Fitzgibbon v. Scanlan*, 1 Dow. 269.

(c) *Palmer v. Young*, 1 Vern. 376; *Taster v. Marriott*, Ambl. 658; *Rawe v. Chichester*, Ambl. 715; *Pickering v. Vowles*, 1 Bro. C. C. 197; *Fitzgerald v. Raynsford*, 1 Ball & B. 37, n.; *Eyre v. Dolphin*, 2 Ball & B. 290; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Randall v. Russell*, 3 Mer. 196, 197; *Tanner v. Elworthy*, 4 Beav. 487; *Giddings v. Giddings*, 3 Russ. 241. [*Vanhorne v. Fonda*, 5 J. C. R. 388; *Smiley v. Dixon*, 1 Pa. R. 439, 1 Lead. Cas. Eq. 56, Am. n.]

¹ See post, page 539, n. (z); *Holdridge v. Gillespie*, 2 J. C. R. 33; *Galbraith v. Elder*, 8 Watts, 81; *Fisk v. Sarber*, 6 Watts & Serg. 18; *McClanachan v. Henderson*, 2 A. K. Marsh. 388; case of *Heager's Exr's*, 15 S. & R. 65.

rule will not be extended to a *quasi* tenant in tail or the original lease.(d)

In all these cases, however, the parties who seek to enforce the trust of the renewed lease, will not be relieved, except on the terms of repaying to the trustee, or other person, renewing the sums expended by him in obtaining the renewal, or a due proportion of them, in the case of a tenant for life.(e)

In an early case, a trustee for a lunatic was discharged from the trust for taking a renewal of a lease for himself.(f)

A trustee, or tenant for life, of leaseholds, who renews, and himself pays the fines and other expenses of renewal, will have a lien on the estate for the amount; or, in the case of a tenant for life, for a proper proportion of the amount, with interest.(g)

XII.—OF TRUSTEES OF ADVOWSONS, AND PRESENTATIONS TO ECCLESIASTICAL BENEFICES.

It has been already stated, that the legal right to present to a benefice is vested in the trustees having the legal estate in the advowson; but the right of nomination belongs, in equity, to the *cestui que trusts*, whose nominee the trustees will be bound to present.(h)

Where the trusts of the advowson are expressly declared, no question can arise as to the relative rights of the trustees and *cestui que trusts*. And it may be observed, that if a testator make a general disposition of the whole beneficial interest in his real estate, the right of nominating to a benefice on a vacancy will pass by that gift, though it is not expressly included in it. For instance, where there was a devise of manors, lands, &c., to a trustee to receive the rents, issues, and profits, and dispose of the same for the benefit of A., it was held, that an advowson passed by the devise, and a sale of the next presentation by the trustee, by the direction and for the benefit of A., was established, to the exclusion of the testator's heir-at-law, who claimed to be entitled by resulting trust for want of an express disposition.(i)

And even if no trust of the devised estate be expressly declared, yet if the devisees take the legal estate in the character of *trustees*

(d) *Blake v. Blake*, 1 Cox, 266.

(e) See *James v. Dean*, 11 Ves. 396; *Randall v. Russell*, 3 Mer. 196.

(f) *Ex parte Phelps*, 9 Mod. 357.

(g) *Holt v. Holt*, 1 Ch. Ca. 190; *Rawe v. Chichester*, Ambl. 715, 720; *Kemp-ton v. Packman*, 7 Ves. 176, cited.

(h) Ante, p. 261; *Att.-Gen. v. Forster*

10 Ves. 328; *Att.-Gen. v. Newcombe*, 14 Ves. 8; *Att.-Gen. v. Parker*, 3 Atk. 577; *Martin v. Martin*, 12 Sim. 579.

(i) *Earl of Albemarle v. Rogers*, 2 Ves. jun. 477; S. C. 7 Bro. P. C. 522.

only, they *will not be allowed to take the right of presentation, as a benefit undisposed of, for themselves (though it is one of no pecuniary value), but that right will result as fruit undisposed of to the heir-at-law. (k) [*440]

In the late case of *Martin v. Martin*, (l) a testator devised an advowson and all other his real estates, and also his personal estate, to trustees in trust to pay the “rents, dividends, interest, and annual income” of his real estates, until sold as after directed, and of his personal estate to his sister, until she should have a child, and then in trust for her children or child who should attain twenty-one, and if she should have no such child, then in trust after her death for the trustees, their heirs, &c. He then directed the trustees to sell the advowson and other real estates with all convenient speed after his death, and to stand possessed of the proceeds upon the trusts before declared. There was also a power for the trustees to apply the “rents, dividends, interest, and annual income” of his real estates, until sold, for the maintenance of the sister’s children during their minorities, and a direction that the surplus “rents, &c.” should be invested and accumulated. The testator was the incumbent of the living, of which the advowson was so devised, and it consequently became vacant by his death, and could not be sold according to the trust. His sister, who was also his heiress-at-law, had three children living at his death, and the question was, whether the sister, or her children, or the trustees, were entitled to present to the vacant living. It was held by the Vice-Chancellor of England, that, as the presentation did not produce “any rents, dividends, interest or annual income,” it was not included in the trusts declared for the children, and that the sister was entitled to the presentation as the testator’s heiress-at-law. (ll)

In *Edenborough v. Archbishop of Canterbury* (m) there was a grant of an advowson by Queen Elizabeth to four persons their heirs and assigns without expressing any trust, further than by reciting a prior grant of the same advowson to two persons and the parishioners of the church for twenty-one years. However, the trust for the benefit of the parishioners had continually been admitted and acted upon by the feoffees from the time being down to the year 1823, and at the hearing of the cause in 1826, it was treated on all sides as a clear trust, and no question was raised as to the right of the original grantees to take beneficially.

(k) *Kensey v. Langham*, Forr. 143;
Sherrard v. Lord Harborough, Ambl.
 165; *Earl of Albemarle v. Rogers*, 2
Ves. jun. 482; *Martin v. Martin*, 12 Sim.
 579.

(l) *Martin v. Martin*, 12 Sim. 579.

(ll) *Ib.*

(m) 2 Russ. 93.

However, it is clear that the trustees of advowsons will be at liberty to exercise their right of presentation for their own benefit, if such be the intention of the creator of the trust. Thus where the trustees had a discretionary power of selection from amongst certain specified objects, amongst whom one of the trustees was himself included, the court refused to restrain the other trustee from presenting his co-trustee, for he was clearly an object of the testator's intention, and there was no proof of any corrupt or simoniacal motive.(n)

Where there are several *cestui que trusts* of an advowson, who are jointly entitled to the right of nomination, and there has been no severance of their joint ownership by an arrangement providing for the alternate exercise *of the privilege of nominating, it was [*441] laid down by Lord Hardwicke, that they must all agree, or there can be no nomination.(o) But any arrangement by the *cestui que trusts* for the successive or alternate right of nomination will be binding on the trustees.

And where an advowson is held in trust for the *inhabitants or parishioners* of a place, it has been determined, that the trustees will be bound to present the clerk, who is nominated by the *majority* of the *cestui que trusts* qualified to vote.(p) Unanimity in such a case is obviously almost impracticable, and to require it would defeat the object of the trust.

Where the trust of an advowson is for the parishioners or inhabitants of the parish generally, the right of nomination has in practice usually been restricted to the parishioners paying church and poor rates. And where this restriction is supported by proof of habitual usage, it will be recognised, and acted upon by the court in directing the execution of the trust.(q) For some sort of construction must necessarily be put upon trusts couched in such general terms, and there is no better way of construing them than by usage.(r)(1)

But where this limited construction has not been put upon the

(n) *Potter v. Chapman*, Ambl. 98.

(o) *Seymour v. Bennett*, 2 Atk. 483.

(p) *Fearon v. Webb*, 14 Ves. 13, sec. 24; *Att.-Gen. v. Rutter*, 2 Russ. 101, n., see 103; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 108.

(q) *Att.-Gen. v. Parker*, 3 Atk. 576, 7;

Att.-Gen. v. Forster, 10 Ves. 335; *Att.-Gen. v. Newcombe*, 14 Ves. 1; *Fearon v. Webb*, 14 Ves. 13; *Att.-Gen. v. Rutter*, 2 Russ. 101, n.; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93.

(r) Per Lord Hardwicke, 3 Atk. 577.

(1) In the case of *Attorney-General v. Forster*, 10 Ves. 342, Lord Eldon appears to have considered it as a point of considerable doubt, in the absence of authority, whether the trust was such as the court could execute. But his Lordship added, that it was then too late even to state that doubt, as his judgment was bound by the decision of Lord Hardwicke and the Court of Exchequer, which left no doubt, but that the court was bound to execute the trust.

trust by usage, it has been held, that a part of the parishioners cannot by their vote or declaration narrow the right of voting, so as to exclude those who do not pay a poor or church rate.(s) And it is clear, that if the usage have been for all housekeepers to take a part in the nomination, that custom will prevail.(t) Moreover, the usage of confining the right of voting in these cases to the payers of church and poor rates, ought to be constant and invariable.(u)

Where the right of voting is restricted to rate-payers, those parishioners have no right to vote who are rateable, but have not been actually rated, from having come into the parish since the last rate and before another has been made, unless the rate has been postponed for any unfair purpose.(x) In the same case, it was Lord Eldon's opinion, that Jew parishioners, being otherwise qualified, were entitled to vote at the election of a vicar, though Roman Catholics were not so entitled; and that opinion was acted upon in the election on that occasion.(y) The Catholic Relief Act(z) which has since passed, does not appear to have affected the principle, on which this distinction must have proceeded.

The election of an incumbent by the parishioners under a trust of this *description must be by open polling and not by ballot;(a) for where the votes are given by ballot, the trustees [*442] cannot know whether the party, whom they are required to present, has been duly elected by the majority of proper votes.(b) However, it would be otherwise, if it could be shown, that all the *cestui que trusts* who had the right to vote, had agreed to abide by the result of an election made by ballot.(c)

The right of nomination to a benefice, when vested in the parishioners at large, is not of a charitable or public nature; and any question arising upon the construction or exercise of that right, must be brought before the court by an ordinary suit between the parties, as in other cases of private rights. An information for such a purpose by the Attorney-General is improper, and will be dismissed, except so far as it relates to keeping up the number of the trustees, or to the payment of a pension or salary to the incumbent.(d)

At law, an infant of the most tender years may *present* to a church

(s) *Faulkner v. Elger*, 4 B. & Cr. 449; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 104.

(t) *Att.-Gen. v. Parker*, 3 Atk. 577.

(u) *Edenborough v. Archbishop of Canterbury*, 2 Russ. 104.

(x) *Edenborough v. Archbishop of Canterbury*, 2 Russ. 110, 111.

(y) 2 Russ. 111.

(z) 10 Geo. IV. c. 7.

(a) *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93; *Faulkner v. Elger*, 4 B. & Cr. 449.

(b) 2 Russ. 108, 9.

(c) *Ibid.*

(d) *Att.-Gen. v. Newcombe*, 14 Ves. 1, 6; *Att.-Gen. v. Parker*, 1 Ves. 43; see *Fearon v. Webb*, 14 Ves. 19; *Att.-Gen. v. Cuming*, 2 N. C. C. 139, 149.

on its avoidance, and it has been decided, that he will have the same right of *nomination* in equity. In *Arthington v. Coverley*,^(e) an advowson was conveyed to trustees, in trust (in a certain event which happened), to present such person as the grantor, his heirs, or assigns, should appoint; and, in default of such nomination by the grantor, or his assigns, that the trustees should present a person of their own choosing. The grantor died, leaving his son and heir, an infant six months old. On a vacancy of the benefice, the guardian of the infant made him seal and put his mark to an instrument nominating a clerk to the living, and the trustees were compelled to present this nominee on a bill filed against them by the infant for that purpose.

Mr. Hargrave, however, has suggested a doubt, as to how far a court of equity would support a nomination obtained from an infant without the concurrence of his guardian;^(f) and there can be no question but that such a transaction would be regarded with jealousy, and relieved against, if any case of undue contrivance or imposition were established.

The bankruptcy of the *cestui que trust* of an advowson will not deprive him of the right of nominating to a vacancy, which occurs before the advowson or next presentation is sold by the assignees.^(g) By the 77th section of 6 Geo. IV. c. 16, the assignees of a bankrupt are authorized to execute all powers which the bankrupt could legally execute for his own benefit (except the right of nomination to any ecclesiastical benefice). As the void turn cannot be sold, it is not assets for the benefit of the creditors.^(h)

By the statutes 1 Will. & M. c. 26, and 12 Ann. c. 14, s. 1, Roman Catholics are disabled from presenting to any ecclesiastical benefice, and the right of patronage is transferred to the Universities [*443] of Oxford and *Cambridge.⁽¹⁾ By the 3d section of the statute of Will. & M., trustees of Roman Catholics are also disabled from making any such presentation; and by the 4th section the trustees incur a penalty of 500*l.* by presenting to a benefice without giving notice of the avoidance to the Vice-Chancellor of the University to which the presentation belongs. The statute 11 Geo. II. c. 17, s. 5, declares, that every grant of any advowson or right of presentation or nomination to any benefice by Roman Catholics, or by their trustees, or mortgagees, shall be null and void, unless it be for a valuable consideration to a Protestant purchaser.

(e) 2 Eq. Cas. Abr. 518.

(g) Wats. 106; 3 Cruis. Dig. 20.

(f) 1 Co. Litt. 89, a. n. 1.

(h) 3 Cruis. Dig. 20, n.

(1) The presentation to the livings south of the Trent, belongs to the University of Oxford, and to those north of that river, to Cambridge.

The incapacity of Roman Catholics to present or nominate to livings, has not been removed by the late act (10 Geo. IV. c. 7) for the relief of persons of that religious persuasion; for by the 16th section of that statute, it is expressly declared, that nothing therein contained shall extend to enable any person otherwise than he was then by law enabled, to exercise any right of presentation to any ecclesiastical benefice whatever; or to repeal, vary, or alter, in any manner, the laws then in force in respect to the right of presentation to any ecclesiastical benefice.

A lunatic *cestui que trust* cannot nominate to a benefice, nor can his committee; but the right of patronage will be exercised by the Lord Chancellor, by virtue of the general authority delegated to him by the crown.(i)

Where a *feme sole*, having an equitable estate in advowson, marries, and the husband's marital rights are not modified by settlement, the trust of the advowson will vest in him in right of his wife, and he will have the right of nomination upon any avoidance that happens during the continuance of that estate. Husbands may take an estate by curtesy; and since the statute of 3 & 4 Will. IV. c. 105, widows will be entitled to dower, of the trust of an advowson, and will respectively have the right of nomination upon any avoidance during the continuance of those estates.(k)

Aliens, traitors, felons, and outlaws, are incapable of exercising the right of presentation; but where the legal estate is vested in them, that right is forfeited to the crown.(l) There might be a question, how far the trustees for such persons would become entitled to present for their own benefit, to the exclusion of the title of the crown.(m)

Where an advowson is vested in several trustees, they must all join in signing the presentation on a vacancy, and the ordinary cannot be compelled to admit the clerk, where all the trustees have not concurred.(n)

However, this rule does not apply where the trustees have been incorporated by charter; for the major part of those who attend at a meeting of the corporation, would have the power of binding the rest by affixing the corporate seal to a presentation. But in such a case, it seems that all the other trustees must have received notice of the intended meeting.(o)

*And where it is *expressly declared* by the trust, that the *major part* of the trustees shall have the right of appoint- [*444]

(i) 3 Cruis. Dig. 22.

(k) Ib. 14.

(l) Wats. 106.

(m) Ante, Pt. II. Ch. III. p. 335, 6.

(n) Att.-Gen. v. Scott, 1 Ves. 413, 4;

Seymour v. Bennett, 2 Atk. 483; Co. Litt. 186, b; Wilson v. Dennison, Ambl. 82.

(o) Att.-Gen. v. Davy, 2 Atk. 212;

Wilson v. Dennison, Ambl. 82.

ment, those who dissent from the choice of the majority will notwithstanding be bound by their election, and will be compelled to give legal effect to it by joining in the presentation of the clerk so chosen to the bishop.(p) And if the dissenting trustee in such a case refuse to concur in the presentation, he will not be allowed his costs of a suit occasioned by his refusal.(q) And as these trusts are in the nature of public ones, it seems that the decision of the majority would be binding on the whole number without any express direction for that purpose in the trust instrument.(r)

However, in these cases the right of election is vested equally in all the trustees, and they must all have due notice of the intended meeting for the purpose of election. Therefore in a case, where twelve out of twenty-three trustees, being in favor of a particular candidate for the living, met and appointed him to the vacancy without giving notice of their intention to the other eleven trustees, who supported a rival candidate, the election was declared void for want of due notice.(s)

Where the power of choosing a clergyman to fill the vacancy is vested in the trustees, that being a personal trust cannot be delegated by them to others, and they cannot therefore vote by proxy at the election;(t) although where the choice has been regularly made, the power of *signing the presentation*, being a mere ministerial act, may be deputed by proxy to the others.(u)

A direction in the trust instrument that the trustees shall meet for the purpose of election within a certain time—as four months or eight days after the occurrence of a vacancy, need not necessarily be observed; and an appointment by the trustees having the legal estate will not be invalidated, because it was made after the prescribed period.(x)

So a declaration, that when the trustees are reduced to a certain number, new ones shall be appointed, has been held to be merely directory. And where the required number has not been kept up, a presentation by the then existing trustees,(y) though they may have been reduced to one only,(z) or even by the heir of the last surviving trustee,(a) has been supported.

(p) Att.-Gen. v. Scott, 1 Ves. 413; 417; Wilson v. Dennison, Ambl. 82, Att.-Gen. v. Gunning, 2 N. C. C. 139; 86.

Wilson v. Dennison. Ambl. 82.

(u) Ibid.

(q) 5 N. C. C. 156, 7.

(x) Att.-Gen. v. Scott, 1 Ves. 413,

(r) Att.-Gen. v. Scott, 1 Ves. 413, ante, Ch. I. Sect. 1.

415; Lansdown case, Ibid. cited.

(s) Att.-Gen. v. Scott, 1 Ves. 413; and see Att.-Gen. v. Cuming, 2 N. C. C. 139.

(y) Att.-Gen. v. Scott, 1 Ves. 413;

Att.-Gen. v. Cuming, 2 N. C. C. 139.

(z) Att.-Gen. v. Floyer, 2 Vern. 748.

(a) Att.-Gen. v. Bishop of Lichfield,

(t) Att.-Gen. v. Scott, 1 Ves. 413, 5 Ves. 825.

But in such cases the court will take care that the number of trustees is properly filled up for the future; (b) and where the appointment in question is set aside, it will direct new trustees to be appointed, before the fresh election is made. (c) An information may be filled by the Attorney-General to have the requisite number of trustees supplied. (d)

Pending a suit respecting the right of nomination or presentation to a *benefice, the bishop will be restrained from taking advantage of the lapse, and exercising the right of presentation [*445] himself. (e)

If a trustee refuse to present on the nomination of his *cestui que trust*, he will be compelled to do so by the decree of the court; and if his refusal were unreasonable or improper, he would doubtless be fixed with the costs. Although if he acted from conscientious though mistaken motives, he would not be made to pay the costs, although he might not be allowed to receive them. (f)

If the presentation were lost by lapse, owing to the refusal of the trustee to present, there can be no question, but that he would be held personally responsible to the *cestui que trust* for the damage sustained by him.

XIII.—OF TRUSTEES OF STOCK OR SHARES.

The Bank of England is not bound to take notice of a trust affecting public stock standing in their books; and they will refuse to recognise any other than the legal title. (g)(1)¹ And the rule of the Bank is in general not to allow a sum of stock to be transferred into the names of more than four co-proprietors.

The first duty of trustees of stock is to receive the dividends, and apply them to the purposes of the trust. However, when the *cestui*

(b) Att.-Gen. v. Bishop of Lichfield,
5 Ves. 825, 831.

(c) Att.-Gen. v. Scott, 1 Ves. 419.

(d) Att.-Gen. v. Newcombe, 14 Ves.
1, 12.

(e) Edenborough v. Archbishop of
Canterbury, 2 Russ. 92, 111; Att.-Gen.
v. Cuming, 2 N. C. C. 139, 145.

(f) Att.-Gen. v. Cuming, 2 N. C. C.
139, 156.

(g) Hartga v. Bank of England, 3
Ves. 55; Bank of England v. Moffat, 3
Bro. C. C. 260; Bank of England v.
Parsons, 5 Ves. 665.

(1) And where a creditor has obtained an order under the 15th sect. of the late act, 1 & 2 Vict. c. 110, charging interest of his debtor in stock, which stands in the name of trustees, the Bank will still pay the dividends to the trustees, who have the legal title to receive them, and the trustees are to apply the dividends according to the equitable interests of the parties. *Bristed v. Wilkins*, 3 Hare, 235.

¹ See note, ante, page 174.

que trust is absolutely entitled to the receipt of the whole income without deduction, a power of attorney to receive the dividends will be properly given by the trustees to the *cestui que trust* or his assigns.^(h)

The power of attorney must be executed by all the trustees, and it will become void and must be renewed on the death of the parties by whom it is given. So the power will be revoked, if the trustees themselves on any occasion apply for and receive the dividends.

The remedy for a *cestui que trust*, under the act 1 Will. IV. c. 60, in case of the incapacity of the trustee of stock, or his refusal or neglect to transfer or pay the dividends, has been already considered.⁽ⁱ⁾

The acts for the reduction of stock always provide, that any engagement respecting the original stock, shall be satisfied by the same amount of reduced stock. Therefore where a person has bound himself by a covenant or bond to transfer to trustees a certain sum in a particular stock, and the stock in question previously to the time of making the transfer is reduced by act of parliament, the trustees may be compelled to accept the reduced stock in satisfaction of the settlor's engagement.^(k) By the late act for the reduction of the three-and-a-half-per-cent. stock ^{*}(7 Vict. c. 4, s. 9), trustees, [*446] of stock, or one of them on behalf of the others, are empowered to assent to the reduction under the act, and are indemnified for so doing.

Where stock, in which trust-moneys are invested, is reduced by act of parliament, all the persons beneficially interested, including annuitants for life, as well as persons entitled to the *corpus* of the fund, must bear their portion of the loss equally.^(l)

Where the trust property consists of bank or India stock, or stock in the foreign funds, and the trust authorizes the continuance of such investments, the same rules of management prevail as those concerning stock in the British funds.

Any extraordinary *bonus* on bank or other stock, which is settled in trust for one for life with remainder over, must not be paid over to the tenant for life, but it must be treated as capital, and invested by the trustees, and the dividends only paid to the *cestui que trust* for life.^(c)¹

(h) See *Wright v. Lord Dorchester*, 3 Russ. 49, n.

(i) *Ante*, Pt. I. Div. III. ch. II. Sect. 2, and Pt. III. Ch. IV.

(k) *Sheffield v. Earl of Coventry*, 2 R. & M. 317; *Milward v. Milward*, 2 M. & K. 311.

(l) *Att.-Gen. v. Poulten*, 8 Jurist, 611; [3 Hare, 555.]

(c) *Brander v. Brander*, 4 Ves. 890; *Paris v. Paris*, 10 Ves. 185; *Clayton v. Gresham*, *Ib.* 288; *Witts v. Steere*, 13 Ves. 363.

¹ See *ante*, note to page 386.

Trustees in whose name the shares of any canal, railway, or other company are standing, are primarily liable to the company for the calls upon those shares, as well as the other expenses which the shareholders are bound to pay. But they are of course entitled to claim from their *cestui que trusts*, and to retain out of the trust-moneys in their hands, any payments which they may have been compelled to make in consequence of this liability.(d)

A trustee of stock will be allowed in his accounts the usual payment of one-sixteenth per cent. which is charged by a stock-broker for identifying him at the Bank, on making the transfer of the fund to the person beneficially entitled.(e)

XIV.—OF TRUSTEES OF CHoses IN ACTION.

Trusts are frequently declared of *choses in action*, such as bonds, covenants, policies of assurance, or simple contract debts, and other property of that description, which is not at the moment in actual and tangible existence, and which can be compulsorily realized only by suit or action.

In these cases the debt or thing in action may either be created by the settlement itself—as in those cases where the settlor binds himself by covenant or bond to pay the trustees a certain sum of money, or do some other act,—or it may be actually in existence and vested in the settlor previously to the creation of the trust, and may be transferred by him with all the rights and remedies for enforcing it to the trustees—as where a debt or policy of insurance is assigned to trustees to hold on the trusts declared. In the former case the trustees take the *legal* interest, and at the proper time they will be bound to take such legal proceedings, as may be requisite for enforcing payment or performance *in their own names* ;(1) in *the latter [*447] case the assignment gives them only an *equitable* title, and all proceedings at law must be instituted by them in the name of the assignor.¹ Where a testator being entitled to *choses in action* be-

(d) *Preston v. Guyon*, 10 Law Journ. N. S., Chanc. 72.

(e) *Jones v. Powell*, 6 Beav. 488; vide post, [Allowances,] p. 570, &c.

(1) Where a settlor enters into a covenant with a trustee for the benefit of a third person, the *cestui que trust* cannot even in *equity* institute a suit against the covenantor for a specific performance without making the trustee a party. *Cooke v. Cooke*, 2 Vern. 36; *Cope v. Parry*, 2 J. & W. 538.

¹ See notes to *Row v. Dawson*, 2 Lead. Cas. Eq. pt. ii. 210, &c. (1st Am. Ed.), as to the effect of the assignment of *choses in action*. Trustees substituted by the court cannot sue at law in their own names, on a note payable to, or a judgment recovered by, the original trustee. *Ingersoll v. Cooper*, 5 Blackf. 426; *Davant v. Guerard*, 1 Spear's Law R. 242.

queaths them by his will to trustees, and appoints the same persons his *executors*, the legal title will of course vest in the trustees upon the testator's death by virtue of their appointment as executors.^(f)

It is the duty of the trustees in all these cases to take every necessary step by suit or action or otherwise, for realizing the *chose in action* at the time contemplated by the trust. And if the fund be lost from their neglect of this duty, they will be held personally responsible to their *cestui que trusts* for the loss, although they acted without any improper motive.^(g) And it is not sufficient for the trustee merely to apply to the debtor for payment, but it is his duty to bring an action, if necessary, for the recovery of the amount.^(h)¹

However, where covenants or bonds are entered into by a settlor with trustees, it seems that the *ability* of the settlor to discharge these engagements, will be the measure of the responsibility of the trustees, if the sum be lost by their neglect to put in force the security. Thus in a recent case A. on his marriage with B. covenanted with a trustee to pay 10,000*l.* on Martinmas-day, 1824, upon trust for A. for life, with remainder to B. for life, and then for the children of the marriage. A. died without having paid any part of the 10,000*l.*, and a suit was instituted by B. against the trustee to compel him personally to pay the 10,000. The cause was heard before Lord Cottenham, who made a decree referring it to the Master to inquire, *whether A. had been of ability to pay the 10,000*l.* or any part thereof during the period intervening between Martinmas, 1824 and his death, or during any part of that period.* The Master found that A. was of ability to have paid 4,200*l.* between 1824 and 1832, and that he was not able to pay anything after 1832; and on the hearing on further directions before Vice-Chancellor Knight Bruce,

(f) *Caney v. Bond*, 6 Beav. 486.

486; *Rogers v. Vasey*, V. C. K. Bruce,

(g) *Caffrey v. Darby*, 6 Ves. 488;

27th Jan. 1845, MS. [*Cross v. Petrie*,

Mucklow v. Fuller, Jac. 198; *Powell v.*

10 B. Monr. 413.]

Evans, 5 Ves. 839; *Tebbs v. Carpenter*,

(h) *Lowson v. Copeland*, 2 Bro. C. C.

1 Mad. 290; *Lewson v. Copeland*, 2

156. [See *Wolfe v. Washburne*, 6

Bro. C. C. 156; *Caney v. Bond*, 12 Law

Cowen, 261, that dissent of *cestui que*

Journ. N. S. Chanc. 484; S. C. 6 Beav.

trust immaterial at law.]

¹ In *Waring v. Darnall*, 10 G. & J. 127, it was held that there was no peremptory obligation upon a trustee (especially if acting with the knowledge and approbation of a large portion of the parties interested) to sue upon a bond passed to him as trustee, the very month or year it becomes due. A due regard to the ultimate security of the debt, might require him (it was said) to indulge the debtor; and if, contrary to a reasonable expectation, any portion of the debt were lost, in the exercise of a fair discretion, equity would not compel him to make good the loss. So in *Hester v. Wilkinson*, 6 Humph. 215, where a trustee residing in another State, delayed bringing suit for the recovery of a negro, part of the trust property, which had been illegally levied on, till the cause of action was barred by the statute, was not held responsible for the value of the slave.

the defendant, the trustee, was ordered to pay the sum of 4,200*l*. into court.*(i)*

It will be equally the duty of the trustees to realize the debt, which is the subject of the trust, although the person by whom it is owing is himself one of the trustees; and the others will be responsible to the *cestui que trusts* for neglecting to enforce the payment in such a case.*(k)*

And it seems, that the duty of realizing such securities will be peculiarly imperative, where the debt which is the subject of the trust, is payable *in instalments*, in which case the trustees will not be justified in showing much indulgence to the debtor on the non-payment of any instalment.*(l)*

However, if a discretion be left to the trustee, and in the *bona fide* exercise of that discretion he delay the realization of the property, the court will not fix him personally with the loss thus occasioned.*(m)*

*A trustee who brings an action at law for the recovery of a *chose in action*, or whose name is used for that purpose, is [*448] entitled to be indemnified by his *cestui que trust* against the costs; and a court of equity, on the application of the trustee, will restrain the *cestui que trust* from proceeding in the action, until he has given the required security for the costs.*(n)*

Where the trust property consists of an existing *chose in action*, such as a bond or other debt, or a policy of assurance, which is assigned by the settlement to the trustees, it has been decided, that the title of the trustees, under the settlement, will not be perfect or valid as against subsequent purchasers or incumbrancers, unless notice of the settlement be given to the parties who are liable to the payment of the debt—as to the obligor in the bond, or the insurers in the policy.*(o)*¹ It is therefore unquestionably the duty of trustees of

(i) Maitland v. Bateman, Nov. 1840, [Roden v. Murphy, 10 Alab. 804; Ins. V. C. K. Bruce, Feb. 1844, S. C. 13 Law Co. v. Smith, 11 Penn. St. R. 120.] Journ. N. S., 272; 8 Jurist, 926.

(k) Mucklow v. Fuller, Jac. 198. [See ante, part III. Div. 1, Ch. 1. Sect. 2.] *(o)* Wright v. Lord Dorchester, 3 Russ. 49, n.; Deare v. Hall, 3 Russ. 1; Loveridge v. Cooper, Id. 30; Forster v. Blackstone, 1 M. & K. 297; Timson v. Ramsbottom, 2 Keen, 35. [See Etty v. Bridges, 2 Y. & Coll. 486.]

(l) Caffrey v. Darby, 6 Ves. 495.

(m) Buxton v. Buxton, 1 M. & Cr. 80.

(n) Annesley v. Simeon, 4 Mad. 390.

¹ Meux v. Bell, 1 Hare, 73; Stocks v. Dobson, 17 Jurist, 539. The rule is, however, different on this point in most of the United States; and it is held that the assignee's title is good against attaching creditors, or subsequent assignees without notice: Sharpless v. Welsh, 4 Dall. 279; Corson v. Craig, 1 Wash. C. C. 424; U. S. v. Vaughan, 3 Binn. 374; Muir v. Schenck, 3 Hill (N. Y.), 228; Littlefield v. Smith, 17 Maine, 327; Warren v. Copelin, 4 Metcalf, 594; Talbot v. Cook, 7 Monroe, 438; *contra*, in Connecticut: Van Buskirk v. Ins. Co., 14 Conn. 145; see Am. Note to Row v. Dawson, 2 Lead. Cas. Eq. pt. ii. 236 (1st Ed.) But

such interests to ascertain, that the required notice of the assignment to them is duly given. (p)

It has been decided, that for this purpose notice to *one of several* obligors, or to *one* member of an insurance society, operates as notice to *all*. (q) But a notice so limited will continue in operation only as long as the party to whom it was given is living, and liable to contribute to the payment, and the other obligors or insurers will not afterwards be affected by the notice. (r) A trustee, therefore, ought not to dispense with a formal notice of the settlement of the bond or policy to *all* the obligors or debtors, or to the insurance society generally.

The trustees should also insist on having the bond or policy, or other instrument, which is the subject of the trust, delivered up to them. If through the omission of this precaution, or otherwise through their neglect, the instrument get into the possession of the settlor or tenant for life, who raises money upon it, and a suit thus becomes necessary, the trustees would in all probability be deprived of all their costs of the suit, even if they should not be decreed to pay costs. (s)

However, where from the neglect of the trustees to obtain possession of the policy of assurance, which had been assigned to them upon trust, or to give notice of the assignment at the office, the settlor had subsequently sold the policy, and received the proceeds, the trustees may maintain a suit against the settlor to recover the value of the policy, and the decree will be against him with costs. (t)

An assignment of a *chose in action* in general confers no *legal* interest on the assignee, and can only be enforced by the interference

(p) See *Jacob v. Lucas*, 1 Beav. 436.

(s) *Evans v. Bicknell*, 6 Ves. 174;

(q) *Smith v. Smith*, 2 Cr. & Mee. 31; *Meux v. Bell*, 1 Hare, 73; *Re Styan*, Phill. 155; *Duncan v. Chamberlayne*, 11 Sim. 123. [See 4 Hare 446; 9 Beav. 323.]

Knye v. Moore, 1 S. & St. 65; *Meux v. Bell*, 1 Hare, 82, 98; *Booth v. Lightfoot*, L. C. 17th Jan., 1844.

(r) *Timson v. Ramsbottom*, 2 Keen, 35; *Meux v. Bell*, 1 Hare, 88, 89.

(t) *Fortescue v. Barnett*, 3 M. & K. 36.

in *Fisher v. Knox*, 13 Penn. St. R. 622, it was held that the assignee of a judgment; who neglected to have it marked to his use on the docket, was to be postponed to a subsequent assignee for value. The principle above stated does not apply to a *bona fide* payment by the debtor to the assignor, without notice, which, of course, will discharge the debt. *Reed v. Marble*, 10 Paige, 409; *Note to Row v. Dawson*, p. 235. So, in England, of a release, on a fair *bona fide* settlement: *Stocks v. Dawson*, 17 Jurist, 539. If he pays after notice, however, he still remains liable: *Ibid.*, *Brashear v. West*, 7 Peters, S. C. 608; and the assignor is a trustee of the money received: *Ellis v. Amason*, 2 Devereux's Eq. 273. This doctrine was held, in *Wilmot v. Pike*, 5 Hare, 14, not to apply to equitable estates in land, as equity of redemption; but see the remarks in *Etty v. Bridges*, 2 Y. & Coll. 486.

of a court in equity. Hence, where the assignment is made without any consideration, the court will not usually give any assistance to the parties claiming under the trusts of such an instrument, upon the general principle, that volunteers have no equity to come to the court to perfect their title.^(u)¹ *However, there may be an [*449] exception to this general rule, where the *choses in action* is assignable *by agreement between the parties*, though not at law, as in the case of a policy of insurance, upon an assignment of which the insurance society will recognise the title of the assignee.^(x)² And if the trustee have accepted and acted upon the trusts declared by any voluntary instrument, the court will not afterwards suffer the settlor to revoke or alter his previous disposition to the prejudice of the trustee.^(y) And it is clear, that as regards the rights and remedies between the *cestui que trust* and his *trustee*, the fact of the creation of the trust being voluntary will be wholly immaterial, if the relation of trustee and *cestui que trust* have been actually created.^(z)

An assignment of a policy of insurance in trust will carry with it not only the original sum assured, but all *bonuses*, or other additions, which may be afterwards made. And the trustees will be entitled to receive all such additional sums, and will hold them on the same trusts as the original sum, although they may not be expressly mentioned in the settlement, and although the declaration of the trusts applied in terms to the original sum only.^(a)

Where the party liable to the payment of the debt, or other *choses in action*, becomes bankrupt or insolvent, it is the duty of the trustee to prove against his estate for the amount. And where there are several trustees, they must all join in making the proof,^(b) unless an order be obtained for *one* of them to prove.^(c) The concurrence of the *cestui que trusts* in the proof, is in general also necessary, for the debt may have been paid to the *cestui que trust*, which might be a

(u) *Antrobus v. Smith*, 12 Ves. 39; *v. Jenkin*, 1 Hare, 458; S. C., *Phill. Edwards v. Jones*, 1 M. & Cr. 226; 153.

(z) *Lechmere v. Earl of Carlisle*, 3 P. Wms. 222; *supra*, Pt. I. Div. I. Ch. II. Sect. 5.

(a) *Courtney v. Ferrers*, 1 Sim. 137; *Parker v. Both*, 9 Sim. 388.

(b) *Ex parte Rigby*, 19 Ves. 463; 2 Rose, 224; *Burridge v. Row*, 1 N. C. C. 183, 583; 8 Jurist, 299.

(c) *Ex parte Smith*, 1 Deac. 385; 2 M. & A. 536; *Ex parte Phillips*, 2 Deac. 334.

¹ *Kennedy v. Ware*, 1 Barr, 273; and see the notes, *ante*, page 83, 84.

² See note, *ante*, page 88.

good discharge to the debtor.(d) But where the whole legal interest is vested in the trustee, and the *cestui que trusts* are infants, or otherwise incapacitated from any binding act, the trustee may prove alone.(e) In a proof by trustees, the instrument creating the trust should be exhibited.(f)

Where a trustee of a *chose in action*, such as a recognisance, releases it without consideration, he will be decreed in equity to replace the principal with interest.(g)¹ But it has been held, that a trustee will be justified in releasing a debt, if such a proceeding be for the benefit of the trust. As where a trustee released an insolvent tenant from the arrears of rent, in order to get him to give up possession of the estate.(h)

XV.—OF TRUSTEES FOR CHARITABLE OR PUBLIC PURPOSES.

The rules of construction applicable to trusts for charitable purposes, differ materially in many respects from those respecting ordinary trusts, and there are also important distinctions as to the nature and extent of *the jurisdiction of the Court of Chancery in [*450] enforcing or controlling the execution of these trusts.²

It has been stated in a previous chapter,(i) that where the object of a testator is charity, a far less accurate and definite declaration of trust will suffice, than is requisite in other cases. Lord Eldon observed in a modern case,(k) “neither is there any doubt, that the same words in a will when applied to the case of individuals, may receive a very different rule of construction from that which would govern them, if applied to the case of charity. If I give my property to such person as I shall hereafter name to be my executor, and afterwards appoint no executor; or if having appointed an executor, he dies in my lifetime, and I appoint no other to supply his place, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give

(d) *Ex parte Dubois*, 1 Cox, 310; *Beardmore v. Cuttenden*, Cooke, 211; *Ex parte Herbert*, 2 Gl. & G. 161; *Ex parte Green*, 2 Deac. & Ch. 116. (h) *Blue v. Marshall*, 3 P. Wms. 381. [See *Walker v. Brungard*, 13 S. & M. 725, 767; *Allen v. Randolph*, 4 J. C. R. 693.]

(e) *Ex parte Dubois*, 1 Cox, 312.

(i) *Ante*, p. 131.

(f) *Green*, 149.

(k) *Mills v. Farmer*, 1 Mer. 55, 94.

(g) *Jevon v. Bush*, 1 Vern. 342.

¹ See *ante*, 274, note (1.)

² As to the doctrine of charitable uses in the United States, see *ante*, 79, note. With regard to dedications of land to public or pious purposes, which seem to be sustained even in those States where the doctrine of charitable uses has not been adopted, see *Beatty v. Kurtz*, 2 Peters, 256; *Cincinnati v. White*, 6 Id. 566; *Hadden v. Chorn*, 8 B. Monr. 78; *Price v. Methodist Church*, 4 Hammond, 542; 3 Kent's Comm. 433, 450.

effect to a bequest in favor of charity, the court will in both instances supply the place of an executor, and carry into effect that, which in the case of individuals must have failed altogether. A third principle, which it is now too late to call in question, is, that in all cases, in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain, but the mode in which it is to be carried into effect, the intention will be carried into execution by this court, which will then supply the mode, which alone was left deficient. Again, in the case of an individual, if I leave my estate to such person as my executor shall name, and appoint no executor, or having appointed one, he dies, and I neglect to supply his place with another, it is admitted, that the bequest so given amounts to nothing. Yet it cannot be denied that such a bequest to charity would indicate that general charitable intention, which, according to the rules of law, is sufficient to give it effect; and that the court in such a case would assume the office of the executor.”(l)

And in the previous case of *Moggridge v. Thackwell*,(m) the same great Judge laid it down as proved by the authorities, “That if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated, shall not destroy the charity: but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished.”(n)

In accordance with these principles, it has frequently been decided that where a testator has sufficiently expressed his intention to dispose of his estate in trust for charitable purposes *generally*, the general purpose will be enforced by the court to the exclusion of any claim of the next of kin to take under a resulting trust; although the *particular* purpose or mode of application is not declared at all by the testator.(n) And the same rule prevails, although the testator refers to some past or intended declaration of the particular charity, which declaration is not made, or *cannot be discovered;(o) and although the selection of the objects of the [*451] charity and the mode of application are left to the discretion of the trustees. And it is immaterial that the trustees refuse the gift, or

(l) *Mills v. Farmer*, 1 Mer. 94, 96

(m) *Moggridge v. Thackwell*, 7 Ves. 69; ante, p. 130.

(n) *Att.-Gen. v. Mathews*, 2 Lev. 167; *Clifford v. Francis*, 2 Freem. 330; *Baylis v. Att.-Gen.* 2 Atk. 339; *Att.-Gen. v. Herrick*, Ambler. 212; *Price v. Archbishop of Canterbury*, 14 Ves. 371, 2; vide supra, p. 128.

(o) *Case*, 2 Freem. 261; 7 Ves. 73, and 1 Mer. 59; *Att.-Gen. v. Syderfen*, 1 Vern. 224; 7 Ves. 43, n.; *Cook v. Dunkinfield*, 2 Atk. 562, 567; *Mills v. Farmer*, 1 Mer. 55; *Commissioners of Char. Donations v. Sullivan*, 1 Dr. & W. 501; vide supra, p. 128.

die, or that their appointment is revoked in the lifetime of the testator, causing a lapse of the bequest at law.(p)¹

The same construction will also be adopted, where a *particular* charitable purpose is declared by the testator, which does not exhaust the whole value of the estate;(q) or where the particular trust cannot be carried into effect, either for its uncertainty,(r)² or its illegality,(s) or for want of proper objects.(t) And in all these cases the general intention of the testator in favor of charity will be effectuated by the court, through a *cy pres* application of the fund.³

However, this construction will not prevail, unless the testator has

(p) *Att.-Gen. v. Hickman*, 2 Eq. Ca. Abr. 193; *D'Oyley v. Att.-Gen.* 2 Eq. Ca. Abr. 194; 7 Ves. 58, n.; *White v. White*, 1 Bro. C. C. 12; *Moggridge v. Thackwell*, 1 Ves. Jun. 464; 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55; *Att.-Gen. v. Glegg*, 1 Atk. 356; *Att.-Gen. v. Andrew*, 3 Ves. 633.

(q) *Thetford School case*, 8 Co. 130; *Att.-Gen. v. Arnold*, Show. P. C. 22; *Att.-Gen. v. Mayor of Coventry*, 2 Vern. 327; *Att.-Gen. v. Johnson*, Ambl. 190; *Att.-Gen. v. Sparks*, Id. 201; *Att.-Gen. v. Haberdashers' Company*, 4 Bro. C. C. 103; *Att.-Gen. v. Tonner*, 2 Ves. jun. 1; *Att.-Gen. v. Minshull*, 4 Ves. 11; *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 308; *Att.-Gen. v. Caius Coll.*, 2 Keen, 150; *Att.-Gen. v. Catherine Hall*, Jac. 381; *Att.-Gen. v. Drapers' Company*, 4 Beav. 67; *Att.-Gen. v. Wansey*, 15 Ves. 230; *Att.-Gen. v. Dixie*, 2 M. & K. 342; *Att.-Gen. v. Merchant Venturers' Society*, 5 Beav. 338.

(r) *Att.-Gen. v. Mathews*, 2 Lev. 167; *S. C. Finch*, 245, and 7 Ves. 69, 70, stated; *Moggridge v. Thackwell*, 1 Ves. jun. 464; 7 Ves. 36; *Pieschell v. Paris*, 2 S. & St. 384; *Simon v. Barber*, 5 Russ. 112; *Bennett v. Hayter*, 2 Beav. 81.

(s) *Att.-Gen. v. Green*, 2 Bro. C. C. 492; *Da Costa v. De Paz*, Ambl. 228; 2 Sw. 487, n.; *Att.-Gen. v. Baxter*, 1 Vern. 848; *Cary v. Abbott*, 7 Ves. 490; *Att.-Gen. v. Todd*, 1 Keen, 803; *Att.-Gen. v. Bowyer*, 3 Ves. 713; *Widmore v. Governors of Queen Anne's Bounty*, Ambl. 637; *Att.-Gen. v. Guise*, 2 Vern. 266; [*S. C. Att.-Gen. v. Baliol Coll.*, 9 Mod. 407; *Glasgow Coll. v. Att.-Gen.*, 1 H. L. Cas. 824. See *Att.-Gen. v. Vint*, 14 Jur. 324; *Martin v. Margham*, 14 Sim. 230.]

(t) *Att.-Gen. v. City of London*, 3 Bro. C. C. 171; *Att.-Gen. v. Boulbee*, 2 Ves. jun. 380; *Hayter v. Trego*, 5 Russ. 113; *Att.-Gen. v. Ironmongers' Company*, 2 M. & K. 576; *S. C.* 2 Beav. 373; *Cr. & Ph.* 208; *Att.-Gen. v. Bishop of Landaff*, 2 M. & K. 586, stated; *Att.-Gen. v. Gibson*, 2 Beav. 317, n.; *Att.-Gen. v. Oglander*, 3 Bro. C. C. 160; *Martin v. Maugham*, [14 Sim. 230; see *Att.-Gen. v. Lawes*, 8 Hare, 32;] vide supra, p. 128, et seq.

¹ See *Att.-Gen. v. Wallace*, 7 B. Monr. 611; *Pickering v. Shotwell*, 10 Barr, 27.

² But where the amount of a fund to be appropriated to answer charity bequests is not specified, the whole will be void for uncertainty. *Flint v. Warren*, 15 Sim. 626.

³ The *cy pres* doctrine is not generally adopted in the United States. See ante, note to page 79. It was, however, recognised in *Baker v. Smith*, 13 Metcalf, 41; *Burr's Ex'r v. Smith*, 7 Verm. 287 (*semble*); *Griffin v. Graham*, 1 Hawks, 96, but *contra*, *McAuley v. Wilson*, 1 Dev. Eq. 276. In *Att.-Gen. v. Wallace*, 7 B. Monr. 611, it was held that if trustees for an indefinite charity refused to accept, or to exercise their discretion, the Court, at the instance of the Attorney-General, might appoint new trustees, and direct a scheme; the statute of Elizabeth being held to be in force in Kentucky.

shown an intention to give to charity *generally*; and if the establishment or benefit of a *particular specified* charity *only* be contemplated by him, and that charity cannot take, the charitable bequests thus failing will be suffered to devolve as in other cases of ineffectual dispositions of property by will.(u) The existence or non-existence of such a general intention in favor of charity, must be gathered from the entire will in every case, and it is difficult to lay down any general rules of construction on this point; these will best be collected from a reference to the several decided cases, which are mentioned in the note below.(x)

We will now proceed to consider what are proper "charitable" objects, within the legal acceptance of the term.

*The stat. 43 Eliz. c. 4, usually known as the Statute of Charitable Uses, has long been regarded as having fixed the [*452] standard of what is to be deemed a good charitable purpose; and no trust will be established by the court as charitable, unless it be for some of the purposes which are enumerated in that statute, or which by analogy comes within its spirit and intendment.(y)

It may be premised, however, that a gift for "charity" or "charitable purposes," generally, without adding more;(z) or for the benefit of the "poor,"(a) or "indigent,"(b) is a sufficient charitable purpose. As is a trust for "such religious and charitable purposes" as the trustees may think proper.(c) And so a direction to apply the property, "having regard to the glory of God in the spiritual welfare of his creatures," is a religious, and therefore a charitable, trust.(d)

The uses enumerated in the preamble of the statute as charitable are, gifts, devises, &c., for the relief of aged, impotent, and poor people; for maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools, and scholars of universities; for

(u) Vide supra, Pt. I. Div. II. Ch. I. Sect. 3, page 120. Eq. Jur. § 1155; Morice v. Bishop of Durham, 9 Ves. 405. [See 1 Spence, Eq. 587.]

(x) Att.-Gen. v. Bishop of Oxford, 1 Bro. C. C. 444, n.; S. C. 4 Ves. 431; Att.-Gen. v. Goulding, 2 Bro. C. C. 427; Grieves v. Case, 4 Bro. C. C. 67; 1 Ves. jun. 548; Att.-Gen. v. Whitchurch, 3 Ves. 141; Corbyn v. French, 4 Ves. 418; Att.-Gen. v. Davies, 9 Ves. 535; Att.-Gen. v. Hinxman, 2 J. & W. 270; De Themines v. De Bonneval, 5 Russ. 288; West v. Shuttleworth, 2 M. & K. 684, 698; Att.-Gen. v. Grocers' Company, 12 Law Journ. N. S., Chanc. 196; [6 Beav. 526.] (z) Clifford v. Francis, 2 Freem. 330; Att.-Gen. v. Syderfen, 1 Vern. 224; 7 Ves. 43, n.; Att.-Gen. v. Her- rick, Ambl. 713; Moggridge v. Thack- well, 7 Ves. 36; Mills v. Farmer, 1 Mer. 55; Legge v. Asgill, T. & R. 265, n. (a) Nash v. Morley, 5 Beav. 177. (b) Kendall v. Granger, 5 Beav. 300, 303. (c) Baker v. Sutton, 1 Keen, 224. (d) Carus v. Townsend, 13 Law Journ. N. S., Chanc. 169.

(y) 2 Rop. Legs. 111, et seq.; 2 Story

repairs of bridges, ports, havens, causeways, churches, sea banks, and highways ; for education and preferment of orphans ; for or towards the relief, stock, or maintenance for houses of correction ; for marriages of poor maids ; for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed ; for relief or redemption of prisoners or captives ; and for aid or ease of any poor inhabitants concerning payments of fifteenths, setting out of soldiers, and other taxes.(e)¹

Besides the above, purposes of a similar nature have been determined to be charitable uses. Thus, gifts for the diffusing the Protestant tenets of the Christian religion, and promoting public worship according to those tenets, and for providing for its ministers—for instance, bequests for the advancement of the Christian religion among infidels ;(f) for the augmentation of poor vicarages ;(g) for the building of a church(h) or erecting an organ gallery ;(i) for the paying off of an incumbrance on a licensed meeting-house ;(k) the repairing parsonage-houses ;(l) the support of a preacher of a certain chapel ;(m) or of dissenting ministers in England ;(n) or for the vicar or curate of a certain place for preaching an annual sermon on a certain day ;(o) or to the singers sitting in the gallery of a certain church, to be paid on a certain day ;(p) to the clerk of *a [453] parish to keep the chimes of a church in good repair to play certain psalms ;(q) for the support of a burial ground,(r) have all been held to be charitable purposes. So also, gifts for the promoting public works for the convenience or benefit of the public, or of the inhabitants of a particular place, are considered as charitable uses. For instance, a gift for the improvement or benefit of a city ;(s)

(e) 2 Rep. Legs. 111; 2 Story, Eq. Jur. § 1159.

(f) Att.-Gen. v. Coll. of William & Mary, 1 Ves. jun. 245.

(g) Widmore v. Woodroffe, Ambl. 636.

(h) Att.-Gen. v. Ruper, 2 P. Wms. 125; Att.-Gen. v. Bishop of Oxford, 1 Bro. C. C. 444, n.

(i) Adnam v. Cole, 6 Beav. 353.

(k) Corbyn v. French, 4 Ves. 418, 427.

(l) Att.-Gen. v. Bishop of Chester, 1 Bro. C. C. 444.

(m) Grieves v. Case, 4 Bro. C. C. 67; S. C. 1 Ves. jun. 548; Att.-Gen. v. Pearson, 3 Mer. 353, 409.

(n) Waller v. Childs, Ambl. 524; Att.-Gen. v. Hinckman, 2 Eq. Abr. 193;

West v. Shuttleworth, 2 M. & K. 696.

(o) Sorresby v. Hollins, Highmore, 174; Turner v. Ogden, 1 Cox, 316.

(p) Ibid.

(q) Ibid.

(r) Doe v. Pitcher, 6 Taunt. 363.

(s) Howse v. Chapman, 34 Ves. 542; Att.-Gen. v. Brown, 1 Swanst. 265;

Att.-Gen. v. Heelis, 2 S. & St. 67; Att.-Gen. v. Corporation of Dublin, 1 Bligh.

N. S. 337; Att.-Gen. v. Mayor of Carlisle, 2 Sim. 437; Att.-Gen. v. Corporation of Shrewsbury, 6 Beav. 220. [See ante, 133 note.]

¹ In Pennsylvania, the Statute of Elizabeth not being directly in force, the court is not confined, in its application of the rules with regard to charitable uses, to the objects enumerated in the preamble to that statute. *Witman v. Lex*, 17 S. & R. 88; *Wright v. Linn*, 9 Barr, 435.

a sum of money to be applied in forming works for supplying the inhabitants of a town with spring water;(t) or for the support of a public botanical garden,(u) have been supported as charitable. As have also gifts to promote the education or the relief of the poor; for establishing a school;(x) for erecting a small school-house and a house for the master;(y) and bequests to the poor inhabitants;(z) or to the widows and children of seamen belonging to a town;(a) or to the widow and orphans;(b) or to the poor inhabitants of a parish;(c) or for the support of hospitals;(d) or to establish a life-boat;(e) or for the benefit of the British Museum.(f)¹

In a modern case, where the question of what would constitute a charitable purpose was fully discussed, Sir J. Leach, V. C., said that he was of opinion "that funds supplied from the gift of the crown, or from the gift of the legislature, or from private gift, for any legal *public or general purpose*, are charitable funds to be administered by courts of equity. And it is not material that the particular public or general purpose is not expressed in the Statute of Elizabeth, if it come within the equity of that statute. Thus a gift to

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| (t) Jones v. Williams, Ambl. 656. | (b) Att.-Gen. v. Comber, 2 S. & St. |
| [See Att.-Gen. v. Plymouth, 9 Beav. 67.] | 93. |
| (u) Townley v. Bedwell, 6 Ves. 194. | (c) Att.-Gen. v. Clarke, Ambl. 422; |
| (x) Att.-Gen. v. Williams, 4 Bro. C. C. 525. [See ante, 133, note.] | Att.-Gen. v. Bulles, Jac. 407; Att.-Gen. |
| (y) Att.-Gen. v. Bowles, 2 Ves. 547; | v. Ward, 3 Ves. jun. 228; Att.-Gen. v. |
| Johnston v. Swann, 3 Mad. 457. | Pearce, 2 Atk. 38; Att.-Gen. v. Free- |
| (z) Att.-Gen. v. Corporation of Exeter, 3 Russ. 395; Att.-Gen. v. Wilkinson, 1 Beav. 370; Bristow v. Bristow, 5 Beav. 289. | man, 1 Dan. 117. |
| (a) Powell v. Att.-Gen. 3 Mer. 48. | (d) Masters v. Masters, 1 P. Wms. 420. |
| [See McColl v. Atherton, 12 Jur. 1042.] | (e) Johnston v. Swann, 3 Mad. 457. |
| | (f) Trustees of British Museum v White, 2 S. & St. 594. |

¹ The following have been recently held valid gifts to charity, in England: a bequest "to the Queen's Chancellor of the Exchequer for the time being, for the benefit and advantage of Great Britain;" *Nightingale v. Gouldbourn*, 2 Phill. 594; a bequest to the commissioners for the reduction of the National Debt. *Ashton v. Lord Langdale*, 4 Eng. L. & Eq. 80; "to the minister and members of churches, holding particular doctrines;" *Att.-Gen. v. Lawes*, 8 Hare, 32; to the governors of a society, "for the increase and encouragement of good servants." *Loscombe v. Wintringham*, 13 Beav. 87; S. C. 7 Eng. L. & Eq. 164; "to be applied and appropriated in such manner as the trustees for the time being, &c., in their uncontrolled discretion, may think proper and expedient, for the benefit and advancement, and propagation of education and learning in every part of the world, as far as circumstances would admit." *Whicker v. Hume*, 10 Eng. L. & Eq. 218. But in *Habershon v. Vardon*, 7 Eng. L. & Eq. 228; a gift towards contributions "for the political restoration of the Jews to Jerusalem," was held not charitable; though a gift towards a fund for the bishopric of Jerusalem, was sustained. See in the United States, ante, page 133, in note.

maintain a preaching minister—a gift to build a session-house for a county—a gift by parliament of a duty on coals imported into London, for the purpose of rebuilding St. Paul's church after the Fire of London—have all been held to be charitable uses within the equity of the Statute of Elizabeth.”(g) So a trust to assist a literary person in his pursuits is also a good charitable trust; as is a trust to found an essay on a subject of science.(h)¹

So where there is a trust for the benefit of poor “householders” or poor “relations;” although each individual object may be said to be private, yet in the extensiveness of the benefit accruing from such trusts they may very properly be called public charities, and will be treated as such.(i)²

But there has been already occasion to observe that a trust for [*454] “private” *charities cannot be enforced by the court as a charitable purpose;(k) and also that a direction to apply a fund discretionarily in favor of objects of “benevolence and liberality” does not come within the technical meaning of the term “charitable.”(l) Charity, said Sir W. Grant, in its widest sense denotes all the good affections men ought to bear towards each other; in its more restricted and common sense, relief to the poor. In neither of these senses is it employed in the Court of Chancery.(m)

So it has been held, that a gift for “schools of art” is not a charitable purpose.(n)

And in a very late case, it was held by Lord Langdale, M. R., that a gift of a residue to trustees to be by them applied for the relief of domestic distress, assisting indigent but deserving individuals, or

(g) *Att.-Gen. v. Helis*, 2 S. & St. 67, 76.

(h) *Thompson v. Thompson*, 1 Coll. N. C. C. 395. [*Pickering v. Shotwell*, 10 Barr, 27; but see *Bridges v. Hartley*, 14 Jur. 683; 19 L. J. Ch. 416.]

(i) *Att.-Gen. v. Pearce*, 2 Atk. 88; *White v. White*, 7 Ves. 423; see *Nash v. Morley*, 5 Beav. 177. [See *Bull v. Bull*, 8 Conn. 147; stated ante, note to p. 68.]

(k) *Ommaney v. Butcher*, T. & R. 270; *Ellis v. Selby*, 1 M. & Cr. 293; *Nash v. Morley*, 5 Beav. 177; ante, Pt. I. Div. II. Ch. I. Sect. 3.

(l) *Morice v. Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522, and see *James v. Allen*, 3 Mer. 17. [But see *Witman v. Lex*, 17 S. & R. 193.]

(m) 9 Ves. 405; see ante, Pt. I. Div. I. Ch. II. Sect. 4, Pl. III.; and Pt. I., Div. II. Ch. I. Sect. 3.

(n) *Duke, Char. Us.* 128.

¹ In *Lowell's Appeal*, 22 Pick. 215, a bequest “for the promotion of the moral, intellectual, and physical instruction and education of the inhabitants” of the city of Boston, was held good as a charity.

² A bequest to a lodge of freemasons “for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans,” was held to be a charity in *Duke v. Fuller*, 9 New Hamp. 538; and not to fail on the dissolution of the lodge; and see *Vander Volgen v. Yates*, 2 Barb. Ch. 290. But as to Odd Fellows' lodges, see, contra, *Babb v. Reid*, 5 Rawle, 151.

encouraging undertakings of general utility in such mode and proportions as their own discretion may suggest, was not such a charitable trust as could be enforced by the court; for although the first part of the trust might have been supported as a good charitable purpose, owing to the use of the word "indigent," yet the latter alternative in favor of undertakings of "general utility," rendered the trust too indefinite.(o)

And it is settled, that a trust to present to a church on the nomination of the parishioners at large, is not of a public nature; and any question arising on such a trust must be brought before the court by an ordinary suit, and not by an information by the Attorney-General.(p)

Moreover, in determining whether or not there is a proper charitable purpose, the source *from whence* the fund is derived, as well as the object *to which* it is to be applied, must be attended to. The fund must proceed from the *gift or bounty* either of the crown or state, or some private person, otherwise it will not be charitable: and therefore rates or assessment, levied under an act of parliament by the inhabitants of a town *on themselves* for the improvement or benefit of their town, are not charitable funds to be administered by the court;—for there is no gift or bounty in the creation of such a fund.(q)¹

It is clearly settled, that the court here has jurisdiction to enforce the performance of a charitable trust created in this country, although the object of a trust is a *foreign* charity;(r) although it will not interfere to direct the *application* of the trust fund, where there is a competent jurisdiction in the foreign country for that purpose.(s) But it is to be observed, that a trust for a foreign charitable purpose cannot be supported here, if it contravene the policy of the English

(o) *Kendall v. Granger*, 5 Beav. 300.

(p) *Att.-Gen. v. Parker*, 1 Ves. 43; *Att.-Gen. v. Newcombe*, 14 Ves. 1, 6; see *Fearon v. Webb*, 14 Ves. 19; *Att.-Gen. v. Cuming*, 2 N. C. C. 139, 149.

(q) *Att.-Gen. v. Heelis*, 2 S. & St. 77. [See *Thomas v. Ellmaker*, 1 Pars. Eq. 107.]

(r) *Oliphants v. Hendrie*, 1 Bro. C. C. 571; *Campbell v. Radnor*, Ib. 171; *Att.-Gen. v. Bishop of Chester*, Ib. 444; *Att.-Gen. v. City of London*, 3 Bro. C. C. 171;

S. C., 1 Ves. jun. 243; *Att.-Gen. v. Le-pine*, 19 Ves. 309; S. C., 2 Sw. 181; *Gospel Propagation Society v. Att.-Gen.*, 3 Russ. 142; *Curtis v. Hutton*, 14 Ves. 537; *Mackintosh v. Townsend*, 16 Ves. 330; *Emery v. Hill*, 1 Russ. 111; *Thompson v. Thompson*, 8 Jurist, 639. [*Burbank v. Whitney*, 24 Pick. 153.]

(s) *Provost of Edinburgh v. Aubery*, Amb. 236; *Emery v. Hill*, 1 Russ. 111; *Collyer v. Burnett*, Tam. 79.

¹ Associations of individuals for general charitable or public purposes, are charities, and within the control of the court as such. *Thomas v. Ellmaker*, 1 Pars. Eq. 108; *Wright v. Linn*, 9 Barr, 433; *Penfield v. Sumner*, 11 Verm. 296. But it is otherwise with regard to associations for mutual benevolence, as the Odd Fellows' societies. *Babb v. Reid*, 5 Rawle, 151.

[*455] law, although it may not *be illegal according to the laws of the state where the charity is to be established. And on this ground the court has declined to enforce trusts for the support of foreign Roman Catholic establishments, before the recent act (2 & 3 Will. IV. c. 115) for the relief of Roman Catholics.(t)

And trusts for charitable purposes in this country cannot be supported, if they are of an illegal character. And their illegality may arise either from their being in contravention of the common law, or of some statutory provision.¹ Thus, gifts to superstitious purposes are illegal and void by the general policy of law independently of any statute. And gifts for the maintenance of persons to "pray for the souls of the dead," or "to maintain perpetual obits, lamps," &c., are superstitious; and as such are void.(u) And before the passing of the act 2 & 3 Will. IV. c. 115, trusts for the propagation of the Roman Catholic faith were held to be void as superstitious.(x) But by that statute Roman Catholics are placed on the same footing as Protestant Dissenters in this respect, and such gifts will consequently now be supported;(y) and it has been decided, that that act is retrospective in its operation.(z) It has been also held, that a gift for the advancement of the Jewish religion is illegal.(a)

By the statute 1 Edw. VI. c. 14, all gifts to the superstitious uses

(t) *De Garcia v. Lawson*, 4 Ves. 434, n.; *Smart v. Prujean*, 6 Ves. 560. *v. Lawson*, 4 Ves. 434, n.; *Smart v. Prujean*, 6 Ves. 560.

(u) *Duke, Char. Us.* 466; 2 *Rop. Legs.* 113; 2 *Jarm. Pow. Dev.* 13. (y) *West v. Shuttleworth*, 2 *M. & K.* 684.

(x) *Att.-Gen. v. Todd*, 1 *Keen*, 803; *Cary v. Abbott*, 7 Ves. 490; *Att.-Gen. v.* 221. (z) *Bradshaw v. Tasker*, 2 *M. & K.*

Power, 1 *Ball & B.* 145; *De Themines v. De Bonneval*, 5 *Russ.* 288; *De Garcia* n.; *sed vide Strauss v. Goldsmid*, 8 *Sim.* 514. (a) *Da Costa v. De Paz*, 2 *Sw.* 487,

¹ A charity, otherwise valid, will not be affected by the fact, that it tends to a perpetuity, as that is involved in its very nature. *Griffin v. Graham*, 1 *Hawks*, 96; *Inglis v. Sailors' Snug Harbor*, 3 *Pet. S. C.* 99; *State v. Gerard*, 2 *Ired. Eq.* 210; *Hillyard v. Miller*, 10 *Barr*, 335. But in the last case it was held, that a trust for accumulation, which might extend beyond the period allowed by law, was void, although the fund thus to be created was directed to be ultimately applied to the foundation and support of a charity. In *Christ's Hospital v. Granger*, 1 *Mac. & G.* 460. 14 *Jur.* 339, however, it was held, that a contingent limitation over from one charity to another, was not within the rule against perpetuities, and therefore good. In the particular case, there was a bequest, in 1624, to the corporation of Reading, to be applied to certain purposes, with a proviso, that if the corporation should for one year neglect to observe the directions of the will, the fund should be utterly void, and the property be transferred to the corporation of London, in trust for Christ's Hospital. After the lapse of over two hundred years, a breach of the condition occurred; and the gift over was sustained. The case of *Hillyard v. Miller*, ut *supr.*, has not been considered, in Pennsylvania, as entirely satisfactory; and the distinction on which it is based is, certainly, not very broad.

there mentioned—viz., “towards or about the finding, maintenance, or sustentation of any priest, of any anniversary or obit, lamp, light, or lights, or other like thing”—devolve beneficially to the crown.(b) But if the superstitious purpose be not within the terms of that statute, but is void from the general illegality of its object, and the gift has not been impressed with a *trust for charity generally*, the failure will create a resulting trust for the heir or next of kin of the donor.(c)¹

If, however, the gift create a *general* trust for charity, the illegality of the *particular* purpose, as being superstitious, will not affect the validity of the *general* trust, and the duty of appropriating the amount to other charitable purposes will devolve upon the crown.(d)

A conveyance or devise of real estate in trust for a charitable or public institution, being a *corporation*, is inoperative by the Statutes of Mortmain, unless it be sanctioned by a license from the crown.(e)² However, the corporation of Queen Anne's bounty is an exception to this general rule, for by the stat. 43 Geo. III. c. 107, that institution is exempted from the operation of the Mortmain Acts.

Previously to the stat. 9 Geo. II. c. 36, there existed no legal restriction to the power of vesting real estate in trustees for such charitable purposes, or institutions, as were not of a corporate character. And this power might have been exercised equally by deed or will. But by that *act, all gifts by *will* of real estate, or any interest therein, in trust or for the benefit of any charitable [*456] uses whatsoever, are made void; as are voluntary conveyances *inter vivos* for the same purposes, unless made by deed, indented and sealed and delivered in the presence of two or more witnesses, twelve calen-

(b) Att.-Gen. v. Fishmongers' Company, 2 Beav. 151.

(c) West v. Shuttleworth, 2 M. & K. 684; De Themines v. De Bonneval, 5 Russ. 288; vide *supra*, p. 134.

(d) Da Costa v. De Paz, Ambl. 228; S. C., 2 Sw. 487, n.; Cary v. Abbott, 7 Ves. 490; West v. Shuttleworth, 2 M. & K. 697, 8; De Themines v. De Bonneval, 5 Russ. 297; ante, p. 48.

(e) Co. Litt. 99, a.; 1 Sand. Us. 339, n.

¹ There are no uses which can be denominated superstitious in the United States. Methodist Church v. Remington, 1 Watts, 218; Gars v. Wilhite, 2 Dana, 170.

² As to the Statutes of Mortmain in the United States, see ante, 48, note. In New York, in the recent cases of Ayres v. Methodist Church, 3 Sandf. S. C. 369; Andrew v. N. Y. Bible Soc., 4 Id. 178; Chittenden v. Chittenden, 1 Am. Law Reg. 538; it was held, that corporations, being exempted out of the statute of wills, could not at law take by devise for any pious or charitable object foreign to the purposes of their institution; and that the statute of Elizabeth having been expressly repealed, and its principles not in force in that State (in which the court differ from many previous decisions in New York; see ante page 79, in note), such devises could not be sustained as charities; but that there would be a resulting trust for the heir-at-law.

dar months before the death of the donor, and enrolled in the Court of Chancery within six months after execution. By the 4th and 5th sections, the two universities and their colleges, *(f)* and the colleges of Eton, Winchester, and Westminster, are expressly exempted from the operations of that act.¹

This statute has been determined to include not only direct devises of real estate to charitable uses, but also all such bequests, as in any manner affect or relate to interests in real property. Thus bequests of money to be laid out *(1)* in the purchase of lands, *(g)* as well as of lands to be sold, *(h)* or of sums charged upon or to be raised by sale or mortgage, or by any other means out of lands, *(i)* (including judgment debts, *(k)* or the lien of a vendor for his purchase-money, *(l)*) as also of leaseholds or terms for years, *(m)* money secured on mort-

(f) See 45 Geo. III. c. 101.

(g) Att.-Gen. v. Davies, 9 Ves. 545; Att.-Gen. v. Hartwell, Ambl. 451; S. C. 2 Ed. 334; Att.-Gen. v. Bowles, 2 Ves. 547; Widmore v. Woodroffe, Ambl. 637; Grieves v. Case, 4 Bro. C. C. 67; S. C. 2 Cox, 301; Middleton v. Clithero, 3 Ves. 734.

(h) Trustees of British Museum v. White, 2 S. & St. 594; Durour v. Motteux, 1 Ves. 320; Att.-Gen. v. Lord Weymouth, Ambl. 720; Curtis v. Hutton, 14 Ves. 53; Waite v. Webb, 6 Mad. 71; Gravenor v. Hallam, Ambl. 643. [See Wright v. Trustees, 1 Hoff. Ch. 202.]

(i) Arnold v. Chapman, 1 Ves. 108;

Att.-Gen. v. Lord Weymouth, Ambl. 24; Jackson v. Hurlock, Ambl. 487; Jones v. Williams, Id. 651; Wright v. Roe, 1 Bro. C. C. 61; Leacroft v. Maynard, 1 Ves. jun. 279; White v. Evans, 4 Ves. 21; Baker v. Hall, 12 Ves. 497; Currie v. Pye, 17 Ves. 462; Att.-Gen. v. Harley, 5 Mad. 321; Cooke v. Stationers' Company, 3 M. & K. 266.

(k) Collinson v. Pater, 2 R. & M. 344.

(l) Harrison v. Harrison, 1 R. & M. 71.

(m) Att.-Gen. v. Graves, Ambl. 155; Att.-Gen. v. Tomkins, Id. 216; Middleton v. Spicer, 1 Bro. C. C. 201; Paice v. Archbishop of Canterbury, 14 Ves. 364; Johnston v. Swann, 3 Mad. 457.

(1) But if the direction to invest in land be not *imperative*, but a discretion is vested in the trustees to lay it out or not, it has been held not to come within the statute. As where the money was to be laid out in land, or "*otherwise.*" Soresby v. Hollins, 9 Mod. 221; S. C., Ambl. 211, cited; Grimmitt v. Grimmitt, Ambl. 211; Curtis v. Hutton, 14 Ves. 537. But see English v. Orde, Highm. Mortm. 82; Bridgm. Duke, Char. Us. 432; and Kirkbank v. Hudson, 7 Price, 212; see Att.-Gen. v. Goddard, T. & R. 348.

¹ The following decisions, since the publication of the text, may be referred to, upon the construction of the Act of Geo. II.; and, amongst other things, as what is to be considered real property within its provisions: Doe v. Harris, 16 M. & W. 517; Sparling v. Parker, 9 Beav. 450; Tomlinson v. Tomlinson, Id. 459; Smith v. Oliver, 11 Id. 481; Walker v. Milne, Id. 507; Trye v. Corporation of Gloucester, 14 Id. 173; S. C., 6 Eng. L. & Eq. 73; Hilton v. Giraud, 1 De G. & Sm. 183; Att.-Gen. v. Munro, 2 Id. 122; Att.-Gen. v. Gardner, Id. 102; Myers v. Perigal, 16 Sim. 533, *contra*, S. C. in Common Pleas, 14 Eng. L. & Eq. 229; Ashton v. Lord Langdale, 4 Eng. L. & Eq. 80; Crafton v. Frith, 3 Id. 164; Whicker v. Hume, 10 Id. 218; Longstaff v. Rennison, 11 Id. 267; Att.-Gen. v. Hull, 15 Id. 182; Church Building Soc. v. Barlow, Id. 582; Att.-Gen. v. Ward, 6 Hare, 477. A charity may be divisible, under the Mortmain Act, and will be upheld so far as allowed by law. Crafton v. Frith, 3 Eng. L. & Eq. 164.

gage,(n) or money to be applied in paying off incumbrances affecting lands in mortmain,(o) have all been held to be void within the provisions of the act. And the statute has also been held to apply to money secured by turnpike tolls, or the bonds of turnpike commissioners,(p) and to navigation shares,(q) and money secured upon poor or county rates,(r) and also to a right of mooring ships in the Thames under a lease from the crown.(s) So it is now settled, that a bequest of money for the purpose of *building* a school-house, hospital, or other building for a charitable purpose, is void; for the direction to build, involves *prima facie* the purchase of land.(t) In some of the *earlier cases, indeed, such bequests were held not to be within the statute, as it might be possible for the trustees in such cases to get a piece of ground given them, so as to prevent the necessity of any purchase:(u) but these cases have been overruled by the more modern authorities.

However, if the testator expressly declare that the money is *not* to be applied to the purchase of land or erection of buildings, a bequest to a school *to be erected* has been held good.(x) And the presumption that land is intended to be purchased for the purpose of building, may be rebutted by evidence to disprove that intention.(y) And so the bequest will be good, if the testator clearly point to land already in mortmain; for a bequest to build upon or improve lands or buildings *already in mortmain*, is not within the statute.(z) And it has been held, that a direction to trustees to *provide* a school-house, is not void, for a building might be *hired* for the purpose.(a) Where a testator creates a *mixed fund of realty and personalty* for payment of debts and legacies, and gives several legacies, some being for

(n) Att.-Gen. v. Caldwell, Ambl. 635; Att.-Gen. v. Meyrick, 2 Ves. 44; Howes v. Chapman, 4 Ves. 542; Att.-Gen. v. Munby, 1 Mer. 327; Johnston v. Swann, 3 Mad. 457.

(o) Corby v. French, 4 Ves. 418; Waterhouse v. Holmes, 2 Sim. 162; Davies v. Hopkins, 2 Beav. 276.

(p) Knapp v. Williams, 4 Ves. 430, n.

(q) Howes v. Chapman, 4 Ves. 542.

(r) Finch v. Squire, 10 Ves. 41.

(s) Negus v. Coulter, Ambl. 367.

(t) Att.-Gen. v. Tyndall, Ambl. 614; 2 Ed. 207; Pelham v. Anderson, 1 Ed. 296; Att.-Gen. v. Hyde, Ambl. 751; 1 Bro. C. C. 444, n.; Foy v. Foy, 1 Cox, 163; Att.-Gen. v. Nash, 3 Bro. C. C. 588; Att.-Gen. v. Whitchurch, 3 Ves. 144; Chapman v. Brown, 6 Ves. 604; Att.-Gen. v. Parsons, 8 Ves. 186; Att.-Gen. v. Davies, 9 Ves. 535; Pritchard v. Ar-

bouin, 3 Russ. 456; Giblett v. Hobson, 5 Sim. 651; 3 M. & K. 517; Mather v. Scott, 2 Keen, 172.

(u) Vaughan v. Farrer, 2 Ves. 182; Att.-Gen. v. Bowles, Id. 547.

(x) Henshaw v. Atkinson, 3 Mad. 306.

(y) Giblett v. Hobson, 3 M. & K. 517.

(z) Glubb v. Att.-Gen., Ambl. 373; Harris v. Barnes, Id. 651; Brodie v. Duke of Chandos, 1 Bro. C. C. 444, n.; Att.-Gen. v. Parsons, 8 Ves. 186; Att.-Gen. v. Munby, 1 Mer. 327; Foy v. Foy, 1 Cox, 163; Ingleby v. Dobson, 4 Russ. 342. [Trye v. Corporation of Gloucester, 6 Engl. L. & Eq. 73; Crafton v. Frith, 3 Engl. L. & Eq. 164.]

(a) Johnston v. Swann, 3 Mad. 457; and see Att.-Gen. v. Williams, 4 Bro. C. C. 426.

charitable purposes, and adds a declaration, that none of the charity legacies are to be paid out of the produce of the real estate, but that they are to be paid *exclusively* out of the personalty, such a general direction will not suffice to throw the whole of the charity legacies exclusively on the personal estate, but a proportionate part of them will still remain charged on the realty, and will be consequently void to that extent.(b)¹

It has been decided that copyhold lands are within the provisions of this statute.(c)

The 6th section of the act expressly exempts dispositions of real or personal estate in Scotland from its operation.(d) And it has been decided that the act in question is local in its operation, and does not extend to Ireland,(e) or to the West Indies, or other colonies.(f) Still less could it apply to real property situated in foreign countries.

Bequests, therefore, of *personal estate* in aid of foreign charities, will be supported, although the object of charitable application is of the nature of real estate. But gifts of *real estate* in England, or any interest therein, to a foreign charity, are within the mischief remedied by the act, and are consequently void.(g)

It has been decided, that a policy of insurance is not within the act, although the assets of the insurance company consist partially of real estate.(h) And shares in the London Gas Light and Coke Company have also been held not to be within the act.(i)

[*458] *The exception in the act in favor of the universities and colleges of Eton, Winchester, and Westminster, has been held to apply only to gifts made to these societies *beneficially*, and not where they are made trustees for other charitable purposes.(k)

(b) *Sturge v. Dimsdale*, 6 Beav. 462; see *Philanthropic Society v. Kemp*, 4 Beav. 581. [See the remarks on these cases in *Robinson v. Geldard*, 12 Engl. L. & Eq. 64, by Lord St. Leonards.]

(c) *Arnold v. Chapman*, 1 Ves. 108; *Henchman v. Att.-Gen.*, 2 S. & St. 498; S. C., 3 M. & K. 262.

(d) See *M'Intosh v. Townsend*, 16 Ves. 330; *Oliphant v. Hendrie*, 1 Bro. C. C. 570.

(e) *Campbell v. Lord Radnor*, 1 Bro. C. C. 271.

(f) *Att.-Gen. v. Stewart*, 2 Mer. 143. [*Whicker v. Hume*, 10 Engl. L. & Eq. 218.]

(g) *Curtis v. Hutton*, 14 Ves. 537; *Att.-Gen. v. Mill*, 3 Russ. 328.

(h) *March v. Att.-Gen.*, 5 Beav. 334.

(i) *Thompson v. Thompson*, 1 Coll. N. C. C. 381.

(k) *Att.-Gen. v. Munby*, 1 Mer. 327.

¹ But in *Robinson v. Geldard*, 12 Engl. L. & Eq. 64, before Lord St. Leonards, overruling S. C., 3 De G. & Sm. 499, it was held, that where it appears from the face of the will to be the intention of a testator, that a bequest to a charity shall be paid out of the pure personalty, it amounts, in some respects, to a demonstrative legacy, which will not abate, with general legacies, on the failure of assets. See the remarks in this case on marshalling in favor of charities; and as to conversion in favor of charities, so as to enable corporations (where excepted out of the statute of wills) to take, see *Wright v. Trustees, Hoffm. Ch. 202*.

A further exception to the operation of the statute is made by the Church Building Acts,^(l) by which gifts for the building, repairing, or providing of churches and chapels, and houses for the residence of ministers, and also of churchyards and glebes, are rendered valid.

Another exception is created by the custom of London, which enables freemen to devise lands within the city notwithstanding the Statute of Mortmain.^(m)

And so it seems that a gift to or for the benefit of the *Crown* is not within the operation of the statute. In *Thellusson v. Woodford*,⁽ⁿ⁾ a devise of the produce of real estate to be paid to the king for the use of the sinking fund, was supported. But a gift to the British Museum is not within the principle of this exception.^(o)

Where any interest in real estate is conveyed by *deed* in trust for a charitable purpose, the provisions in the act as to the execution and enrolment of the conveyance, as well as to the donor's continuing to live for a twelvemonth after the gift, must be strictly complied with, or the disposition will be void.^(p)⁽¹⁾

There has been already occasion to consider at some length the respective rights of the donee in trust on the one hand, and of the heirs-at-law or next of kin or residuary legatee of the donor on the other, to the benefit of a particular charitable gift, which is void under the Statute of Mortmain.^(q)

The nature of the expressions, by which a valid trust for charity may be created, have also been discussed.^(r)

As the court has adopted different rules of construction with respect to charitable trusts, so it has a more complete and searching jurisdiction for the supervision and control of the trustees.

Any question affecting a charitable trust may be brought before the court by information in the name of the Attorney-General,¹ or

^(l) 43 Geo. III. c. 108; 58 Geo. III. c. 45; 59 G. III. c. 134; 3 G. IV. c. 72; 5 Geo. IV. c. 103; 7 & 8 Geo. IV. c. 72; 1 & 2 Will. IV. c. 38 & 45; 2 & 3 Will. IV. c. 61; 1 Vict. c. 75; 1 & 2 Vict. c. 106 & 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60.

⁽ⁿ⁾ *Thellusson v. Woodford*, 4 Ves. 227.
^(o) *British Museum v. White*, 2 S. & St. 594.

^(p) *Att.-Gen. v. Munby*, 1 Mer. 327; *Price v. Hathaway*, 6 Mad. 304.

^(q) *Ante*, this section; *et vide supra*,

^(m) *Middletown v. Cater*, 4 Bro. C. Pt. I. Div. II. Ch. I. Sect. 3.
C. 409.

^(r) *Ibid.*

⁽¹⁾ The Act 9 Geo. IV. c. 85, makes conveyances of land to charitable uses, which were executed before that act, valid, notwithstanding the formalities required by the 9 Geo. II. c. 36, had not been observed, but the operation of this act is only retrospective, and applies only to purchases for valuable consideration.

¹ See *Att.-Gen. v. Ward*, 12 Jur. 807; and in the United States, *Att.-Gen. v. Wallace*, 7 B. Monr. 611; *Going v. Emery*, 16 Pick. 119; *Parker v. May*, 5 Cushing, 336; *Duke v. Fuller*, 9 N. H. 538. The Attorney-General's right to proceed is not affected by the long acquiescence of the parties interested. *Corporation of Newcastle v. Att.-Gen.*, 12 Cl. & F. 402.

in some cases the proceedings may be by bill; but in that case the Attorney-General must be made a party to the suit, and the court will refuse to proceed in his absence.(s)

Where it is sought to administer or control an *established* charity under the direction of the court, there must be an information by the Attorney-General, who is entitled to the supervision and control of [*459] the proceedings: *and it is only where the question to be decided is, *whether there is a good creation of a charitable trust or not*, that a bill making the Attorney-General a defendant will be entertained.¹

However, it is to be observed, that if the trust be not for a charity within the intent of the Statute of Charitable Uses, an information by the Attorney-General will be improper.(t)

A summary jurisdiction to proceed by petition has also been conferred on the court by more than one statute. The statute 52 Geo. III. c. 101, usually known as Sir Samuel Romilly's Act, recites in its preamble the expediency of providing a more summary remedy in cases of breaches of trust created for charitable purposes, as well as for the just administration of the same; and in case of any breach of such trusts, or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any such trust, it enables any two or more persons to petition the Court of Chancery or Exchequer, such petition to be heard and determined in a summary way; and by the 2d section every such petition must be allowed and certified by the Attorney or Solicitor-General.²

(s) *De Themines v. De Bonneval*, 5 Att.-Gen. v. Parker, 1 Ves. 43; Att.-Russ. 288. Gen. v. Newcombe, 14 Ves. 1, 6; Att.-

(t) Att.-Gen. v. Hever, 2 Vern. 382; Gen. v. Cuming, 2 N. C. C. 139, 149.

¹ There are many dicta and adjudications since the statute of the 43 Elizabeth, affirming the full jurisdiction of Chancery over charitable uses *ab origine*; against which appears but the single dictum of Lord Loughborough, in the Attorney-General v. Bowyer, 3 Ves. Jr. 726 b, that the Court of Chancery had not, prior to the statute, any cognizance upon informations for the establishment of charities; but that parties made out such cases as well as they could at law. And this assertion of doctrine was not confined to proceedings by *information* in the name of the Attorney-General, but extended to all cases of charitable uses; and it was so applied in the case of the Baptist Association v. Hart's Executors, 4 Wheaton, 1. But in the great and very recent case in the Supreme Court of the United States,—*Vidal et al. v. The Citizens of Philadelphia et al.*, 2 Howard's Rep. 127, it was shown, not only from reports of cases since the statute, but from the calendars of the proceedings in Chancery in the Tower of London, printed by direction of the Record Commission in 1827, that charitable uses might be enforced in Chancery, upon the general jurisdiction of the court independently of the statute of Elizabeth; and that the jurisdiction had been acted on, not only subsequent, but antecedent to that statute.—T.

² Upon the construction of this act see *Re Hall's Charity*, 14 Beav. 115; 15

By the Act of 59 Geo. III. c. 91, the provisions of which were continued and extended by 2 Will. IV. c. 57, and are embodied in the late act of 5 & 6 Will. IV. c. 71, the Attorney-General, on the certificate of the commissioners of charities, is empowered to proceed in the Court of Chancery, either in a summary way by petition, or by information for the purpose of remedying any abuse in the management of charities.

The 21st section of Sir Edw. Sugden's Act (1 Will. IV. c. 60) extends to trustees of charities all the provisions of that act, enabling the court, upon application by petition, to direct conveyances to be made in case of disability, &c., of the existing trustees; those provisions have been already considered at length in a previous chapter.^(u) The 23d section of the same act further empowers the court, also upon petition, to appoint new trustees of charities in case of the death of all the old trustees. And by the 3d section of 2 Will. IV. c. 57, a petition for this purpose may be presented by the Attorney-General.

The 71st section of the Municipal Corporations Act, 5 & 6 Will. IV. c. 76,¹ provides, that where any municipal corporation then existing, or any members thereof, shall be trustees of property for any charitable purpose, the trust property shall remain vested in them until the 1st of August, *1836, when their interest is to cease, and the future administration of the trust is to be provided for [*460] by the order of the Lord Chancellor.

The recent act, 3 & 4 Vict. c. 77,² also confers extensive jurisdiction on the court for controlling and reforming grammar schools;

(u) Ante, Pt. I. Div. III. Ch. II.; Pt. II. Ch. IV. Sect. 3.

Jur. 740; *Re Godmanchester Grammar School*, 15 Jur. 833; *Att. Gen. v. East Retford Grammar School*, 17 L. J. Ch. 450; *Att.-Gen. v. Bristol*, 14 Sim. 648; *Att.-Gen. v. Earl of Devon*, 15 Sim. 259; *Att.-Gen. v. Earl of Stamford*, 1 Phill. 737; *Att.-Gen. v. Bovill*, Id. 762; *Re Shrewsbury Grammar School*, 1 Mac. & G. 324; 14 Jur. 259; *Re Suir Island Charity*, 3 Jones & Lat. 171; *Re Butterwick Free School*, 6 Engl. L. & Eq. 104; *Att.-Gen. v. Bishop of Worcester*, 9 Id. 1. As to costs, see *Att.-Gen. v. Ironmongers' Co.*, 10 Beav. 194; *Att.-Gen. v. Ward*, 12 Jur. 807; *James v. James*, 11 Beav. 397; *Solicitor-Gen. v. Bath*, 13 Jur. 866.

¹ As to this Act, see *Re St. John's Hospital*, 3 Mac. & G. 235; 15 Jur. 235; *Re Worcester Charities*, 2 Phill. 284; *Re Shrewsbury Charities*, 1 Mac. & G. 84; 13 Jur. 20; *Att.-Gen. v. Ludlow*, 2 Phillips, 635; *Att.-Gen. v. Corp. of Norwich*, 9 Engl. L. & Eq. 93.

² See, under this statute, called Sir Eardley Wilmot's Act, and generally as to Grammar Schools, *Re Fremington School*, 10 Jur. 512; *Att.-Gen. v. Earl of Devon*, 15 Sim. 193; *Att.-Gen. v. Earl of Stamford*, 16 Sim. 453; 1 Phill. 737; *Att.-Gen. v. Ludlow*, 2 Phill. 685; *Doe v. Willis*, 2 Eng. L. & Eq. 356; but see *Willis v. Childs*, Id. 41; S. C. 13 Beav. 117; *Reg. v. Dean, &c., of Rochester*, 6 Eng. L. & Eq. 269; (see 7 Hare, 532; 13 Jur. pt. ii., 309;) *Att.-Gen. v. Bishop of Worcester*, 9 Eng. L. & Eq. 1.

and by the 21st section this jurisdiction may be exercised on petition, according to the provisions of Sir Samuel Romilly's Act (52 Geo. III. c. 101).

There has been already occasion to consider at length the extent and nature of the summary statutory jurisdiction of the court as well as the mode in which it will be exercised.(x) But it may be here observed in addition, that the court will interfere on petition only in cases of clear abuse of charity; and if there should be any adverse question as to the nature or object of the charitable trust, or in what manner the breach of trust is to be taken advantage of;(y) or as to the title to the charity estates;(z) or as to the parties liable for the breach of trust,(a) these are cases for an information and not a petition under the statutory jurisdiction.

It is also to be remarked, that where the court has undertaken the regulation of a charity, it will act without any actual complaint, whenever any circumstance comes under its notice, which in its judgment requires a remedy.(b)

Where there is a local visitor duly constituted, the internal regulation and conduct of the charity will be under his exclusive jurisdiction, and the court will not interfere with him in the exercise of that jurisdiction.(c)¹ But the due application of the *revenues* of a charity is a *trust*, the strict performance of which will be enforced by the court, notwithstanding the appointment and existence of a visitor. And informations with that object have repeatedly been entertained notwithstanding the objection, that the object was within the cognizance of the visitor.(d)

The crown is the visitor of all corporations of royal foundation:(e) and also where the heir of the founder cannot be discovered(f) or is

(x) Ante, Pt. II. Ch. IV. Sect. 3.

(y) *Ludlow Corporation v. Greenhouse*, 1 Bl. N. S. 17.

(z) *Ex parte Rees*, 3 V. & B. 10.

(a) *Ex parte Skinner*, 2 Mer. 453; *Re St. Wenn's Charity*, 2 S. & St. 66.

(b) *Att.-Gen. v. Cooper's Company*, 19 Ves. 194.

(c) *Att.-Gen. v. Price*, 3 Atk. 108; *Att.-Gen. v. Middleton*, 2 Ves. 327; *Att.-Gen. v. Smythes*, 1 Keen, 239; S. C. 2 M. & Cr. 135; *St. John's College, Cambridge v. Todington*, 1 Burr. 200; *Att.-Gen. v. Lock*, 3 Atk. 165; *Att.-Gen. v.*

Catherine Hall, Jac. 392; *Att.-Gen. v. Archbishop of York*, 2 R. & M. 468.

(d) *Att.-Gen. v. Corporation of Bedford*, 2 Ves. 505; *Att.-Gen. v. Foundling Hospital*, 2 Ves. jun. 42; *Att.-Gen. v. Dixie*, 13 Ves. 519; *Re Berkhamstead School*, 2 V. & B. 134; *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 491.

(e) *Case of Queen's College, Cambridge*, Jac. 1; Co. Litt. 344, b; 1 Bl. Comm. 481.

(f) *Ex parte Wrangham*, 2 Ves. jun. 609; *Att.-Gen. v. Black*, 11 Ves. 191; *Att.-Gen. v. Clarendon*, 17 Ves. 4, 98.

¹ As to the rights of a visitor, and the powers of a Court of Chancery in such case, see *Att.-Gen. v. Magdalen College*, 11 Jur. 681; *Whiston v. Dean, &c.*, of Rochester, 7 Hare, 532; *Atty.-Gen. v. Dean, &c.*, of Rochester, 6 Eng. L. & Eq. 269; *Att.-Gen. v. Browne's Hospital*, 17 Sim. 137; *Sanderson v. White*, 18 Pickering (Mass.), 332.

lunatic.(g) And this visitatorial authority will be exercised through the Keeper of the Great Seal, to whom the application must be made by petition, and not by information or suit.

In the case of any doubt or difficulty in the administration of the funds of a charity, the Court of Chancery is the proper tribunal to which the trustees should have recourse in the first instance. And if they apply to parliament without the sanction of the court, and fail in obtaining their act, the court will not suffer the costs of the unsuccessful application to be thrown on the funds of the charity : (h) although it would be otherwise, *if the legislature had declared its approval of such an application by passing the act. (i) [*461]

It has been already seen, (k) that where there is a gift of property generally to charity *without the interposition of any trustees*, it will rest with the crown to direct the mode of its application by sign-manual; but where *a trust* is created, the application will be effected by means of a scheme to be directed and approved of by the Court of Chancery. (l)

It has also been shown, (m) that if a gift be impressed with the character of a general trust for charitable purposes, the trustees will not in general be suffered to derive any benefit from the failure of all or any of the particular purposes declared by the creator of the trust; (n) or to appropriate any surplus which may remain after the satisfaction of these particular purposes; (o) or which may arise from the subsequent increase in the value of the trust estate. (p)

Moreover it has been long settled that the gift of *a certain specified rent charge or annuity* in trust for a charity, will amount to a gift of the estate itself, and will carry a subsequent increase of rents to the exclusion of the claim of the trustees, *if the specified sum be*

(g) Att.-Gen. v. Dixie, 13 Ves. 519, 533.

(h) Att.-Gen. v. Earl of Mansfield, 2 Russ. 501, 519. [See Att.-Gen. v. Andrews, 14 Jur. 905.]

(i) Ibid. Downing College case, 2 Russ. 519, cited.

(k) Ante, Pt. I Div. II. Chap. 1, Sect. 3.

(l) Moggridge v. Thackwell, 7 Ves. 86; Paice v. Archbishop of Canterbury, 14 Ves. 372; Ommaney v. Butcher, T. & R. 270.

(m) Ante, Pt. I. Div. II. Ch. I. Sect. 3.

(n) Ante, Pt. I. Div. II. Ch. I. Sect. 3; Att.-Gen. v. Ironmongers' Company, 2 M. & K. 579; 2 Beav. 313, and 1 Cr. & Ph. 208; Att.-Gen. v. Bishop of Landaff, lb. 586, stated; Att.-Gen. v. Oglander, 3 Bro. C. C. 166.

(o) Att.-Gen. v. Arnold, Show. P. C.

22; S. C.'2 Russ. 434, stated; 2 Att.-Gen. v. Sparks, Ambl. 201; Att.-Gen. v. Coopers' Company, 3 Beav. 29; Att.-Gen. v. Painters and Stainers' Company, 2 Cox, 51; Att.-Gen. v. Minshull, 4 Ves. 11; Att.-Gen. v. Earl of Winchelsea, 3 Bro. C. C. 334.

(p) Thetford School Case, 8 Co. 130; S. C. 2 J. & W. 316, stated; Att.-Gen. v. Johnson, Ambl. 190; Att.-Gen. v. Haberdashers' Company, 4 Bro. C. C. 103; Att.-Gen. v. Mayor of Coventry, 2 Vern. 399; Ex parte Jortin, 7 Ves. 340; Att.-Gen. v. Coopers' Company, 3 Beav. 29; Att.-Gen. v. Christ's Hospital, 4 Beav. 73; Att.-Gen. v. Brentwood School, 1 M. & K. 570; Att.-Gen. v. Drapers' Company, 6 Beav. 382.

equal to the annual value of the estate at the time of the gift.(g) Although the principle of these cases has not met with the approval of later Judges,(r) and it will not be extended. And it has been held, that if there be a gift of an estate to trustees in trust, to apply in charity merely a specified annual sum *which does not amount to the then value of the estate*, any surplus will not go to the charity, but the trustees will take it for their own benefit; unless indeed the instrument be so framed, as to create a resulting trust to that extent for the heir of the donor.(s) And if the trustees be themselves objects of the donor's bounty, that will be an additional argument in favor of their right to the beneficial enjoyment of the surplus.(t) However, the mere fact of the trustees being a charitable corporation or institution, such as a college or hospital, will not of itself have this operation.(u)

So, *à fortiori*, where the residue, after making certain specified payments *in favor of a charity, is given expressly or by implication [*462] to the trustees for their own benefit, the particular charitable payments will not be increased out of the improved value, but the whole income, subject to the actual payments directed by the trust, will belong beneficially to the trustees.(x)(1)

Where the trustees are themselves an eleemosynary corporation, and several specified charitable payments are directed to be made by them, *one of which is for their own benefit*, and the residue after making the several payments is given *to charity generally*; it has been held, that a subsequent improvement in the value of the property will be applied rateably in the increase of the payments to all the objects of the donor's bounty, *including the trustees themselves.*(y)

(g) Att.-Gen. v. Coventry, 2 Vern. 399; 7 Bro. P. C. 235; Att.-Gen. v. Johnson, Ambl. 190; Att.-Gen. v. Drapers, Company, 4 Beav. 67; Att.-Gen. v. Christ's Hospital, Ib. 73; Att.-Gen. v. Coopers' Company, 3 Beav. 29; Mystery of Mercers v. Att.-Gen., 2 Bl. N. S. 165.

(r) See Att.-Gen. v. Mayor of Bristol, 2 J. & W. 307.

(s) Att.-Gen. v. Mayor of Bristol, 2 J. & W. 294; Att.-Gen. v. Grocers' Company, 6 Beav. 526.

(t) Att.-Gen. v. Mayor of Bristol, 2 J. & W. 294; Att.-Gen. v. Grocers' Company, 6 Beav. 526.

(1) The decision of Lord Langdale, M. R., in the recent case of Att.-Gen. v. Drapers' Company, 4 Beav. 67, appears to militate against the principle of these cases; unless indeed any distinction can be founded on the circumstance, that the amount of the residue, which was given beneficially to the trustees, was there actually specified, instead of being left uncertain.

(u) Att.-Gen. v. Christ's Hospital, 4 Beav. 74; and see Att.-Gen. v. Caius College, 2 Keen, 150.

(x) Att.-Gen. v. Gatherine Hall, Jac. 381; Att.-Gen. v. Skinners' Company, 2 Russ. 407; Att.-Gen. v. Cascoigne, 2 M. & K. 647; Att.-Gen. v. Grocers' Company, 6 Beav. 526.

(y) Att.-Gen. v. Caius College, 2 Keen, 150; Att.-Gen. v. Coopers' Company, 3 Beav. 29; see Mystery of Mercers v. Att.-Gen., 2 Bl. N. S. 165; [and Att.-Gen. v. Merchants Venturers' Co., 17 L. J. Ch. 137.]

Where an estate is charged with the payment of *certain specified sums* for particular charitable purposes, *without any general trust* for charity, those payments will not be increased out of the improved value of the property, although they may have become insufficient for the purposes contemplated by the creator of the trust.^(z)

Where there is a disposition in trust for charity *generally*, but the *particular purposes* expressed by the donor cannot be effectuated, it has been already seen, that there will be no resulting trust for the heir or next of kin.^(a) Still less will the *trustees* be entitled to the interest thus becoming undisposed of for their own benefit. But there must be a *cy pres* application—that is, an application to such charitable purposes as will be supposed to come nearest to the original intention of the donor.^(b)¹ However, the trustees could never be advised to make such an application of the trust funds of their own authority, but recourse must be had to the court, which alone is competent to elaborate a proper *cy pres* application; and this will be done by means of a scheme to be settled by the Master upon due inquiries and evidence, and ultimately to be approved of by the court.² For the purposes of the present work, therefore, it will be unnecessary to go into an inquiry as to the nature and principles of *cy pres* applications, which may be gathered from the cases referred to above.

We will now proceed to consider cursorily the powers and duties of trustees of charities in the administration of their trusts.

As a general rule, trustees of charities should never alienate the *trust estate without the sanction of the court. It does not [*463] necessarily follow, that such an alienation will be treated *per se* as a breach of trust: for in some instances the court has sanctioned,^(c) and has even gone so far as to direct, a sale by the trus-

(z) Att.-Gen. v. Gascoigne, 2 M. & K. 647; Commissioners of Char. Donations v. De Clifford, 1 Dr. & W. 245.

(a) Ante, Part I. Div. II. Chap. I. Sect. 3.

(b) Att.-Gen. v. Boulton, 2 Ves. jun. 379; Att.-Gen. v. Whitechurch, 3 Ves. 141; Att.-Gen. v. Bowyer, Ib. 714; Bishop of Hereford v. Adams, 7 Ves. 324; Att.-Gen. v. Wansay, 15 Ves. 231; Att.-Gen. v. Coopers' Company, 19 Ves. 187; Att.-Gen. v. Ironmongers' Company, 2 M. & K. 576; 2 Beav. 313, and Cr. & Ph. 208.

(c) Att.-Gen. v. Warren, 2 Sw. 302; Att.-Gen. v. Hungerford, 8 Bl. 437; 2 Cl. & Fin. 357. [Griffitts v. Cope, 17 Penn. St. 96.]

¹ See ante, 451, note.

² Where the scheme has been approved by the Attorney-General, a report by a Master appears unnecessary. Att.-Gen. v. Earl Mansfield, 14 Sim. 601.

tees,(d)(1) where such a course has appeared to be for the benefit of the charity (although a very strong case indeed must be established, before the court will so act).(e) And what the court will sanction upon its own consideration of what would have been beneficial to the charity, may also be done by trustees upon their own authority in exercise of their legal powers.(f) But it is plain that in ordinary cases a most important part of the duty of the trustees is to preserve the trust property,(g) and it lies with those, who seek to support a sale by them, to show that the transaction in question was beneficial for the charity.(h) In the absence of such proof, and *a fortiori* if there be any evidence showing that the sale was improvident or prejudicial to the charity, it will be treated as a breach of trust, and set aside.(i)

So with regard to leases of the charity estates, it is the general duty of the trustees so to manage and dispose of the property intrusted to them, as may best promote and maintain the charitable purposes of the founder ;(k)¹ and in considering the validity of such leases, two points are principally to be regarded, viz., the duration and nature of the term, and the consideration for the lease.

With regard to the term to be granted, it may be laid down as a general rule (though subject to many exceptions), that it should be for *years* and not on *lives* ;(l) and for not more than twenty-one years ;(m) or in case of *building leases* for ninety-nine years,(n) in *possession* and not *reversionary*,(o) and without any absolute covenant for renewal, still less for perpetual renewal.(p)

(d) Att.-Gen. v. Nethercoat, 1 Hare, 400; cited; Anon. case, cited 2 Sw. 302; and see Att.-Gen. v. Warren, 2 Sw. 291. [Att.-Gen. v. Wallace, 7 B. Monr. 611.]

(e) Att.-Gen. v. Mayor, &c., of Newark, 1 Hare, 395; see Att.-Gen. v. Bul-ler, Jac. 412.

(f) Per Lord Langdale, M. R., 4 Beav. 458.

(g) Ibid.

(h) Att.-Gen. v. Owen, 10 Ves. 555; Att.-Gen. v. Brooke, 18 Ves. 326; Att.-Gen. v. Brettingham, 3 Beav. 51; Att.-Gen. v. Pargeter, 6 Beav. 150.

(i) Att.-Gen. v. Kerr, 2 Beav. 420; Att.-Gen. v. Brettingham, 3 Beav. 91; Att.-Gen. v. Mayor of Newark, 1 Hare, 395; see Att.-Gen. v. Burgesses of East Retford, 2 M. & K. 35. [See Price v. Methodist Church, 4 Hamm. 542.]

(k) Att.-Gen. v. South Sea Company, 4 Beav. 457.

(l) Att.-Gen. v. Cross, 3 Mer. 524, 539.

(m) Att.-Gen. v. Owen, 10 Ves. 555, 560; Att.-Gen. v. Backhouse, 17 Ves. 283, 291.

(n) Ibid.

(o) Att.-Gen. v. Kerr, 2 Beav. 420.

(p) Att.-Gen. v. Brooke, 18 Ves. 319.

(1) An order for the sale of charity estates may be obtained by petition under Sir S. Romilly's Act, (52 Geo. III. c. 101.) Re Parke's Charity, 12 Sim. 329. [But see Re Suir Island Charity, 3 Jones & Lat. 171.]

¹ As to leases of the charity estates, see Att.-Gen. v. Gaines, 11 Beav. 83; Att.-Gen. v. Pilgrim, 2 Hall & Tw. 186; Att.-Gen. v. Donnington, 13 Eng. L. & Eq. 388; Black v. Ligon, 1 Harp. Eq. 205.

This is the general rule; and trustees could rarely be advised to depart from it without the sanction of the court. But it by no means follows, that leases granted in opposition to that rule are *necessarily* invalid as a breach of trust. On the contrary, such leases have frequently been supported under special circumstances. Thus, where it has been the usual custom to lease for lives, or for years determinable on lives, the trustees will be justified in adopting that custom, and in granting leases in that form.(q) *But in such cases it seems that the number of lives in the grant [*464] ought not to exceed three.(r) Again, where the terms of the lease are fair and reasonable, and for the benefit of the charity, the court on being satisfied of those facts has upheld leases granted by trustees for a long term, such as eighty years,(s) or even for so long an absolute term as amounts in fact to an alienation, as 980 or 999 years;(t) and a lease with a covenant for perpetual renewal has also been sustained on the same ground.(u)

However, it is incumbent on those who seek to support charity leases of this unusual description, to establish the facts on which their validity depends; and if they fail in doing so, the leases will be set aside, and be decreed to be delivered up to be cancelled. Thus, leases for long terms of years absolute,(x) or for a term in reversion,(y) or containing a covenant for perpetual renewal,(z) have repeatedly been set aside for want of proof of facts which could establish their propriety.

Where there is any doubt in the mind of the court as to the propriety of such leases, it will be referred to the Master to ascertain that point.(a) And in considering this question, the several terms of the lease—such as the amount of the rent, and its being fixed or liable to be increased,(b) and the covenants on the part of the lessee, as whether there is an obligation to repair, and expend money on the property,(c) will have their due weight. For the disadvantage

(q) Att.-Gen. v. Cross, 3 Mer. 524; Att.-Gen. v. Crook, 1 Keen, 121.

(r) Att.-Gen. v. Cross, 3 Mer. 539.

(s) Att.-Gen. v. Backhouse, 17 Ves. 283.

(t) Att.-Gen. v. Warren, 2 Sw. 291; Att.-Gen. v. South Sea Company, 4 Beav. 453; see Att.-Gen. v. Kerr, 4 Beav. 420, 428. [See Black v. Ligon, 1 Harp. Eq. 205; but see the remarks of Chancellor Kent, 4 Comm. 107, and post, 482, note.]

(u) Att.-Gen. v. Hungerford, 8 Bl. 437; 2 Cl. & Fin. 357.

(x) Att.-Gen. v. Green, 6 Ves. 453;

Att.-Gen. v. Owen, 10 Ves. 555; Att.-Gen. v. Griffith, 13 Ves. 565; Att.-Gen. v. Brooke, 18 Ves. 326; Att.-Gen. v. Hotham, T. & R. 209; Att.-Gen. v. Pargeter, 6 Beav. 150; Att.-Gen. v. Foord, Ib. 288.

(y) Att.-Gen. v. Kerr, 2 Beav. 420.

(z) Att.-Gen. v. Brooke, 18 Ves. 319.

(a) Att.-Gen. v. Maywood, 18 Ves. 315, 319; Att.-Gen. v. Backhouse, 17 Ves. 283, 294; Att.-Gen. v. Warren, 2 Sw. 302.

(b) Att.-Gen. v. Backhouse, 17 Ves. 291; Att.-Gen. v. Owen, 10 Ves. 560.

(c) Att.-Gen. v. Cross, 3 Mer. 540.

occasioned by the length of the term may be counterbalanced by the advantageous nature of the covenants and other stipulations.

So the custom of letting usually prevailing in the country will be taken into consideration; *(d)* although this custom will sanction a husbandry lease for 200 years at a fixed rent. *(e)*

With regard to the consideration which will support a lease by trustees of charity lands, it has been laid down, that the trustees may take fines, or reserve rents, as is the most beneficial to the charity. *(f)* And where it is customary to lease upon fines with a small reserved rent, the trustees will doubtless be justified in adopting that custom. *(g)* However, as a general rule, the most improved annual rent that can reasonably be obtained should be reserved, having due regard to the security of its payment. But whether the lease be upon fines, or at an annual rent, it may doubtless be set aside for mere inadequacy of consideration alone; *(h)* although for that purpose the inadequacy [*465] must be very great, and must *be clearly proved. It will not be sufficient that a little higher rent might have been obtained, *(i)* or that the value of the property at a *subsequent* period is shown to have been greater than the rent obtained. *(k)* In cases of charity property, the *security* of the rent is the essential point to be looked to; and for that reason it is desirable that the tenant should have a beneficial interest in the property as an encouragement to pay his rent. *(l)* Therefore, the inadequacy of the amount reserved is less a badge of fraud in this, than almost any other instance. *(m)* Hence a charity lease will rarely be overturned *solely* for insufficiency of value; although that, when joined with other circumstances, such as unreasonable length of the term, will materially assist the court in determining against the validity of the lease. *(n)* And so if there be in addition any evidence, or presumption, of collusion or corruption in obtaining the lease, the court will unquestionably relieve. *(o)* And the tenant being a relation of the trustee is a circumstance to raise a suspicion of the existence of fraudulent motives. *(p)*

When a lease is set aside for undervalue, both the trustees and the lessee will be liable to make good to the charity the difference between the proper value and what has been actually received. *(q)*

(d) Att.-Gen. v. Price, 3 Atk. 110;
Att.-Gen. v. Cross, 3 Mer. 529, 540.

(e) Att.-Gen. v. Pargeter, 6 Beav. 150.

(f) Att.-Gen. v. Stamford, 2 Sw. 591.

(g) Ibid.

(h) Reresby v. Farrer, 2 Vern. 414;
East v. Ryal, 2 P. Wms. 284; Att.-Gen.
v. Gower, 9 Mod. 224; Att.-Gen. v.
Dixie, 13 Ves. 519; Att.-Gen. v. May-
wood, 18 Ves. 315; Yervel v. Sutton,
Duke Ch. Us. 43; Eltham v. Warreyn,
Ib. 67.

(i) Att.-Gen. v. Cross, 3 Mer. 541.

(k) Ibid.

(l) See Watson v. Hindsworth Hos-
pital, 2 Vern. 596.

(m) Ex parte Skinner, 2 Mer. 457.

(n) Att.-Gen. v. Green, 6 Ves. 452;
Att.-Gen. v. Dixie, 18 Ves. 519; Att.-
Gen. v. Brooke, 18 Ves. 326.

(o) Ex parte Skinner, ubi supra.

(p) Ibid.

(q) Att.-Gen. v. Stamford, 2 Sw. 592.

With regard to the general powers of trustees to grant leases of charity property, it was said by Lord Langdale, M. R., in a recent case,^(r) "It is certainly a strong proposition to lay down, that the trustees of a charity have the same powers which a prudent owner has with respect to his own property: there may, perhaps, be *dicta* which go almost to that extent, but I apprehend that much more is expected from trustees acting for a permanent charity, than can be expected from the ordinary prudence of a man in dealings between himself and other persons. A man acting for himself may indulge his own caprices, and consider what is convenient or agreeable to himself, as well as what is strictly prudent. Trustees of a charity, within the limits of their authority, whatever they may be, should be guided only by a desire to promote the lasting interest of the charity."^(r)

Where the trustees are expressly restricted by the terms of the trust to leases of a certain form and duration, it is of course incumbent upon them to adhere to the line thus marked out for their guidance.^(s) Indeed, the court itself has no power to sanction any departure from the prescribed mode.^(t) But where the trust instrument contains a power for the trustees to grant leases in a peculiar form, as for three lives or thirty-one years, the court, if necessary, will control the trustees in the exercise of such a power, for the benefit of the charity.^(u) In granting leases of the charity property, the trustees must not stipulate for or reserve any personal benefit for themselves. For instance, where a corporation, being trustees for a charity, caused a covenant to be inserted in a *lease of the charity lands, binding the lessee to grind at the corporation [*466] mill, it was held by the Lord Chancellor, that this covenant was improper, and a sufficient reason for refusing them their costs.^(v)

And on the same principle, charitable trustees must not grant a lease to one of their number. And should a trustee take such a lease, and enter into possession under it, the court will charge him with an occupation rent at the extreme value.^(x)

The extent of the powers of the trustees in the control and management of charities will depend in every case on the terms of the deed or instrument of foundation. Where the general discretionary administration of the trust is committed to them, the court will not interfere with them in the exercise of their discretion, unless a breach

(r) Att.-Gen. v. Kerr, 2 Beav. 428.

(v) Att.-Gen. v. Stamford, 2 Sw. 592, 3.

(s) See Att.-Gen. v. Griffith, 13 Ves.

(x) Att.-Gen. v. Dixie, 13 Ves. 519,

565.

534; Att.-Gen. v. Clarendon, 17 Ves.

(t) Att.-Gen. v. Rochester, 2 Sim. 34.

491, 500.

(u) Ex parte Berkhamstead School,
2 V. & B. 138.

of trust be shown to have been committed.¹ And the right of nominating and removing the objects and officers of the charity, and generally of determining its mode of application within the principles pointed out by the founder, will be left exclusively to them.(y)

But the trustees must be careful not to exceed the powers conferred on them by the instrument of foundation, or to travel out of the strict line of the trust. And if from the wording of the trust, or the change in value of the charity property, or other alteration of circumstances, any question should arise which was not clearly defined or provided for by the founder, they could not safely act without the direction of the court.(z)

If the particular charitable purposes be clearly defined by the trust, those purposes must be carried out strictly by the trustees, and any application of the property to a different object will be a breach of trust. Thus, a trust to find a preacher in *Dale*, will not be properly executed by providing one in *Sale*. And a trust to provide a preacher will not authorize an application of the fund to the relief of the poor, or any other different purpose.(a)

So, where an estate is given in trust for the *repair of a chapel*, the trustees must apply the whole of the rents to that object, and must not suffer the surplus to be mixed with *the parish rates for general purposes*.(b) And a fund vested in trustees for the purpose of *establishing an hospital*, will be improperly applied towards *lighting and paving the town*.(c) Again, a trust for the benefit of the inhabitants of *one parish* cannot be extended by the trustees to those of *other parishes*.(d) And where a chapel was granted in trust for the benefit of *a school*, the trustees are not authorized in incurring any expense in enlarging the chapel for the benefit of the *inhabitants of the hamlet* where the school is situated.(e)

(y) Att.-Gen. v. Lock, 3 Atk. 164; Russ. 501; Att.-Gen. v. Earl of Lonsdale, 1 Sim. 105; Att.-Gen. v. Buller, Jac. 407.

(a) Duke's Char. Us. 116; Wilvescomb case, Ib. 94.

(b) Att.-Gen. v. Vivian, 1 Russ. 237.

(c) Att.-Gen. v. Kell, 2 Beav. 575.

(d) Att.-Gen. v. Brandreth, 1 N. C. C. 200.

(e) Att.-Gen. v. Mansfield, 2 Russ. 501.

(z) See Att.-Gen. v. Christchurch, Jac. 474; Att.-Gen. v. Earl of Mansfield, 2

¹ Att.-Gen. v. Moseley, 12 Jur. 889; Willis v. Childe, 2 Eng. L. & Eq. 41; 13 Beavan, 117 (but see Doe dem. Childe v. Willis, 2 Eng. L. & Eq. 356); Reg v. Darlington School, 6 Q. B. 682; Wilkes's Charity, 7 Eng. L. & Eq. 73; Parker v. May, 5 Cush. 351; Att.-Gen. v. Wallace, 7 B. Monr. 611. But where trustees choose to assign reasons for their action, and these reasons are insufficient to justify it, the court will interfere. Wilkes's Ch., ut supra.

So, the trustees of a charity will not be justified in placing the funds *under the control of other persons, who were not contemplated by the creator of the trust.(f) [*467]

Where the objects of a trust for charity are described in general terms, the trustees, in executing the trust, must adopt the construction which has been applied by the court to those general terms. For instance, where the trust is for the "poor" of a parish generally, the charity funds ought to be applied exclusively to the relief of those poor *who are not in receipt of parochial relief*.(g)¹ And a trust to establish a "*grammar school*," must be executed by the establishment of a school for instruction in the classics: or at any rate a system of education, excluding the study of the classics, will be an improper execution of the trust;(h) although, if the trust be for the maintenance of a "*school*" simply, it will be in the discretion of the trustees to establish a grammar school, or a school for teaching other branches of learning, subject to the control of the court.(i) And in several modern instances, the court has sanctioned the introduction of a provision for instruction in writing, arithmetic, &c., into a scheme for the regulation of a grammar school.(k)

In like manner, where the trust is "for the establishment and maintenance of a place of worship for protestant dissenters," and the particular sect and nature of the doctrines to be taught, are not specified, it has been decided that no doctrines ought to be allowed to be taught, which are opposed to the opinions of the founder. And the appointment of a preacher of a different persuasion will amount to a breach of trust on the part of the trustees, for which they may be removed from the trust.(l)²

(f) Att.-Gen. v. Brandreth, 1 N. C. C. 200.

(g) Att.-Gen. v. Clarke, Ambl. 422; Att.-Gen. v. Corporation of Exeter, 2 Russ. 45, and 3 Russ. 395; Att.-Gen. v. Wilkinson, 1 Beav. 370. [But see Att.-Gen. v. Bovill, 1 Phill. 762, where this rule was disapproved.]

(h) Att.-Gen. v. Hartley, 2 J. & W. 353; Att.-Gen. v. Dean of Christchurch, Jac. 474; Att.-Gen. v. Earl of Mansfield, 2 Russ. 501; Re Bedford Charity, 2 Sw. 528.

(i) Duke's Ch. Us. 169; Att.-Gen. v. Hartley, 2 J. & W. 370; Att.-Gen. v. Jackson, 2 Keen, 541.

(k) Att.-Gen. v. Haberdashers' Company, 3 Russ. 530; Att.-Gen. v. Dixie, 3 Russ. 534, n.; 2 M. & K. 342; Att.-Gen. v. Gascoigne, 2 M. & K. 652; Att.-Gen. v. Caius College, 2 Keen, 151.

(l) Foley v. Wontner, 2 J. & W. 247; Att.-Gen. v. Pearson, 3 Mer. 353; and 7 Sim. 290; Att.-Gen. v. Shore, 7 Sim. 309, n. [9 Cl. & F. 390: (Lady Hewley's Charities)]; Att.-Gen. v. Drummond, 1 Dr. & W. 353; 3 Id. 162.

¹ See, as to the apportionment of bequests to the "poor of a parish," on the division of the latter into districts, Re West Ham Charities, 12 Jur. 783; 2 De G. & Sm. 218; and as to the division of a township, where funds have been appropriated for school purposes for its inhabitants, Plymouth v. Jackson, 15 Penn. St. Rep. 44.

² See, on this subject, Att.-Gen. v. Shore, 9 Cl. & F. 390; Att.-Gen. v. Wilson,

So, where a lease was granted to trustees in trust for "the congregation of protestant dissenters of the Presbyterian persuasion, who then met at a house belonging to A.," to be used as a meeting-house "for the said congregation of protestant dissenters," and the congregation in question had always acted upon the system of doctrine and discipline of the Church of Scotland; it was held that the minister and majority of the existing congregation forfeited their interest by seceding from that form of worship, and that the trustees were justified in removing them by ejectment.^(m)

Where a trust is created for maintaining "the worship of God," without prescribing the form of worship, the object will be presumed to have been in favor of the Established Church, and the trust must be executed accordingly.⁽ⁿ⁾

Where an estate was vested in trustees in trust for the *repair* of a church and chapel, it was held, that the trustees were justified in applying *accumulated rents* in *rebuilding* the chapel; although the [*468] *corpus* of *the property could not be so applied: and it seems that the trust did not authorize any payments towards the fitting up of the chapel.^(o)

(m) *Broom v. Summers*, 10 Law Journ. N. S., Chanc. 71.

(n) *Att.-Gen. v. Pearson*, 3 Mer. 409.

(o) *Att.-Gen. v. Foyster*, 1 Anst. 116.

16 Sim. 210; *Att.-Gen. v. Munro*, 2 De G. & Sm. 122; *Glasgow Coll. v. Att.-Gen.*, 1 H. L. Cas. 801, overruling S. C., 2 Coll. 665; *Att.-Gen. v. Hutton*, 1 Drury, 480; *Drummond v. Att.-Gen.*, 2 H. L. Cas. 837, 2 Eng. L. & Eq. 15; *Att.-Gen. v. Murdock*, 7 Hare, 445; aff. 1 De G. M. & G. 86, 12 Eng. L. & Eq. 83; *Att.-Gen. v. Lawes*, 8 Hare, 32. The better doctrine appears to be, in the United States, that the court will interfere to prevent a diversion of the temporalities of a church, whether by a majority or minority of its members; and to require them to be appropriated to the support of the form of worship, and to teaching the doctrines, for which they were originally intended. *Miller v. Gable*, 10 Paige, 647; *Gable v. Miller*, 2 Denio, 492; *Field v. Field*, 9 Wend. 394; *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. 439; *Hendrickson v. Dean*, Saxton, 577; *App. v. Lutheran Congregation*, 6 Barr, 201; *Trustees v. Sturgeon*, 9 Barr, 322; see *Denn v. Bolton*, 7 Halsted, 205: *Contra*, *Organ Meeting-House v. Seaford*, 1 Dev. Eq. 453; *Keyser v. Stanisfer*, 6 Hamm. 363. In order to ascertain what were those doctrines, reference may be made to history, and to the prior and contemporaneous standard theological writers of the time. *Att.-Gen. v. Shore*, 9 Cl. & F. 390; *Drummond v. Att.-Gen.* 1 H. L. Cas. 801; *Gable v. Miller*, 2 Denio, 492; *Trustees v. Sturgeon*, 9 Barr, 322; *Kniskern v. Lutheran Ch.*, 1 Sandf. Ch. 439. But this is merely on the usual ground of determining what were the circumstances in which the donor or testator was placed, in order to ascertain the meaning he applied to his words; and, therefore, evidence of his particular opinions is inadmissible. *Drummond v. Att.-Gen.*; *Trustees v. Sturgeon*; ut supra. See, further, as to the separation of religious bodies, *Skilton v. Webster*, Bright. N. P. 203; *Presbyterian Congregation v. Johnston*, 1 Watts & S. 1; *Hadden v. Chorn*, 8 B. Monr. 78.

A mere change of name by a religious society will not affect any of its rights. *Cahite v. Bigger*, 8 B. Monr. 213.

It has been decided, that the trustees of a school may increase the salaries of the master and usher, which had been fixed by the will at a certain amount, where the circumstances of the charity property admitted of the increase, and where the increase of the salaries *was not prohibited* by the will.(p) However, in the absence of special discretionary powers, trustees could rarely be advised to take upon themselves the responsibility of any such unauthorized application of the funds.

A trust for the "relief of the poor" has been held to authorize the trustees to apply the fund in building a school-house for the education of the children of the parish.(q)

Where the court is *in possession* of the fund given in trust for charity, it will not in general deliver it over to the uncontrolled administration of the trustees, however ample may be their discretionary powers; but it will usually be referred to the Master to approve of a scheme in order to insure the due application of the whole of the fund.(r) However, in a late case a fund in court was ordered to be transferred to the legatees in trust to be administered by them, although it was objected on behalf of the Attorney-General, that a scheme ought to have been directed.(s) And if the gift be in trust for an *established charity*, payment will be directed without any reference.(t)

And where the trust is for a *foreign* charity, the court has no jurisdiction to direct a scheme, but will order the fund to be paid over to the trustees.(u)

It is a rule of the court not to marshal the assets of a testator in favor of legacies to charity, so as to give them effect out of the personal estate, where they are void, so far as they touch any interest in land.(x)

Neither the old Statutes of Limitation,(y) nor the late act 3 & 4

(p) Att.-Gen. v. Dean of Christchurch, 2 Russ. 321.

† (q) Wilkinson v. Malin, 2 Tyr. 544, 570.

(r) Supple v. Lawson, Ambl. 730; Waldo v. Caley, 16 Ves. 211; Well-beloved v. Jones, 3 S. & St. 40; Corporation of Sons of Clergy v. Mose, 9 Sim. 610.

(s) Society for Propagation of Gospel v. Att.-Gen., 3 Russ. 143.

(t) 1 S. & St. 43; 9 Sim. 610.

(u) Provost of Edinburgh v. Aubery, Ambl. 236; Emery v. Hill, 1 Russ. 112;

Minet v. Vulliamy, Ib. 113; Att.-Gen. v. Lepine, 2 Sw. 181.

(x) Mogg v. Hodges, 2 Ves. 52; Att.-Gen. v. Tyndall, Ambl. 614; Forster v. Blagden, Ib. 704; Hillyard v. Taylor, Ambl. 713; Att.-Gen. v. Hurst, 2 Cox, 364; Makeham v. Hooper, 4 Bro. C. C. 153. [See ante, 457, note.]

(y) Att.-Gen. v. Mayor of Coventry, 2 Vern. 399; 7 Bro. P. C. 235; 3 Mad. 353; Att.-Gen. v. Mayor of Bristol, 2 J. & W. 321; Att.-Gen. v. Mayor of Exeter, Jac. 448; Irish Incorporated Society v. Richards, 1 Dr. & W. 258; Att.-Gen. v. Hungerford, 8 Bl. N. S. 437.

Will. IV. c. 27, apply to any questions between the trustees and the objects of the charity as to the appropriation or application of the trust property.(z) Although an adverse enjoyment of any part of the fund by the trustees for a long period, is a very material point for consideration in putting a construction upon the interest on which such a question may arise.(a)¹

[*469] *Where upon an information or suit, the court has decided against the right of the trustees of a charity to appropriate any part of the funds for their own benefit, the decree for an account of the sums improperly appropriated by them has frequently, and indeed will ordinarily be limited to the time of the filing of the information or bill, if the misappropriation have been made for a long period, through real mistake, and without any corrupt motive, and if the evidence or answer of the trustees disclose no reason for extending the account farther back.(b) And the circumstances of the trustees being a corporate body, will increase the disposition of the court to apply a lenient construction to their proceedings;(c) although in a proper case the court will also struggle to adopt a similar rule in favor of a trustee, who is a private individual.(d)

But this relaxation of the strict rules of equity is a matter of discretion, in the exercise of which the court will be governed by the particular circumstances of each case.(e) And it is clear, that if

(z) See Sir E. Sugden's observations in *Irish Incorp. Society v. Richards*, 1 Dr. & W. 287, 8; and *Att.-Gen. v. Persee*, 2 Dr. & W. 67; *Att.-Gen. v. Flint*, V. C. Wigram. [4 Hare, 147; *Comm. of Donations v. Wybrants*, 2 Jones & Lat. 183.]

(a) *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 321; *Att.-Gen. v. Mayor of Exeter*, Jac. 448.

(b) *Att.-Gen. v. Johnson*, Ambl. 190; *Att.-Gen. v. Owen*, 10 Ves. 555; *Att.-Gen. v. Griffith*, 13 Ves. 565; *Att.-Gen. v. Dixie*, Ib. 519; *Att.-Gen. v. Skinners' Company*, 5 Mad. 173; *Att.-Gen. v. Mayor of Coventry*, 7 Bro. P. C. 235; *Att.-Gen. v. Corporation of Exeter*, 2

Russ. 50; *Att.-Gen. v. Burgesses of East Retford*, 2 M. & K. 35; *Att.-Gen. v. Mayor of Newbury*, 3 M. & K. 650; *Att.-Gen. v. Prettyman*, 4 Beav. 462; *Att.-Gen. v. Drapers' Company*, Ib. 67; *Att.-Gen. v. Christ's Hospital*, Ib. 73; *Att.-Gen. v. Drapers' Company*, 6 Beav. 382.

(c) *Att.-Gen. v. Mayor of Newbury*, 3 M. & K. 651.

(d) *Att.-Gen. v. Prettyman*, 4 Beav. 462; and see *Att.-Gen. v. Caius College*, 2 Keen, 150, 167.

(e) *Att.-Gen. v. Mayor of Exeter*, Jac. 449, 450; *Att.-Gen. v. Prettyman*, 4 Beav. 466; *Att.-Gen. v. Drapers' Company*, 6 Beav. 382.

¹ No neglect or perversion of the funds of a charity, by the trustees, will be permitted to affect it. *Hadley v. Hopkins's Academy*, 14 Pick. 240; *Griffitts v. Cope*, 17 Penn. St. 96; *Wright v. Linn*, 9 Barr, 433; *Att.-Gen. v. Wallace*, 7 B. Monr. 611; *Price v. Methodist Church*, 4 Hamm. 542; *McKissick v. Pickle*, 16 Penn. St. 148. The declarations of a trustee for a charity will not affect the persons interested in the trust, *McKissick v. Pickle*, ut supr. But the general rule does not apply where there is express limitation over from one charity to another, contingent on the neglect of the trustees of the first to carry out the provisions of the will. *Christ's Hospital v. Grainger*, 1 Mac. & G. 460; 14 Jur. 339.

there be any wilful or improper conduct on the part of the trustees, the retrospective account will be decreed against them from the commencement of the misappropriation of the fund.(f) And if they continue to appropriate the charity funds after receiving due notice of the impropriety of such a course, they would be ordered to account from the time of their receiving the notice.(g) And if they should confound the particular fund in question with other charitable funds, also under their control, in one general account, instead of keeping the accounts separate, that would be an act of mal-administration, for which no goodness of intention (supposing them to be cognizant of the confusion they were effecting) could excuse them.(h)¹

Moreover, the promptitude of the trustees in assisting the court to rectify the error, will be an important ingredient for consideration in deciding upon the extent of their liability. But in order to entitle them to the indulgence of the court, they ought by their answer to give every possible information and facility, in order to the due decision of the question.(i) And if there be any resistance on their part to the establishment of the right, or any concealment of the evidence, it becomes a much more difficult thing for the court to give them the benefit of its discretion in these cases.(k)

In some instances the court, notwithstanding the blamelessness of the *trustees, and the hardship of the case, has not thought proper itself to limit the strict liability of the trustees, but has [*470] referred it to the Attorney-General, to consider whether it were a proper case in which to enforce the extreme rights of the charity.(l)

If the trustees, by their answer, recognise and establish their liability to account for the charity funds beyond the filing of the information, the court will act upon the admission, and decree the retrospective account to that extent, although there may be no improper conduct on the part of the defendants. For instance, where the answer rendered account as far back as 1791, the decree directed the account to be taken up to that year.(m) And so where the defen-

(f) *Att.-Gen. v. Brewers' Company*, 1 Mer. 295.

(g) See *Att.-Gen. v. Burgesses of East Retford*, 2 M. & K. 35, 37.

(h) Per Lord Brougham, Ch., in *Att.-Gen. v. Mayor of Newbury*, 3 M. & K. 651, 2.

(i) *Att.-Gen. v. Burgesses of East Retford*, 2 M. & K. 35; *Att.-Gen. v. Prettyman*, 4 Beav. 466.

(k) Per Lord Langdale, M. R., in *Att.-Gen. v. Prettyman*, 4 Beav. 466; and see *Att.-Gen. v. Burgesses of East Retford*, 2 M. & K. 35.

(l) *Att.-Gen. v. Mayor of Exeter*, 2 Russ. 362, 370; *Att.-Gen. v. Brettingham*, 2 Beav. 91, 95; *Att.-Gen. v. Prettyman*, 4 Beav. 462, 467.

(m) *Att.-Gen. v. Corporation of Stafford*, 1 Russ. 547.

¹ Where there is a breach of trust by charity trustees, the party injured has no right to be indemnified out of the trust fund. *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507.

dants (a corporation) admitted their liability to account generally for charity funds received by them, and stated, that they had always charged themselves in their books as debtors to the charity for the amount of the sums appropriated, they were decreed to account generally, without any limitation, although it was objected, that the account would thus go back for 200 years.(n)

The nature of the trust instrument will also materially influence the court in directing retrospective accounts against trustees of charities for their past appropriation of the funds; and where they have acted honestly, though erroneously, under an instrument of doubtful construction, they will not be charged with any past misapplication. On this point, it has been said, by Lord Eldon, "it often happens from the nature of the instrument creating the trust, that there is great difficulty in determining how the funds of a charity ought to be administered. If the administration of the funds, though mistaken, has been honest, and unconnected with any corrupt purpose, the court, while it directs for the future, refuses to visit with punishment what has been done in time past. To act on any other principle would be to deter all prudent persons from becoming trustees of charities."(o)

There has already been occasion to consider the extent of the jurisdiction of the court in removing trustees of charities, and appointing others in their places, as well as the circumstances and the manner in which that jurisdiction will be exercised.(p)¹ It may be here repeated, that in charity cases, the court will direct, that the newly-appointed trustees shall be at liberty to appoint others to succeed them when necessary.(q) And also, that new trustees of a charity will never be appointed without a reference to the Master.(r)

The effect of a power in the trust instrument to appoint new trustees, has also been considered.(s)

It may be almost unnecessary to remark, that if there be a gift to an established charitable institution, or to the governors, or treasurer, &c., of such an institution, without expressly declaring any trust, the donees will take as trustees for the charity, and not for their own benefit.(t)

(n) *Att.-Gen. v. Mayor of Exeter*, Jac. 443; S. C., 2 Russ. 362.

(o) *Att.-Gen. v. Corporation of Exeter*, 2 Russ. 45, 54.

(p) *Ante*, Pt. I., Div. III., Ch. II., p. 190, and notes.

(q) *Att.-Gen. v. Earl of Winchelsea*, Seton Decr. 131; Re 52 Geo. III., c. 101; 12 Sim. 262.

(r) *Att.-Gen. v. Arran*, 1 J. & W. 279.

(s) *Ante*, Pt. I., Div. III., Ch. I.

(t) *Irish Incorporated Society v. Richards*, 1 Dr. & W. 294.

¹ It seems, that a testamentary trustee of a charity will not be removed merely because he is bankrupt, and occasionally residing abroad. *Archbold v. Comm. Charitab. Donations*, 2 H. L. Cases, 440. In Massachusetts, trustees of a charity are not obliged to give bond, as in other cases. *Lowell's App.*, 22 Pick. 215.

*III.—OF TRUSTEES OF POWERS.

[*471]

I.—OF POWERS OF SALE [471].

II.—OF POWERS OF LEASING [480].

III.—OF POWERS OF CHANGING SECURITIES [482].

IV.—OF DISCRETIONARY POWERS [485].

I.—OF POWERS OF SALE.

A trustee could rarely be justified in selling the trust estate for any purpose, however beneficial, without an authority express or implied conferred on him for that purpose by the trust instrument: and wherever the nature or duration of the trusts, or the description of the property, renders the necessity for a sale at all probable, a power of sale should never be omitted.

A power of sale may be given to trustees, either as appendant to the legal estate, and to take effect out of it; or, it may exist as a mere collateral authority, unaccompanied by any legal interest in the property to be sold. In the latter case, if the trust be created by will, the legal estate will descend to and remain vested in the testator's heir until divested by the execution of the power, whereupon, it will pass to the vendee.^(t)

For instance, if a testator devise lands to his executors to sell, the freehold will pass to them by the devise, coupled with the power; but if the devise be merely, "*that his executors shall sell*" the land, the executors take only a power, and the freehold vests in the heir by descent.^(u) And so it seems to be the better opinion, that a devise of lands to be sold by the executors, without any words of direct gift, will invest them with a power only, and not pass the legal estate.^(x)¹

^(t) Earl of Stafford v. Buckley, 2 Ves. 179; Warneford v. Thompson, 3 Ves. jun. 513; 1 Sugd. Pow. 115, et seq. 6th edit.; see Forbes v. Peacock, 11 Sim. 152.

^(u) See 1 Sugd. Pow. 128, 6th edit., and authorities there cited.

^(x) 1 Sugd. Pow. 133.

¹ See on these distinctions, 4 Kent's Comm. 331, &c.; 4 Greenl. Cruise. 199, note; and see Peter v. Beverly, 10 Pet. 532; 1 How. U. S. 134; Jackson v. Burr, 9 John. R. 104; Peck v. Henderson, 7 Yerg. 18; Ferebee v. Proctor, 2 Dev. & Batt. 439; 1 Dev. & Batt. Eq. 496; Haskell v. House, 3 Brevard, 242; Tainter v. Clark, 13 Metcalf, 220; Zebach v. Smith, 3 Binn. 69; and post, 472, note. Where there is only a naked power, the legal estate vests in the heir till the sale, who, before that period, will be entitled to the rents and profits: Haskell v. House, 3 Brevard, 242; Thornton v. Gaillard, 3 Rich. 418; Bradshaw v. Ellis, 2 Dev. & B. Eq. 20; Marsh v. Wheeler, 2 Edw. Ch. 156; Taylor v. Benham, 5 How. 269; Lindenberg v. Matlack, 4 Wash. C. C. 278; Jackson v. Burr, 9 John. R. 104; Allen v. De Witt, 3 Comstock, 276; though he be at the same time executor. Schwartz

It is clear, that no precise form of words is requisite for creating a power of sale, powers are mere declarations of trust, and any words, however informal, which show an intention to create such a power, will be sufficient for the purpose.(y) Thus, as we have already seen, the trustees will take a power of sale by implication, under a trust for the payment of debts: for such a power is necessary to the due execution of the trust.(z)¹

Without entering into a discussion of the law affecting powers in general (which would be foreign to the object of the present work), we will now proceed to consider some of the principal points which arise from the power of sale being vested in *trustees*, instead of in the beneficial owners.

It has been decided, that where a *will* directs an estate to be settled to uses in strict settlement, a power for trustees to sell with the consent of the tenant for life, cannot be inserted in the settlement [*472] without an express *provision: not even where there is a direction by the testator for the insertion of "all proper powers and authorities for making leases, and otherwise, according to circumstances."(b)¹

(y) 1 Sugd. Pow. 116.

(b) *Brewster v. Angell*, 1 J. & W. 625;

(z) *Ante*, Pt. III., Ch. II., Sect. 2, Pl. *Horn v. Barton*, Jac. 437, S. C.

II.; *Wood v. White*, 4 M. & Cr. 481, 2.

Estate, 14 Penn. St. R. 47. So of a devisee. *Guyer v. Maynard*, 6 Gill & John. 420. But this intermediate estate will be destroyed, and the interest therein of creditors or purchasers defeated by the exercise of the power. *Braman v. Stiles*, 2 Pick. 464. In Pennsylvania, by the 13th sect. of the Act of 1834 (*Dunlop Dig.* 511), executors, with a naked power of sale over real estate, take and hold the same interest therein, and have the same powers and authorities for all purposes of sale and conveyance, and also of remedy by action, or otherwise, as if the same had been devised to them to be sold. In New York, by the Revised Statutes, on the other hand (Part II. ch. 1, tit. 2, art. 2, § 56), a devise to executors, or other trustees, to be sold or mortgaged, where they are not also authorized to take the rents and profits, vests no estate in them; but is only valid as a power, and the land descends to the heirs, subject to the power. In the United States, generally, there are also various statutes, too numerous to be particularised, authorizing the sale of real estate for debts, and other purposes, by executors, and other trustees, on application to the proper court.

¹ See *ante*, 342, 355, and notes. It is not necessary that there should be a specific authority given to the trustee, to enable him to sell. If a sale is necessary to the due execution of the trust, it will always be inferred, that the testator means to give, to the person directed or empowered, every authority which is necessary for his declared purpose. 2 *Spence Eq. Jur.* 366, and cases cited; *Going v. Emery*, 16 Pick. 111. Thus, a direction to divide and pay over the shares to legatees, where a literal division is impracticable, implies a power to sell for the purpose. *Winston v. Jones*, 5 Alab. 550. But a mere direction to divide is not enough. *Craig v. Craig*, 3 Barb. Ch. 76. So a power to locate and survey will not authorize a sale. *More v. Lockett*, 2 Bibb. 69. And see *Clark v. Riddle*, 11 S. & R. 311.

But it has been held on the construction of *marriage articles*, that a power of sale and exchange was properly introduced into a settlement, where the articles contained a direction for the insertion of "*all usual and proper powers, &c.*," in the settlement.^(c) In the case of *Hill v. Hill*,^(d) the Vice-Chancellor (Sir L. Shadwell) said, "there is a palpable distinction between inserting in a settlement powers for the management and better enjoyment of the settled estates, which are beneficial to all parties, and powers, which confer personal privileges on particular parties, such as powers to jointure, to raise money for any particular purpose, &c. But powers of leasing, of sale and exchange, and (in certain cases) powers of partition, of leasing mines, and of granting building leases, are powers for the general management and better enjoyment of the estates; and such powers are beneficial to all parties."

However, even in a trust created by *articles*, if there be no positive direction for the insertion of a power of sale, or at all events of "the usual and proper powers," it seems that such a power cannot be introduced into the settlement.^(e) And even where there is a general direction in the articles for the insertion of "*all usual and proper powers*," a trustee, who sells under a power of sale inserted in the settlement under that general direction, can scarcely confer a marketable title according to the present state of the authorities.

A power of sale, whether it be a common law authority, or one taking effect under the Statute of Uses, can be exercised only by the parties to whom it is expressly given. Hence doubts have occasionally arisen as to the validity of the execution of the power after the death of the original donees. For instance, where a power is given to two or more persons *by name without any words of survivorship*, it cannot be exercised by the others alone after the death or renunciation of any one of the donees.^(f) But where the power is conferred on "the trustees" as a *class* and not by name, there the power will be continued as long as there are more trustees than one, by whom it may be exercised, although no words of survivorship be added.^(g) If the power were given to persons *nominatim*, but also in their character of trustees without any words of survivorship, it might still be a matter of doubt, whether the power would exist after the death of any of the original donees.^(h)¹

(c) *Peake v. Penlington*, 2 V. & B. 311; *Hill v. Hill*, 6 Sim. 136; see *Williams v. Carter*, 2 Sugd. Pow. App. 23.

(d) 6 Sim. 144.

(e) 2 Sugd. Pow. 484, 6th edit.

(f) 1 Sugd. Pow. 141, 144, 6th edit.

(g) *Ibid.*

(h) 1 Sugd. Pow. 141, 144, 6th edit.; Co. Litt. 113, a. note 2.

¹ Where a power of sale is given to several executors, *virtute officii*, or is given to them by name, but is coupled with an interest or trust, the power may be ex-

Upon the same principle where a power of sale was reserved in a *settlement* to three trustees by name and their heirs, it was held by

exercised by the survivor. *Osgood v. Franklin*, 2 J. C. R. 19; *Zeback v. Smith*, 3 Binn. 69; *Wood v. Sparks*, 1 Dev. & Batt. 389; *Burr v. Sim*, 1 Whart. 266; *Niles v. Stevens*, 4 Denio, 399; *Coykendall v. Rutherford*, 1 Green. Ch. 360; *Putnam Free School v. Fisher*, 30 Maine, 526; *Jackson v. Burtis*, 14 Johns. 391; *Sharp v. Pratt*, 15 Wend. 610; *Peters v. Beverly*, 10 Peters, 532; 1 How. U. S. 134; *Robertson v. Gaines*, 2 Humph. 367; *Miller v. Meetch*, 8 Barr, 417; *Muldrew v. Fox*, 2 Dana, 79; 4 Kent's Comm. 326; note to 4 Greenl. Cruise, 148. See also, ante, 220, 307, and note. As to what interest is requisite to enable a surviving trustee, &c., to exercise a power of sale, see *Watson v. Pearson*, 2 Exch. 580, and American note. The statute law of many of the States, authorizes the survivor of several executors to exercise powers of this nature given, by will. *Dunlop*, Penn. Dig. 519, Act of 1834, § 13; *New Jersey Rev. Code*, tit. X., Ch. 7, Sect. 19; *How. & Hutch.*, Mississippi Dig. 413; *Rev. St. Arkansas*, Ch. IV. § 144; *Missouri*, *Rev. St.*, Ch. 3, Art. 3, § 1; *Alabama*, *Aik. Dig.* 450; *Lucas v. Price*, 4 Alab. 683. In some, indeed, the provision is general, and applies to all trustees. *New York Rev. St.*, p. II. Ch. 1, tit. 2, Art. 3, § 112; *Delaware Rev. Code*, Ch. 90, Sec. 17; *Ohio Rev. Stat.*, Ch. 129, Sect. 59, 60. But the Revised Statutes of New York do not authorize a part of the executors to execute a power, where their co-executor has been *discharged* by the court, after acceptance; it seems that the court must appoint. *Matter v. Van Wyck*, 1 Barb. Ch. 565.

Whether these acts extend to the case of discretionary powers, is not clearly settled. It has been held in Kentucky, that the statute of that State did not apply to them. *Wooldridge v. Watkins*, 3 Bibb. 350; *Clay v. Hart*, 7 Dana, 1; see *Brown v. Bobson*, 3 A. K. Marsh. 331. So in Mississippi, *Bartlett v. Sutherland*, 2 Cushman, Miss. 401. But in *Taylor v. Morris*, 1 Comstock, 341, under the New York statute, an opposite conclusion was come to; the decisions in Kentucky were dissented from, and the cases of *Chanel v. Villeponteaux*, 3 McCord, R. 29, and *Wood v. Sparks*, 1 Dev. & Batt. 389, under the 21 Henry 8, with regard to non-acting executors, approved and followed. But see *Shelton v. Horner*, 5 Metcalf, 462; and *Ross v. Barclay*, 18 Penn. St. 179. In *Earl Granville v. McNeil*, 13 Jur. 252, 7 Hare, 156, under the latter statute it was said, that the question was, whether the confidence was reposed in the individuals named, or in the persons who should *de facto* fill the office of executor; and in the particular case, which was that of a power of appointing new trustees, reserved by a settlement on trusts for sale, to one of the parties, his executors, administrators, and assigns, it was held that the renunciation of one executor did not affect the exercise of the power by those remaining. See also, *Affleck v. James*, 13 Jur. 756, 17 Sim. 121. It seems clear in England, however, that a purely discretionary power will not survive without express words. See post, 489; 1 Sugden on Powers, 7th Ed. 150, 152, 319.

As a general rule, administrators *cum testamento annexo*, succeed only to the ordinary administration duties and authorities, and cannot therefore exercise any trust, or power given by will, with reference to real estate. *Moody's Lessee v. Vandyke*, 4 Binn. 31; *Tainter v. Clark*, 13 Metcalf. 220; *Lucas v. Doe*, 4 Alab. 679; *Hall v. Irwin*, 2 Gilm. 180; *Hunt v. Hadden*, 2 Mass. 160; *Wills v. Cowper*, 2 Ohio, 124; *Knight v. Loomis*, 30 Maine, 208; *Conklin v. Egerton*, 21 Wend. 430 (but see remarks 4 Kent, 7th Ed., note (2) to page 343); *Jackson v. Potter*, 4 Wend. 672; *McDonald v. King*, Cox, 432; *Armstrong v. Park*, 9 Humph. 195; *Drane v. Bayliss*, 1 Id. 174. This, however, has been altered by

the Court of K. B., that two surviving trustees could not execute the power.⁽ⁱ⁾ And although this decision was afterwards disapproved of by Lord Eldon, yet that eminent judge felt himself so far bound by its authority as to refuse *to compel a purchaser to take a title under somewhat similar circumstances.^(k) However, in [*473] a recent case, where a testator *devised* all his residuary estate to three persons by name, and to their *respective* heirs and assigns, in trust first that they the "*above named*" devisees "*and their respective* heirs and assigns" should sell; the Vice-Chancellor of England held, that on the construction of a *will*, the two survivors of the three devisees had power to sell, and his Honor rejected the words "*respective*" as inconsistent with the general intention.^(l)

Where the power is given to several persons by name (*as trustees*), and "the survivors and survivor, and the heirs of the survivor," it is

(i) *Townsend v. Wilson*, 1 B. & Ald. 608; 3 S. C. 3 Mad. 261.

(k) *Hall v. Dewes*, Jac. 189.

(l) *Jones v. Price*, 11 Sim. 557.

statute, with regard to powers of sale, in several of the States. See *Dunlop Penn. Dig.* 530, Act of 1834, § 67; *Com. v. Forney*, 3 W. & S. 357; *Ohio, Rev. St. Ch.* 129, § 59; *New Jersey, R. S. Tit. X. Ch. 7*, § 19; *North Carolina, R. S. Ch. 46*, § 34 (though only implied in executor, *Hester v. Hester*, 2 Ired. Eq. 330; *Smith v. McCrary*, 3 Id. 204); *Missouri, R. S. Art. 3, Ch. 3*, § 1; *How. & Hutch. Miss. Dig.* 413; *Arkans. R. S. Ch. IV.* § 144; *Vermont, R. S. Tit. 12, Ch. 46, Sect. II.* (*semble*); *South Carolina*, 5 Coop. Stat. 15; see *Drayton v. Grimke*, 1 Bail. Eq. 393; *Virginia, Rev. Code*, p. 545; see *Brown v. Armistead*, 6 Rand. 671; *Kentucky, Act of 1810*, 1 Stat. 671; see *Owens v. Cowan's heirs*, 7 B. Monr. 156. But, as in the case of a surviving executor, above referred to, it has been held in some States, that these provisions do not extend to discretionary powers, or personal trusts. *Brown v. Hobson*, 3 A. K. Marsh, 381; *Woodridge v. Watkins*, 3 Bibb. 350; *Montgomery v. Milliken*, Sm. & M. Ch. 498; 5 Sm. & M. 188. See *Conklin v. Egerton*, 21 Wend. 430; 25 Wend. 224; *Tainter v. Clark*, 13 Metcalf, 220. So, in Pennsylvania, in the recent case of *Ross v. Barclay*, 18 Penn. St. R. 179, it was held that the 67th Sect. of the Act of 1834, only authorized an administrator *c. t. a.*, to execute a power to sell for the payment of debts; but not to execute a trust for a collateral purpose, or to exercise a discretionary power; and therefore that a power of sale for accumulation and division did not devolve upon him. In *Brown v. Armistead*, 6 Rand. 594, however, it was held that the administrator with the will annexed, could act under a direction to sell given to executors, "provided the land will sell for as much as in their judgment will be equal to its value," the proceeds of sale to be applied by a trustee named; the power being imperative, and not vesting any peculiar personal confidence in the executors. See *Taylor v. Morris*, 1 Comstock, 341. Where a power of sale in a mortgage is given to the mortgagee, his executors, administrators, and assigns, it may be of course exercised by an administrator, *c. t. a.* *Doolittle v. Lewis*, 7 J. C. R. 48.

The husband of an executrix, acting in her right, cannot exercise a power of sale given to her. *May's heirs v. Frazee*, 4 Litt. 391.

settled, that the power may be well exercised by the *only acting* trustee or his heirs, in case the others *renounce* the trust.^(m)

But where the power is confided to the trustees "and their *heirs*" only, and not their *assigns*, it cannot be exercised by persons claiming by assignment from the heirs of the original trustee.⁽ⁿ⁾ And in a similar case, a *devisee* of the original trustee is equally incapable of exercising the power, for a devise is also an assignment.^(o)¹

And from the observations of Sir L. Shadwell, V. C. E., in the recent case of *Cooke v. Crawford*, which has been just referred to, it seems to be very questionable whether a *devisee* of a trustee would be entitled to exercise powers of sale, or other powers, vested in his testator as trustee, even where the power was limited to the trustee *and his assigns*: and his Honor in that case expressed a strong opinion against the power of a trustee to delegate the execution of a trust to his devisee in any case.^(p)

The power of sale should be carefully framed so as to avoid any question of this nature, and it should be conferred expressly on the trustees, and the survivors or survivor of them, and the heirs, or executors, or administrators of such survivor, and their or his assigns.

If a power of sale be created by a will, but without declaring by whom it is to be exercised, but the proceeds of the sale are directed to be applied or distributed by the executor or any other person, the executor or that other person will take the power of selling by implication, unless any contrary intention appear from the will.^(q)²

(m) *Hawkins v. Kemp*, 3 East, 410; *Cooke v. Crawford*, 11 Law Journ. N. S., Chanc. 406, and 13 Sim. 91; and see *Eaton v. Smith*, 2 Beav. 239; *Sharp v. Sharp*, 2 B. & A. 405. [See ante, 226, 307, and notes.]

(n) *Bradford v. Belfield*, 2 Sim. 264.

(o) *Cooke v. Crawford*, ubi supra.

(p) *Cooke v. Crawford*, 13 Sim. 97; sed vide, *How v. Whitfield*, 1 Ventr. 338; 1 Freem. 476; and see post, p. 541 [Disabilities of Trustees].

(q) *Newton v. Bennet*, 1 Bro. C. C. 135; *Elton v. Harrison*, 2 Sw. 276, n.; *Blatch v. Wilder*, 1 Atk. 420; *Bentham v. Wiltshire*, 4 Mad. 44; *Tylden v. Hyde*, 2 S. & St. 238; *Forbes v. Peacock*, 11 Sim. 152 [S. C., 12 Sim. 528; 11 M. & W. 630; *Curtis v. Fulbrook*, 8 Hare, 28; *Watson v. Pearson*, 2 Exch. 580; *Gosling v. Carter*, 1 Coll. 644; and see *Doe v. Hughes*, 3 Engl. L. & Eq. 558]; *Ward v. Devon*, 11 Sim. 160, stated; sed vide *Patton v. Randall*, 1 J. & W. 189.

¹ But see note (1) to page 283, ante.

² As a general rule, a direction in a will that real estate shall be sold for the payment of debts and legacies, or for division or distribution, without specifying by whom, vests a power of sale in the executors by implication: *Davoue v. Fanning*, 2 John. Ch. R. 254; *Bogert v. Hertell*, 4 Hill, 492; *Meakings v. Cromwell*, 2 Sandf. S. C. 512, affirmed, 1 Selden, 136; *Dorland v. Dorland*, 2 Barb. S. C. 63; *Lloyd v. Taylor*, 2 Dallas, 223; *Houck v. Houck*, 5 Barr, 273; *Silverthorn v. McKinster*, 12 Penn. St. 67; *Putnam Free School v. Fisher*, 30 Maine, 523; *Foster v. Craig*, 2 Dev. & Batt. Eq. 209; *Robertson v. Gaines*, 2 Humph. 378; *Magruder v. Peter*, 11 Gill. & J. 217; *Peter v. Beverly*, 10 Peters, 532; S. C.

The trustees of a power of sale are interposed principally for protecting the settled estate against the tenant for life. It will therefore be a breach of trust on their parts to employ or suffer the tenant for life to exercise the power and to sell the settled property as their agent, and the court will refuse to enforce the specific performance of a contract made by the tenant for life under such circumstances.(r)

But where the trustees have a power of sale with the consent of the tenant for life, and the estate is sold, and the purchase-money received by *the tenant for life, who makes a contemporaneous purchase of another estate, it will be held, that the tenant [*474] for life acted throughout as the *agent* of the trustees, both in the sale and the reinvestment, and the estate so purchased will therefore be treated as subject to the trusts of the settlement, although the conveyance is taken absolutely in the name of the tenant for life.(s)

A trustee is not justified in delegating the power of sale to a stranger,(t)¹ although he may doubtless employ a solicitor or other

(r) *Mortlock v. Buller*, 10 Ves. 309, 313.

(s) *Price v. Blakemore*, 6 Beav. 507.

(t) *Hardwick v. Mynd*, 1 Anst. 109.

1 How. U. S. 134; *contra*, in South Carolina, *Drayton v. Drayton*, 2 Desaus. 250; *Shoulbred v. Drayton*, Id. 246. But in *Geroe v. Winter*, 1 Halst. Ch. 655, on a devise to children in fee, "to be divided or sold as two (out of three) could agree," it was held that there was no implication of a power of sale in the executor. And if, as in the case of a prior devise for life to the executor, the sale is directed to take place *after his death*, he can neither sell, nor transmit the power to his executor: *Waller v. Logan*, 5 B. Monr. 516. In some of the States it is expressly provided by statute that powers of sale not given to any one by name, shall vest in and be exercised by executors: see *Dunlop*, Penn. Dig. 518, Act of 1834, § 12; *Rev. Code Delaware*, ch. 90, § 17; *Clay's Alab. Dig.* 598, § 14; *Missouri, R. S.*, ch. 3, art. 3, § 1; *How. & Hutch.*, Mississippi, 413; *Rev. St. Ark.*, ch. iv. § 144; *South Carolina*, Act of 1787, 5 Coop. St. 15. In the last four States (ut supra), the provisions also extend to cases where a trustee has been appointed by will to make sale, but has refused to act, or has died before execution of the power.

¹ *Black v. Irwin*, *Harper's Law R.* 411; *Pearson v. Jamison*, 1 McLean, 199; *Bergen v. Duff*, 4 J. C. R. 368; or even to his co-trustee: *Bergen v. Duff*, ut supr. But in *Sinclair v. Jackson*, 8 Cowen, 582, it was said to be the better opinion, that trustees with a power might act by attorney, if they restricted him to the conditions imposed on themselves. So in *Hawley v. James*, 5 Paige, 487, the Chancellor, after deciding, that "a general authority to sell and convey lands belonging to the estate, or to contract absolutely for the sale of such lands," cannot be given by trustees with a power of sale, observes: "But they may intrust an agent with an authority to make conditional sales of land lying a distance from the place of residence of the trustees, subject to the ratification of the trustees; . . . and they may also empower him to make and execute valid conveyances of the land thus sold, upon compliance with the terms of sale, after such sales have been so ratified by them. The purchaser in such case, however, would probably be bound to show that this condition precedent had been complied with. The better course in a case of this kind, therefore, is to intrust the

agent to conduct the usual details of the sale.^(u) But the agent's authority must be in writing,^(x) and signed by all the trustees.^(y)

Where the power of sale is in the nature of a trust, the trustees must effect the sale within a reasonable time, although they are empowered to sell "at such time as they may think fit." For by postponing the sale indefinitely, they might materially affect the relative interests of the *cestui que trusts* for life and in remainder.^(z)¹ However, a direction to sell "as soon as conveniently may be," does not render it more imperative on the trustees to urge on the sale; for the law implies that direction.^(a)

A trust to reinvest is usually attached to the exercise of a discretionary power of sale given to trustees. However, it does not appear to be absolutely necessary, that the trustees should have another purchase *immediately in view* before they sell, even where the settlement does not contain the usual direction, that until a convenient purchase can be found, the money shall be laid out at interest.^(b)² But where a sale is made without any immediate prospect

(u) *Ex parte Belchier*, Ambl. 218; 391; see *Hawkins v. Chappel*, 1 Atk. Ord. v. Noel, 5 Mad. 498. 621, 3.

(x) *Mortlock v. Buller*, 10 Ves. 311.

(y) *Ibid.* [*Sinclair v. Jackson*, 8 Cowen, 582.]

(z) *Walker v. Shore*, 19 Ves. 387,

(a) *Buxton v. Buxton*, 1 M. & Cr.

80; see *Fitzgerald v. Jervoise*, 5 Mad. 29; *Garrett v. Noble*, 6 Sim. 504.

(b) *Mortlock v. Buller*, 10 Ves. 309; 2 Sugd. Pow. 511, 12, 6th edit.

agent with a discretionary power to contract, subject to the ratification of the trustees upon his report of the facts; and that they should themselves execute the conveyance, when the terms of sale have been complied with, and transmit it, properly acknowledged, to the agent, to be delivered to the purchaser." Where the trustees have an interest as well as a power, they may act by attorney: *May's Heirs v. Frazee*, 4 Litt. 391; *Telford v. Barney*, 1 Iowa, 591. In *Blight v. Schenck*, 10 Barr, 285, it was said that an assignee, for the benefit of creditors, might make an attorney to convey; but the nature of the authority there does not distinctly appear from the report: see also *Doe v. Robinson*, 2 Cushm. Miss. 688. In Tennessee, by the Act of 1833 (Car. & Nich. Dig. 86), executors authorized by will to sell lands, may execute deeds and agreements to sell, by attorney, the power of attorney being duly executed, proved, and registered. So, in Pennsylvania, by Act of March 14, 1850, Dunlop, 1072, § 1, a trustee, executor, or other person acting in a fiduciary character, with power to convey land in that State, may make conveyances under the power, by attorney, and all previous conveyances so made *bona fide*, are confirmed; but it is provided that the fiduciary is not thereby authorized to delegate to others the discretion vested in himself, for the general management of his trust.

¹ But on the other hand, where there is no necessity for an immediate sale, it will be a breach of trust in a trustee for creditors to bring on a sale at a manifest disadvantage, as where the title is in dispute: *Hunt v. Bass*, 2 Dev. Eq. 297; *Johnston v. Eason*, 3 Ired. Eq. 330; *Quarles v. Lacy*, 4 Munf. 251.

² But in general, where there is a power to sell when the land can be sold and the proceeds invested advantageously for those concerned, the power is not un-

of an advantageous reinvestment, there must be some strong purpose of family prudence to justify the conversion, such as an advantageous offer or the like, in order to absolve the trustees from a breach of trust.(c) Every power of sale should contain a direction that the money shall be invested until a convenient purchase is found, for otherwise, if the trustees sold without any prospect of immediate reinvestment, there might be a question, whether the sale could be supported even in favor of a purchaser.(d)

The tenant for life of a settled estate frequently acquires the ultimate remainder in fee through the failure of the intermediate limitations: and in these cases it seems to be the better opinion that a power of sale given by the settlement to the trustees *during the life of the tenant for life*, can no longer be exercised, for the *intention* of the settlement is to confine the power to the time, during which the uses of the settlement exist.(e)¹

There can be still less question, as to the extinguishment of the power, where it is expressly directed to be exercised only *during the continuance of the trusts*, and this is usually done in the modern forms. But *the power will subsist, unless the trusts have clearly determined, although they may continue through the [*475] fault of the trustees, as by their not making a conveyance directed by the trust.(f) And if the trust continue as to *part* of the pro-

(c) *Mortlock v. Buller*, 10 Ves. 309; *Lord Mahon v. Earl Stanhope*, 2 Sugd. Pow. 512, n.; and see *Broadhurst v. Balguy*, 1 N. C. C. 16, 28; *Watts v. Girdlestone*, 6 Beav. 190; *Cowgill v. Lord Oxmantown*, 3 Y. & Coll. 369.

(d) 2 Sugd. Pow. 511, 12.

(e) *Mortlock v. Buller*, 10 Ves. 292; *Wheate v. Hall*, 17 Ves. 80; 2 Sugd. Pow. 508, 6th edit.

(f) *Wood v. White*, 4 M. & Cr. 460, overruling *S. C. 2 Keen*, 664.

limited, but must be fairly exercised; and the sale will be void where the trustee appears to have been influenced by private and selfish interests, and the sale is for an inadequate price: *Wormley v. Wormley*, 1 Brock. 330; 8 Wheat. 421. Under such circumstances, the trustee ought not to sell, unless he has another and advantageous purchase in view. But it was admitted in this case, that there was much reason in the doctrine, that where the trust is defined in its object, and the purchase-money is to be reinvested upon trusts, which require time and discretion, or the acts of sale and reinvestment are manifestly contemplated to be at a distance from each other, the purchaser is not bound to see to the application of the money: *Id.* 443; see ante, 363, note.

¹ It is a general rule, that a power (except it be in trust) is merged both in law and equity, when the legal and equitable estates are joined in the same person: *McWhorter v. Agnew*, 6 Paige, 111; see *Moore v. Shultz*, 13 Penn. St. R. 101. Where land was conveyed on various trusts with power of sale, and the trustees, intending to annul the trusts, reconveyed to the grantor, it was held that the power was extinguished by the reconveyance; but that, on his subsequently conveying the estate again to the trustees, to hold for the same uses and purposes, and as fully in every respect as under the original conveyance, the power revived: *Salisbury v. Bigelow*, 20 Pick. 174.

perty, but have ceased as to the remainder, the power will remain and be exercisable over the *entirety*, unless there is a direction to the contrary in the trust instrument. For instance, where an estate was vested in trustees, in trust as to a moiety for each of the testator's daughters in fee at twenty-one, with a power for the trustees to sell during the continuance of the trusts, and *one* of the daughters had reached twenty-one, and the trust had consequently determined as to her share, it was held by Sir John Leach, that the trustees had power notwithstanding to sell the *entirety*, it being necessary that the power should exist as to the *whole*, in order to preserve it for the benefit of the other share.^(g) Hence, if it be intended that the power of sale should continue only as to such parts of the estate as remain subject to the trust, that intention should be expressed in framing the power.^(h)

It is settled, that an unlimited power of sale, to be exercised during successive estates tail is not invalid for remoteness, for such a power may be destroyed with the estate tail.⁽ⁱ⁾ And even where the power was collateral to limitation in *fee* it has notwithstanding been supported, where the sale was made within the limits prescribed by law against perpetuity.^(k) However, it is still unsettled how far the execution of an unlimited power of sale, could be supported beyond those limits, and by consequence for an indefinitely prospective period.^(l)

It is settled that a simple power of *sale* will not authorize a *partition* of the estate.^(m) And although it was held on one occasion by Lord Rosslyn, that a power of sale and *exchange* will enable the donees to make a partition;⁽ⁿ⁾ yet that decision has not been acted upon, and appears to be of very doubtful authority.^(o) However, it

^(g) Trower v. Knightley, 6 Mad. 134.

^(l) 2 Sugd. Pow. 495, 6, 6th edit.

^(h) Wood v. White, 4 M. & Cr. 480.

^(m) M'Queen v. Farquar, 11 Ves.

⁽ⁱ⁾ Biddle v. Perkins, 4 Sim. 135; 467.

Powis v. Capron, Ib. 138, n.; Waring v. Coventry, 3 M. & K. 249. [Wallis v.

⁽ⁿ⁾ Abel v. Heathcote, 4 Bro. C. C. 278; S. C. 2 Ves. jun. 98.

Freestone, 10 Sim. 225.]

^(o) Att.-Gen. v. Hamilton, 1 Mad.

^(k) Boyce v. Hanning, 2 Cr. & Jerv. 334.

214; 2 Sugd. Pow. 506, 6th edit.

¹ In Nelson v. Callow, 15 Simons, 353, a testator devised his estates to trustees, in trust for his brother's first and other sons successively in fee; but so that the estate and interest of each of these should cease in favor of his next brother on his dying under twenty-one, and without issue living at his death; and if all of them should die under that age, and without leaving issue living at their deaths, in trust for the person who should be his heir, absolutely. And he empowered the trustees of his will for the time being to sell the estates *at any time after his decease, and at their discretion*. A purchaser under the power, objecting that it was "void as contravening the rule against perpetuities," was nevertheless, compelled to take the title; counsel on both sides, as well as the court, being of opinion that the objection could not be supported.

is clear, that an exchange, or partition of a settled estate, may be circuitously effected under a power authorizing a *sale only*, and for that purpose it is sufficient to use the form of a sale instead of a mere partition or exchange; nor could the transaction, if made *bona fide*, be impeached as an improper execution of the power.^(p)¹

It has been decided, that trustees with a power of sale and exchange may give money for owelty of exchange without any express authority for that purpose.^(q)

A power for trustees to *sell* will authorize a *mortgage* by them, which is a conditional sale, wherever the objects of the trust will be answered by a mortgage; as, for instance, where the trust is to pay debts or raise portions.^(r)² But where the trusts declared of the purchase-money show, that the settlor contemplated an *absolute conversion* of the estate, a *mortgage* *will be an improper execution of the power.^(s) Trustees with a power of sale, can-^[*476] not grant *leases*.^(t)³

Where a mortgage is taken in the name of a trustee, who is expressly empowered to sell the mortgaged estate in a certain event for the purpose of paying off the mortgage debt, and it is declared, that the concurrence of the mortgagor shall not be necessary to perfect the sale, the trustees *alone* may sell, and make a good conveyance of the estate; and it is immaterial that the mortgage deed contains a

(p) 2 Ves. jun. 101; 1 Mad. 223; 2 Sugd. Pow. 507, 6th edit. See Holme v. Williams, 8 Sim. 557; 1 Sugd. Pow. 538.

(q) Bartram v. Whichcote, 6 Sim. 86; 2 Sugd. Pow. 507, 6th edit. (s) Holdenby v. Spofforth, 1 Beav. 390.

(r) Mills v. Banks, 3 P. Wms. 1; Ball v. Harris, 8 Sim. 485; 4 M. & Cr. 264; (t) Evans v. Jackson, 8 Sim. 217.

¹ See as to the construction of powers of sale and exchange, Marshall v. Sladden, 7 Hare, 438; Lord Leigh v. Lord Ashburton, 11 Beav. 478. A power of sale will not of itself authorize an exchange. Ringgold v. Ringgold, 1 H. & Gill, 11; Taylor v. Galloway, 1 Hamm. 232.

² See ante, 355, note. A power to sell or mortgage is not exhausted by a mortgage. Asay v. Hoover, 5 Barr, 20; but see Piatt v. Oliver, 2 McLean, 309.

³ In Hedges v. Riker, 5 J. C. R. 163, where there was a devise to executors in trust for C. for life, and if she died without issue, then in remainder over, with power to the executors "to sell and dispose of so much of the real estate as should be necessary to fulfil the will," it was held that this was sufficient to authorize the executors, the persons in remainder being infants, to execute leases for years of the real estate, for such terms and upon such conditions as were reasonable and necessary to carry into effect the intentions of the testator, expressed in the will. And in Burr v. Sim, 1 Whart, 266, it was said that an absolute direction to sell, by implication authorized the executors to rent houses devised, until they could be sold. But in Seymour v. Bull, 3 Day, 389, a power to *sell and dispose of* lands devised to the children of the testator, was held not to give any right to the executors to enter on the land or to lease it.

covenant on the part of the mortgagor, that he will join in making the conveyance.(u)

The power of trustees for sale to give discharges for the purchase-money will be considered more fully in the next Chapter.(x)¹ However, it may be observed here, that even previously to the recent act 7 & 8 Vict. c. 76, s. 10, where a power of sale was given to trustees, with direction to employ the purchase-money generally for the benefit of the *cestui que trusts* in a manner requiring time and discretion, as where the trust was to lay it out again in lands to the uses of the settlement, and till that was done to invest in the funds;(y) or to employ the money in payment of debts generally;(z) or of certain specified debts, which could not be ascertained until a future and distinct period;(a) or where the parties beneficially entitled to the purchase-money were infants or unborn;(b) it was settled, that the trustees must necessarily take the power of giving discharges for the purchase-money as incident to the trust, and without any express authority for that purpose; for the power of sale would otherwise be nugatory. But where the object of application was specifically pointed out, and was immediate and certain, the purchaser under the power would have been bound to ascertain, that the money was duly applied by the trustees, unless the instrument creating the trust expressly absolved him from that liability, by providing that the receipt of the trustee should be a sufficient discharge.(c)

The 10th section of the act 7 & 8 Vict. c. 76, has been already stated,(d) and its effect in altering the law on this subject will be considered in the next Chapter. It may be observed here, that the provision contained in the 13th section of the same act, which declares, that the act shall not extend to any deed, act, or thing, or (except as to contingent remainders) *to any estate, right or interest created before the first of January, 1845*, must render the practical application of the act a matter of great difficulty in most cases.(e)

A trustee with power to sell and give receipts has the complete power of disposition over the trust estate, and he may compel a pur-

(u) *Clay v. Sharpe*, 18 Ves. 346, n.; see *Corder v. Morgan*, 18 Ves. 344.

(x) Post, Ch. III.

(y) *Doran v. Wiltshire*, 3 Swanst. 699.

(z) Ante, Pt. III. Div. I. Ch. II. Sect. 2, Pl. II. 1; *Forbes v. Peacock*, 11 Sim. 152, 160; *Jones v. Price*, 11 Sim. 557; post, Ch. III.

(a) *Balfour v. Welland*, 16 Ves. 151, 156.

(b) *Sowarsby v. Lucy*, 4 Mad. 142; *Lavender v. Stanton*, 6 Mad. 46; *Breedon v. Breedon*, 1 Russ. & M. 413.

(c) 2 Sugd. V. & P. 30, et seq., 9th edit.; ante, p. 342, 363; and see post, Ch. III. of this Part. [*Duffy v. Calvert*, 6 Gill, 487.]

(d) Ante, Pt. III. Div. I. Ch. II. Sect. 2, Pl. I. note.

(e) See Post, Ch. III.

¹ See ante, 342, 343, and notes; and, in addition to the cases there cited, *Duffy v. Calvert*, 6 Gill, 487, where the English doctrine was followed.

chaser to complete his contract without joining the *cestui que trusts* as parties to a suit for the specific performance.(f)

*A power for trustees to sell and purchase other lands to be held on the same trusts, will not be well executed by a sale [*477] of the trust estate for a rent charge granted out of it by the purchaser.(g)¹ And so a sale for an annuity cannot be supported under the ordinary power.(h)

Where an estate is settled in trust for a tenant for life *without impeachment for waste*, and a power of sale is given to the trustees with a direction for reinvestment, it will be an improper execution of the power for the trustees to sell the land, *minus* the timber on it, and to suffer the timber to be sold separately, and the money to be received by the tenant for life. For the intention of the creator of the power will be taken to have been, that the whole estate, of which the timber constitutes part, should be sold for one entire sum, to be resettled, and the fact of the tenant for life being unimpeachable for waste makes no difference in this respect.(i)

Where trustees are invested with a discretionary power to sell real estate, the estate until sold, and whatever remains unconverted after a partial sale, will retain its original character of realty.(k)

Equity will enforce the specific performance of a proper contract entered into by trustees under a power of sale;(l) and even if the power were determined before the conveyance could be made, yet if the trustees had power to bind the estate by their contract, those who have the legal interest, will be compelled to make it good.(m) However, it has been already seen, that a contract of sale by trustees made in breach of their trust, will not be specifically enforced.(n) Thus it was laid down by Sir John Leach, V. C., in the case of *Ord v. Noel*, "that if trustees fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make

(f) *Binks v. Lord Rokeby*, 2 Mad. 227; *Keon v. Magawly*, 1 Dr. & W. 401; *Drayson v. Pocock*, 4 Sim. 283. [See *Duffy v. Calvert*, 6 Gill, 487.]

(g) *Read v. Shaw*, 2 Sugd. Pow. 512; App. 29.

(h) *Raid v. Shergold*, 10 Ves. 370, 381.

(i) *Cholmeley v. Paxton*, 3 Bing. 207; 5 Bing. 48; 3 Russ. 565; 2 Moore & P. 127; 10 B. & Cr. 564; *Cockerell v. Cholmeley*, 1 Russ. & M. 418; 1 Cl. & Fin. 60; and see *Waldo v. Waldo*, 12

Sim. 107; *Doran v. Wiltshire*, 3 Sw. 699; *Wolf v. Hill*, 1 Sw. 149, n.

(k) *Walter v. Maunde*, 19 Ves. 424; 2 Sugd. Pow. 504.

(l) *Mortlock v. Buller*, 10 Ves. 315; 2 Sugd. Power, 511.

(m) *Mortlock v. Buller*, *ubi supra*.

(n) *Ord v. Noel*, 5 Mad. 438; *Wood v. Richardson*, 4 Beav. 176; *Mortlock v. Buller*, 10 Ves. 311; *Thompson v. Blackstone*, 6 Beav. 470. [See *Dawes v. Betts*, 12 Jurist, 709.]

¹ Power to sell on ground-rent in Pennsylvania, is well exercised by a sale on ground-rent with a clause of redemption in the deed; and the release must be by the donee of the power. *Ex parte Huff*, 2 Barr, 227.

the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party—a court of equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been. The remedy of the law is open to such a purchaser, but he has no claim to the assistance of a court of equity.”(o)

So in a very recent case, where a trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should retain out of the purchase-money the amount of a *private debt due to him from the trustee*, the Master of the Rolls (Lord Langdale) refused to decree a specific performance of this contract on the ground that this on the face of the contract was a breach of trust, and his Lordship allowed a general demurrer to the bill for want of equity.(p)

[*478] The power of trustees for sale to purchase the trust estate *themselves* *will be reserved for more convenient consideration in a future chapter.(q)

Trustees of an estate in strict settlement with a power of sale may sell to the tenant for life,(r) though this was once doubted.(s)

It is no objection to the exercise of a power of sale by trustees, that the conveyance is made to a trustee for the purchaser.(t)

A power of sale, like all other powers, can be exercised only in the mode and subject to the conditions, if any, prescribed by the instrument creating the power.(u) Therefore, where the trust is to sell *after the death of the tenant for life*, a sale *in his lifetime* will be bad, even though it be made under a decree of the court.(x)¹ And so if

(o) *Ord v. Noel*, 5 Mad. 438, 440; et vide *Wood v. Richardson*, 4 Beav. 174, 176; *Mortlock v. Buller*, 10 Ves. 311, 312. [*Johnson v. Eason*, 3 Ired. Eq. 334.] (q) *Post*, Div. II. Ch. III. p. 535 and notes. [See ante, p. 158 and note.] (r) *Howard v. Ducane*, T. & R. 81. (s) 2 Sugd. Pow. 517, 6th edit. (t) T. & R. 81.

(p) *Thompson v. Blackstone*, 6 Beav. 470. (u) See *Wright v. Wakeford*, 17 Ves. 454.

(x) *Blacklow v. Laws*, 2 Hare, 40.

¹*Sweigart v. Berk's Adm.*, 8 S. & R. 304; *Davis v. Howcott*, 1 Dev. & Batt. Eq. 460; *Ervines' Appeal*, 16 Penn. St. R. 266; *Styer v. Freas*, 15 Penn. St. R. 339; even where the tenant for life (widow of the testator) renounces the provision under the will, and claims dower. *Jackson v. Ligon*, 3 Leigh, 161. So where the sale is to take place at the majority of a legatee. *Loomis v. McClinck*, 10 Watts, 274. But if the person for whose benefit the sale has been postponed, joins in the execution of the power, before the period fixed, it will be good. *Gast v. Porter*, 13 Penn. St. R. 535; though see *Davis v. Howcott*, 1 Dev. & Batt. Eq. 460. If, however, the postponement were with a view to a probable rise in value, it is otherwise. *Gast v. Porter*. Where the sale is authorized upon the consent of the tenant for life, consent to a decree of sale is sufficient.

the sale be directed to be made with the consent of the tenant for life, or of any other person, that consent must be obtained before the exercise of the power.(y) And the court will not decree the specific performance of a contract by the trustees for the sale of the estate, where the required consent had not been given at the time of filing the bill.(z)

Upon the same principle, where the power of sale is to be exercised only on some conditional event—such as the deficiency of another estate to answer certain charges(a)—or upon the purchase

(y) *Mortlock v. Buller*, 10 Ves. 308; (a) *Dike v. Ricks*, Cro. Car. 335; see *Bateman v. Davis*, 3 Mad. 98; *Culpepper v. Aston*, 2 Cha. Ca. 221; 2 *Wright v. Wakeford*, 17 Ves. 454. Sugd. Pow. 497, 6th edit.; 2 Sugd. V. (z) *Adams v. Broke*, 1 N. C. C. 627. & P. 48, 9th edit.

Tyson v. Mickle, 2 Gill. 376. See, as to the effect of an alienation of his estate upon the tenant for life's power of consent, *Warburton v. Farn*, 16 Sim. 625, 13 Jur. 528.

With regard to a power to sell for debts, upon "a deficiency of personal assets," it was held in *Coleman v. McKinney*, 3 J. J. Marsh. 251, that a sale would be valid though there were a sufficiency of assets at the time. But the opinion of Ch. J. Bronson in *Roseboom v. Mosher*, 2 Denio, 68, appears rather the other way; and in *Graham v. Little*, 5 Ired. Eq. 407, where executors were authorized to sell any part of the testator's estate, whenever they might think proper to do so, "without any order or decree of court," it was held that they could not sell for the payment of debts, except upon such a deficiency of the personalty. See also *Minot v. Prescott*, 14 Mass. 495. Where, however, there is a power of sale expressly for the payment of debts, such deficiency need not be shown; the presumption being, from the nature of the case, that it existed. *Silverthorn v. McKinster*, 12 Penn. St. R. 67. So, if the power to the executors be to sell, "if in their opinion it shall become necessary for the payment of debts and legacies;" the sale under such circumstances being conclusive of the necessity. *Roseboom v. Mosher*, 2 Denio, 61; *Lord Rendlesham v. Meux*, 14 Simons, 249. If the personal estate be in fact insufficient, executors with a power to sell "on insufficiency of personal assets," must sell, whether they deem it expedient or not. *Coleman v. McKenney*, 3 J. J. Marsh. 246.

A power to sell if the income of real and personal estate be not sufficient to support the testator's wife comfortably, can only be exercised in that event. *Minot v. Prescott*, 14 Mass. 495. So a power to an agent to sell *after* redeeming on a sale for taxes, cannot be exercised before redemption. *Devinney v. Reynolds*, 1 W. & S. 332. So where there is a power of sale to discharge an instalment of a debt, then due, a sale to discharge that instalment and another not due, is void. *Ormsby v. Tarascon*, 3 Litt. 411. But, in general, where there is a discretionary power as to the time and mode of the sale in the trustee, it can only be questioned for an absence of good faith. *Bunner v. Storm*, 1 Sandf. Ch. 357; *Champlin v. Champlin*, 3 Edw. Ch. 59, 7 Hill, 245.

Where a sale is directed to be made within a certain period, a sale before its expiration, though the conveyance be afterwards, is valid, and the fact may be shown by parol evidence. *Harlan v. Brown*, 2 Gill, 475. And if the power be also coupled with a trust, a sale after the period fixed will be good. *Miller v. Meetch*, 8 Barr, 417. But even a discretionary power cannot be exercised after its object has ceased. *Slocum v. Slocum*, 4 Edw. Ch. 613; *Jackson v. Jansen*, 6 Johns. R. 73; *Sharpsteen v. Tillou*, 3 Cow. 651.

and settlement of another estate to the same uses(b)—the power cannot be exercised without the literal performance of those conditions.(c)¹

However, as regards purchasers from trustees under powers of this description, there is a material difference, whether the condition, annexed to the exercise of the power, is *precedent* or *subsequent*. If it be *precedent*, its performance is essential for *giving existence* to the power of sale, and no sale under the power can by possibility be sustained, unless the condition be performed. But where the condition is *subsequent*, the power of sale will attach independently of the performance of the condition, and if the purchaser be expressly or constructively exonerated from seeing to the performance of the trusts, his title would not be affected by the fact that the condition had not been performed. For instance, to select the two conditions just referred to, *where the deficiency of the personal estate* or any other property is the condition on which the power is to be exercised, that is a *precedent* condition, which must be satisfied before the power can arise; consequently it will be incumbent upon a purchaser from the trustees in any case to ascertain that the required deficiency had arisen previously to the sale.(d) But where the reinvestment of the purchase-money is required, that is a *subsequent* condition, and a *bona fide* purchaser from the trustees will not be affected by its non-performance, if they have a power to give discharges for the purchase-money.(e)

[*479] *However, the impolicy and inconvenience of these conditional powers is obvious. To adopt Sir E. Sugden's words, "they tend only to expense and trouble in practice, as a purchaser could not, in general, be compelled to complete his purchase without the sanction of a court of equity; and there are few cases in which he could be advised to accept the title without a decree. It would be much better wholly to omit a power of sale in a settlement, than to fetter its operation by requisitions like these."(f)

A defective execution of a power of sale will be relieved against in equity in favor of a purchaser, if the defect be merely of a formal character.(g) But no relief will be given where the sale is fraudulent, or contrary to the intention of the creator of the power; as in

(b) *Doe v. Martin*, 4 T. R. 39; *Cox v. Chamberlain*, 4 Ves. 631; *Burgoigne v. Fox*, 1 Atk. 575; *Hougham v. Sandys*, 2 Sim. 95, 145.

(c) 2 Sugd. Pow. 497, 6th edit.

(d) 2 Sugd. V. & P. 48, 9th edit.

(e) *Roper v. Halifax*, 2 Sugd. Pow. App. No. 3.

(f) 2 Sugd. Pow. 503.

(g) 2 Sugd. Pow. 100, 135, 142, 517. [4 Kent's Comm. 344.]

¹ See previous note.

the cases already considered of a sale for a rent-charge or annuity, or a sale of the estate deprived of the timber.(h)

Where the trustees take the legal estate of the property to be sold, coupled with the power of sale, they alone are competent to contract, and to make a good conveyance of the legal and equitable estate to the purchaser.(i) And in like manner, where they take merely a power which operates under the Statute of Uses by revoking the old uses, and appointing new ones to the purchaser, they can make a good title by the exercise of their power.(k) And the case is the same even where executors take a power of sale by implication, from having the distribution of the purchase-money.(l)

With regard to the mode in which a trustee should proceed to sell the estate, it has been laid down by Lord Eldon, "that a trustee for sale is bound to bring the estate to the hammer under every possible advantage to his *cestui que trusts*."(m) Therefore, he will not be justified in damping the sale by unnecessary restrictions in the conditions of sale.(n)

Although he may properly affix such reasonable special conditions, as are required by the state of the title.(o)

So the trustees should use all reasonable diligence to obtain the best price.(p)¹ And for this purpose, it will be proper for them to have the estate previously valued.(q)

(h) *Read v. Shaw*, 2 Sugd. Pow. App. 29; *Reid v. Shergold*, 10 Ves. 381; *Cockerell v. Cholmeley*, 1 R. & M. 418; 2 Sugd. Pow. 517. [So where all do not join. *McRea v. Farrow*, 4 H. & Munf. 444.]

(i) *Sowarsby v. Lacy*, 4 Mad. 142; *Keon v. Magawly*, 1 Dr. & W. 401.

(k) Sugd. Pow. *passim*.

(l) *Tylden v. Hyde*, 2 S. & St. 238; *Forbes v. Peacock*, 11 Sim. 152; but see *Blatch v. Wilder*, 1 Atk. 420, where the heir was directed to join in the conveyance.

(m) *In Downes v. Grazebrook*, 3 Mer. 208.

(n) See *Wilkins v. Fry*, 1 Mer. 268; 2 Rose, 375. [See, as to the law of conditions of sale, article in 2 Engl. Law Review, 81.]

(o) *Hobson v. Bell*, 2 Beav. 17.

(p) *Ord v. Noel*, 5 Madd. 440; *Mortlock v. Buller*, 10 Ves. 309.

(q) *Mortlock v. Buller*, 10 Ves. 309; *Conolly v. Parsons*, 3 Ves. 628, n.; see *Campbell v. Walker*, 5 Ves. 680, 1.

¹ If trustees sell at improper times, or neglect to ascertain the true value of the land sold, they will be held responsible for any deficiency. *Quackenbush v. Leonard*, 9 Paige, 347. If the actual value at the time cannot be ascertained, they will be responsible for the highest value. *Ringgold v. Ringgold*, 1 Harr. & Gill, 11. But for this, there must be gross negligence; where the trustees act in good faith, they will not be liable beyond the amount actually received. *Osgood v. Franklin*, 2 John. Ch. 27; 14 John. R. 527. In New York, it is held that, in general, a naked power to sell and reinvest, or to sell for a certain sum, can only be exercised by a sale for cash. *Waldron v. McComb*, 1 Hill, 111 (see S. C., 7 Hill, 335); *Ives v. Davenport*, 3 Hill, 373. And a sale on personal security, indeed, is at the trustee's own risk. *Swoyer's Appeal*, 5 Barr, 377. So a delay to take proper security will render him responsible. *Hurt v. Fisher*, 1 Harr. & Gill,

The contract for sale must not be entered into under circumstances of haste or improvidence.^(r) And where there are several *cestui que trusts* who have conflicting interests, as, for instance, the mortgagor and mortgagee (where the mortgaged estate is vested in a trustee with a power of sale), it will be the duty of the trustee to act [*480] impartially for the *benefit of all the parties interested.^(s) And notice should be given to all the parties of the intended sale, so that each may take means to secure an advantageous sale.^(t)

(r) *Ord v. Noel*, 5 Mad. 440.

6 Mad. 10; see *Pechel v. Fowler*, 2

(s) *Ord v. Noel*, 5 Mad. 440; *Anon.* Anstr. 550.

(t) *Anon.* 6 Mad. 10.

88. But a sale, where the purchase-money is secured by mortgage, is believed to be unobjectionable in Pennsylvania, and probably elsewhere; and by it a better price can generally be obtained. A sale on credit is the usual and authorized course in North Carolina. *Stone v. Hinton*, 1 Ired. Eq. 15; see *Waring v. Darnell*, 10 Gill & John. 126. In Pennsylvania, the Orphans' Court cannot direct a sale for the payment of debts otherwise than for cash. *Davis's Appeal*, 14 Penn. St. 372.

Where a testator directed his executor to sell certain slaves, for the recovery of which an action was then pending on a contract for their purchase, in case he should succeed thereon, and the executor suffered the suit to abate, and surrendered all right to the slaves, on receiving back the purchase-money paid by the testator; it was held, that the power was sufficiently exercised, in the absence of proof of any fraud, or improper dealing. *Jones v. Loftin*, 3 Ired. Eq. 136.

Trustees are liable to their *cestui que trusts* for the deposit forfeited by a purchaser who neglects to comply with his purchase. *Campbell v. Johnston*, 1 Sandf. Ch. 148.

¹ No particular form of notice is necessary. It is sufficient, if the description of the land is reasonably certain, so as to inform the public of the property to be sold. *Newman v. Jackson*, 12 Wheaton, 570. In *McDermot v. Lorillard*, 1 Edw. Ch. 273, it was held, that the New York Revised Statutes, which formerly required an advertisement on a sale by executors under a power in a will, did not apply where the time and mode of the sale were left expressly to their discretion. Under a statute which requires a certain number of days' notice before a sale, the advertisement must be on every day during that time. *Stine v. Wilkison*, 10 Missouri, 75. Where due advertisement is required by the trust deed, it lies on the parties insisting on the validity of the sale, to show that this was complied with. *Gibson v. Toner*, 5 Leigh, 370. In *Minuse v. Cox*, 5 John. Ch. 447, however, Ch. Kent was of opinion, that want of notice would not affect the title of the purchaser; but that the trustee would be liable for the deficiency in price. The purchaser, indeed, cannot raise the objection to free himself from the contract. *Greenleaf v. Queen*, 1 Peters, S. C. 145; see *Beebe v. De Baun*, 3 Engl. Arkansas, 567. See further, as to notice, *Johnson v. Dorsey*, 7 Gill, 269; *Gibbs v. Cunningham*, 1 Maryl. Ch. Dec. 44.

A power to sell is well exercised by a parol sale, or by a sale under articles. *Silverthorn v. McKinster*, 12 Penn. Stat. R. 67; *Taylor v. Adams*, 2 S. & R. 534. A power of sale includes every interest existing at the time, even a reversion on an estate tail of little value. *Mortimer v. Hartley*, 6 Exch. 47; and see *Burton v. Smith*, 13 Peters, 464. But it will not extend to lands acquired after the

In the absence of any express directions in the power, the trustees may sell, either by public auction, or private contract, as circumstances may render it necessary, or most advantageous for the trust estate.^(u) And, after an ineffectual attempt to sell by auction, they may have recourse to a sale by private contract.^(x) This was decided with regard to the assignees of an insolvent, who are expressly directed by the Insolvent Act (7 Geo. IV. c. 57, s. 20) *to sell by auction*. The decision, therefore, applies, *à fortiori*, to the case of trustees to whom no mode of sale is expressly prescribed.¹

(u) Ex parte Dunman, 2 Rose, 66; [See 3 Martin's Conveyan. 290, note Ex parte Hurly, 1 D. & Ch. 631; Ex (b).]
 parte Ladbroke, 1 Mont. & A. 384; but (x) Mathers v. Prestman, 9 Sim. 352.
 see Ex parte Goding, 1 D. & Ch. 323.

date of the will. Roney v. Stitz, 5 Whart. 381; Meader v. Sorsby, 2 Alab. 716; Peck v. Peck, 9 Yerg. 301; see Stiers v. Stiers, 1 Spencer, 52. So a power in a codicil to sell lands "not particularly devised by will," cannot be exercised over lands acquired between the making of the will and the codicil. Peck v. Peck, ut supr. Where the land is in adverse possession at the time, the power cannot be exercised in those States in which the statutes of Champerty and Maintenance are in force, on that ground, and also because of the cloud on the title. Ibid. But in such case, it seems that Chancery would take jurisdiction of a bill to remove trespassers, in order to enable the trustee to sell. Henderson v. Peck, 3 Humph. 247.

A stranger, or wrong-doer, cannot object to irregularities in the sale. Hillegas v. Hillegas, 5 Barr, 97; Casy v. Colvin, 11 Alab. 514. Nor where the *cestui que trusts* waive them, can the purchaser refuse to complete his bargain on account thereof. Greenleaf v. Queen, 1 Peters, S. C. 146; Schenck v. Ellingwood, 3 Edw. Ch. 175. There is, indeed, in favor of meritorious claimants, a general presumption, in the first instance, that the power has been legally exercised. Marshall v. Stephens, 8 Humph. 159.

¹ In Pennsylvania, it has been held, that a private sale by a trustee, or executor, under a power, is void. McCreary v. Hamlin, 7 Barr, 87; Ellet v. Paxson, 2 W. & S. 418; see Ashurst v. Ashurst, 13 Alab. 781; but see Burr v. McEwen, Baldwin, C. C. 154. But this is now remedied by Acts of 1849, 1850; Dunlop, 1019, 1072. Where the trust deed expressly requires a public sale, that must be followed, or the sale will be ineffective. Greenleaf v. Queen, 1 Peters, 145. In Minuse v. Cox, 5 J. C. R. 441, however, it was held, that a power to sell at auction, or otherwise, in whole, or in parcels, on giving three weeks' notice, authorized a private sale, and without any notice. And in Tyson v. Mickle, 2 Gill, 383, where trustees, appointed to sell at public sale, were unable, after unusual efforts, to obtain a purchaser at the minimum price, it was held, that a *bona fide* private sale, though for less than the public offer, was valid: Gibbs v. Cunningham, 1 Maryl. Ch. 44; Gibson's Case, 1 Bland. 138, *accord*; see Beebe v. De Baun, 3 Engl. Ark. 567. A power to sell at auction is duly exercised where the property has been advertised, and an offer sent in by letter, which, exceeding any bid when the property is actually put up for sale, is accepted. Tyree v. Williams, 3 Bibb. 367. In New York, by the Revised Statutes (part II., Ch. 16, tit. 4, § 60), sales under a power may be either public or private (unless otherwise directed); and on such terms as shall be, in the opinion of the executor, most advantageous. As to the sales of personal estate, in the absence of

However, a sale by auction is the most usual, as it is unquestionably the safest course for the trustees to adopt. For, in that case, no question can be raised against them for the inadequacy of price;(y) whereas, in case of a sale by private contract, it would be very hazardous for the trustee to let the estate go at a price less than that at which it had been valued.(z)

Trustees have no authority to buy in the property after it has been put up for sale, unless that authority be given them by the terms of the power. Thus, in a late case, the trustees of a will, at the request of one of the *cestui que trusts*, bought in the property, for which 6,000*l.* had been bid, and shortly afterwards they refused 6,600*l.*; it was subsequently sold for 3,500*l.*, and the trustees were held responsible for the difference in price.(a) The same point had frequently been so decided with regard to assignees in bankruptcy.(b)

The estate may be sold in lots, or partly at one time and partly at another, if such a course be most advisable.(c)¹

Trustees for sale are chargeable with auction duty, in the same manner as other vendors.(d)

(y) *Ord v. Noel*, 5 *Mad.* 440; *Taylor v. Tabrum*, 6 *Sim.* 281. [See *Johnson v. Dorsey*, 7 *Gill*, 269; *Hunter v. Stin-gel*, 1 *Maryl. Ch. Dec.* 283.]

(z) See *Conolly v. Parsons*, 3 *Ves.* 628, n.; *Mortlock v. Buller*, 10 *Ves.* 292, 309.

(a) *Taylor v. Tabrum*, 6 *Sim.* 281.

(b) *Ex parte Lewis*, 1 *Gl. & J.* 69; *Ex parte Buxton*, *Ib.* 355; *Ex parte Bal-dock*, 2 *D. & Ch.* 60.

(c) *Ord v. Noel*, 5 *Mad.* 438; *Ex parte Lewis*, 1 *Gl. & J.* 69; *Co. Litt.* 113, a.

(d) *King v. Winstanley*, 8 *Price*, 180.

the property to be sold, see *Foster v. Goree*, 5 *Alab.* 428; *Beebe v. De Baun*, 3 *Engl. Ark.* 567.

¹ *Stall v. Macalester*, 9 *Ohio*, 19; *Grave v. Shaw*, 14 *Missouri*, 341; *Delaplaine v. Lawrence*, 3 *Comstock*, 301; see *Ewing v. Higby*, 7 *Ohio*, 198. In *Thomas v. Townsend*, 13 *Eng. L. & Eq.* 294, trustees having power to sell land, in order to raise £600, and expenses, put it up to sale in two lots, and sold the first for £600, and the second for £500. The second lot contained more than three acres, and was described in the particulars of sale as readily convertible into building ground. It was held, that the sale of the second lot was proper, as the trustees could not know beforehand the amount which the first would bring. But, under an order of court, directing the sale of land for the payment of a debt, a sale of more than is necessary for the purpose, by the executor, is void. *Wakefield v. Campbell*, 20 *Maine*, 393; see *Davis' App.*, 14 *Penn. St. R.* 372. On the other hand, under such an order, the executor cannot sell in smaller quantities than is necessary. *Quarles v. Lacy*, 4 *Munford*, 251.

Where a lot was advertised at a trustees' sale, as containing a specified number of acres, and the purchaser bid so much per acre, it was held to be a sale by the acre, and he was allowed for a deficiency. *Brown v. Wallace*, 4 *Gill & John*. 479.

There is no implied warranty at a trustees' sale of lands or personalty. *Mock-bee v. Gardner*, 2 *Harr. & Gill*, 176; *Worthy v. Johnson*, 8 *Georgia*, 236; *Sutton v. Sutton*, 7 *Gratt.* 234. As to the covenants of trustees, see ante, 281, note.

II.—OF POWERS OF LEASING.

In exercising a power of granting leases, trustees must confine themselves strictly within the limits of their authority; and any deviation from it in the nature or term of the leases granted, will be treated as a breach of trust.^(e) Thus, where the trust requires the leases to be in possession, and not in reversion, or where it forbids the taking of any fine or premium from the lessee, a reversionary lease, or one for which a fine is paid, is improper, and will be set aside by the court on the application of the *cestui que trust*.^(f)¹

*And such a lease will not be confirmed by the acceptance of the rent by the parties beneficially interested, though continued for several years, unless they were aware of the imperfection of the lease.^(g) [*481]

And although the whole legal estate is vested in the trustees, so that the lease, taking effect out of their legal interest, is valid at law, yet it will be relieved against in equity, if it be contrary to the terms of the equitable power.^(h)

It scarcely comes within the scope of the present work to consider at large the construction of the usual powers of leasing, and the nature and terms of the leases, which are authorized by such powers;⁽ⁱ⁾ but it may be convenient here to state generally the result of the principal decisions on this subject.

Where the power is confined to lands *usually* let, or requires the *usual* rent to be reserved, it will apply *prima facie* only to such lands

(e) *Bowes v. East London Water Works Company*, 3 Mad. 375, 383. power is incapable of confirmation at law: *Sinclair v. Jackson*, 8 Cowen,

(f) *Bowes v. East London Water Works Company*, 3 Mad. 375; and *S. C. Jac.* 324. 588.]

(h) *Ibid.*

(i) 2 Sugd. Pow., chap. 17, p. 326,

(g) *Ibid.* [A void lease under a 6th edit.

¹ See on this subject, *Doe v. Burrough*, 6 Q. B. 229; *Doe v. Stephens*, Id. 208; *Doe v. Williams*, 11 Q. B. 688; *Doe v. Lord Kensington*, 8 Q. B. 429; *Doe v. Courtney*, 11 Q. B. 932; *Doe v. Hole*, 15 Q. B. 848; *Sheehy v. Lord Muskerry*, 1 H. Lords' Cas. 576; *Dyas v. Cruise*, 2 Jones & Lat. 460; *Doe v. Ferrand*, 15 Jur. 1061; 20 L. J. (C. P.), 202; *Leigh v. Earl of Balcarres*, 6 C. B. 847. And see now the Act of 12 & 13 Vict. ch. 26, amended by the Act of 13 & 14 Vict. c. 17 (13 Jur. pt. ii. 343, 14 Id. 335), by which defective leases under a power are to be treated as contracts in equity for such leases as might have been granted under the power; and certain acts, &c., by the grantors, or reversioners to be treated as confirmations.

As to when a power to lease is implied under a power to sell, see ante, 476. Where a testator directed that his widow should "cultivate as much of his land, during her life, or widowhood, as she pleases," and "the balance" was to be rented out by his executors, the power of leasing was held to extend to the whole estate, on the determination of the life estate. *Hoyle v. Stowe*, 2 Devereux, R. 318.

as have been generally leased,(k) although that construction may be relaxed, where the general intention of the settlement requires it.(l)¹

A power to lease all the lands generally will not authorize a lease of *unopened* mines; although mines *already opened* may be leased under a general power.(m)

A power to lease *for lives* will not authorize a lease *for years* determinable upon lives,(n) but under a general power, to lease for any term not exceeding twenty-one years or three lives, such a lease may be granted.(o)

A power to grant leases for two or more lives, implies an authority to grant them during the life of the survivor.(p) But in granting a lease for lives, the lives must be *in esse*,(q) and must be all concurrent.(r) Where the power is to lease for *three* lives, one granted for *two* lives only will be good.(s)

So where there is a power to grant leases for any specified number of years, or for any term not exceeding a certain specified number, a lease for a *less* term than the one specified, is a good exercise of the power.(t) But of course a lease for a *longer* term will not be proper; although it seems that such a lease might be supported to the extent limited by the power, and that the excess only would be void. For instance, it has been held, that where the power is to

(k) 2 Roll. Abr. 261, pl. 11, 12; 2 Sugd. Pow. 339; Earl of Cardigan v. Montague, Id. App. 14; see Orby v. Mohun, 2 Vern. 531; S. C. Prec. Ch. 257.

(l) Goodtitle v. Funucan, Dougl. 565; 2 Sugd. Pow. 349.

(m) Campbell v. Leach, Ambl. 740. [See Leigh v. Earl of Balcarres, 6 Com. Bench, 847.]

(n) Whitlock's case, 8 Rep. 69, b; 1 Sugd. Pow. 514; 2 Id. 354.

(o) 2 Sugd. Pow. 354.

(p) Doe v. Hardwicke, 10 East, 549; 2 Sugd. Pow. 364.

(q) Raym. 263.

(r) Doe v. Halcombe, 7 T. R. 13; 2 Sugd. Pow. 364.

(s) 2 Sugd. Pow. 365.

(t) Isherwood v. Oldknow, 3 M. & S. 382; 1 Sugd. Pow. 520; 2 Id. 355.

¹ Lands were devised for life, with remainder over, with a power to the tenant for life to lease in possession or reversion, for one life or for two or three lives, or for any term or number of years determinable upon one life, or two or three lives, any part of the premises *usually so leased*. It was held that the joining of lands in the same lease, which were usually let separately, was not at variance with the power; the words "usually so leased" applying only to the duration of the lease: Doe v. Stephens, 6 Q. B. 208; Doe v. Williams, 11 Q. B. 688. Where a power to lease provides that the power to lease shall contain all "usual and reasonable covenants," the general rule is to take as a guide the lease in existence at the time of the creation of the power: Doe v. Stephens, *ut supra*. But where there has been an ancient and uniform custom, and a single lease varying therefrom has been granted just before the creation of the power, the exceptional lease is not to govern merely because it is the latest: Doe v. Hole, 15 Q. B. 848.

lease for ten years, and a lease is granted for twenty years, the grant will be good as a lease for ten years.^(u)¹

A general power of leasing authorizes the grant of a lease in possession only, and not one in reversion.^(x)²

*Where the length of the term to be granted is not defined by the power the trustee must be guided by the consideration [*482] of what is most beneficial to the trust estate. *At law* such a power may be exercised to its fullest extent by granting a lease for the longest term.^(y) But in *equity* the trustees take the power coupled with a trust, and in exercising it, they must act precisely as if the estate was given to them in trust to let.^(z)³

Where the legal fee is vested in the trustees, they have at law the power of granting leases to any extent as incident to the legal estate; and if the duties of the trustees require them to be invested with the control and management of the trust estate, they may even in equity grant valid leases of the trust property upon such reasonable terms and for such periods as they may consider most beneficial; and such leases would take effect out of the legal interest in the trustees, and

(u) *Pawcey v. Bowen*, 1 Ch. Ca. 23; (y) *Muskerry v. Chinnery*, Ll. & G. 3 Ch. Rep. 11. 185; 1 Sugd. Pow. 548.

(x) *Ly. Sussex v. Worth*, Cro. Eliz. 6; 2 Sugd. Pow. 370. (z) *Sutton v. Jones*, 15 Ves. 587, 8.

¹ It would, however, be bad at law, and could not be set up in ejectment against the holder of the legal title: *Sinclair v. Jackson*, 8 Cowen, 581. So where lands within a power are joined with others not within it, at one rent, the whole is bad: *Doe v. Stephens*, 6 Q. B. 208.

² So in *Sinclair v. Jackson*, 8 Cowen, 581, it was strongly doubted whether a lease under a power to lease for a given number of years, could be made to commence after the expiration of a subsisting term, and it was decided that, if it could, the term granted by the new lease, and the residue of that which was subsisting, must not, when coupled together, exceed the time limited by the power.

³ In the case of *Black v. Ligon*, Harper's Eq. 205, the trustees of a charity were under an express prohibition against selling or alienating the land. It was held under the circumstances, that a power to lease was implied; and a lease for ninety-nine years, without any annual reservation of rent, and for a gross sum, payable in eight years, was valid. The power had been exercised in good faith, and valuable improvements made by the lessee. This decision, however, was against the opinion of Chancellor Desaussure, and is disapproved by Chancellor Kent, 4 Comm. 107.

By the Rev. Statutes of New York, Pt. II. Art. 3, Sec. 73, 87, &c., a power may be granted to a tenant for life, to make leases for not more than twenty-one years, and to commence in possession during his life. This power is appendant to the estate, and passes with it, on a conveyance. In *Haxtun v. Corse*, 2 Barb. Ch. 506, it was held that if an authority given to executors to lease out land till it could be sold, would have the effect of suspending the absolute power of alienation beyond the time allowed by law, it is void, though the power of sale would not be affected.

independently of any power in the trust instrument, and could only be impeached on the ground that they are unreasonable or prejudicial to the interests of the *cestui que trusts*.^(a) Thus in *Naylor v. Arnitt*,^(b) it was held, that trustees of real estate under a will, in trust to pay two annuities out of the rents and profits, could grant a valid lease of the lands for a term of ten years.^(b)

And upon the same principle it is conceived, that a lease for the usual term of twenty-one years, which contains no extraordinary covenants, might be safely granted by trustees of settled real estate, either in exercise of a general indefinite power of leasing, or by virtue of their interest only, *without any express power*. But any unusual lease, such as a building lease for ninety-nine years, could not be safely granted or accepted under such circumstances, except under the sanction of the court.^(c)

A purchaser of a leasehold interest will be affected with constructive notice of any circumstances appearing on the face of it, which may invalidate it in equity.^(d) As is the case of a party purchasing a lease of charity estates granted for an absolute term of 200 years.^(e) Although it is otherwise where the facts invalidating the lease do not necessarily appear on its face.^(f)

A power of granting building leases for long terms will not be inserted in a settlement, which is made in execution of articles authorizing the introduction of powers for leasing *for twenty-one years*, and other usual powers.^(g)

III.—OF POWERS OF CHANGING SECURITIES.

The exercise of a power to vary the existing securities, must necessarily be left very much to the discretion of the trustees; but the court will not suffer this discretion to be mischievously or ruinously exercised.^(h)

Where any check is imposed upon the trustees by requiring the previous consent of the tenant for life, or his consent in writing, or the observance *of any other formality, the power will be [*483] improperly exercised, unless the required condition is strictly performed.⁽ⁱ⁾

A power of this description is given to the trustees for the security

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| (a) <i>Bowes v. East London Water Works Company</i> , Jac. 329. | (g) <i>Pearse v. Baron</i> , Jac. 158. |
| (b) <i>Naylor v. Arnitt</i> , 1 R. & M. 501. | (h) <i>De Manneville v. Crompton</i> , 1 V. & B. 354-9. |
| (c) See <i>Pearse v. Baron</i> , Jac. 158. | (i) 1 V. & B. 359; <i>Cocker v. Quaile</i> , |
| (d) <i>Walter v. Maunde</i> , 1 J. & W. 181; <i>Cosser v. Collinge</i> , 3 M. & K. 283. | 1 R. & M. 535; <i>Greenwood v. Wakeford</i> , 1 Beav. 579; <i>Kelliway v. Johnson</i> , |
| (e) <i>Att.-Gen. v. Pargeter</i> , 6 Beav. 150. | 5 Beav. 319. |
| (f) <i>Att.-Gen. v. Backhouse</i> , 17 Ves. 283, 293. | |

and benefit of the trust property;(*k*) and it ought not to be exercised, except when required by necessity or convenience,(*l*) and after due inquiry and circumspection.(*m*)¹ Therefore the trustees should have an immediate and advantageous reinvestment in contemplation, before they dispose of the existing securities;(n) and a sale for the mere purpose of converting real estate into personal, would render them responsible for any loss.(o) And it is the duty of the trustees to ascertain by inquiry the propriety and reality of the proposed reinvestment, and not to trust blindly to the assurances of their acting co-trustees on these points.(p) Pending the reinvestment of the fund, the trustee will be justified in laying it out in the purchase of Exchequer bills.(q)

A general power of varying the securities does not enable the trustees by the exercise of the power to vary or affect the relative rights of the *cestui que trusts*. Thus where a testator made a specific bequest of a sum in the long annuities, producing 365*l.* per annum, in trust for his wife for life with remainder over, and gave the trustees the usual power of varying the trust securities, it was held by Sir J. Leach, V. C., that this power did not enable the trustees to diminish the income of the tenant for life, and increase the value of the gift to the remainderman, by disposing of the long annuities, and laying out the money in the three per cents.(r) And on the same principle it would follow that the relative interests of the *cestui que trusts*, or their real or personal representatives, could not be affected by a change of real estate into personal, or *vice versa*.(s)

A general authority for trustees to invest and vary the securities, empowers them to do all acts essential to the performance of that trust: and therefore it necessarily enables them to give sufficient discharges to the borrowers of the trust-money without the concurrence of the persons beneficially interested.(t)

Where trustees have a *discretionary* power of changing the investments of the trust fund, with the consent of the tenant for life, the court will not *compel* them to exercise that power at the instance of the tenant for life, if they refuse to do so in the *bonâ fide* exercise of their discretion. Thus in a recent case, certain sums of stock were vested in the trustees of a marriage settlement upon the usual

(*k*) Lord *v.* Godfrey, 4 Mad. 459.

(*l*) Broadhurst *v.* Balguy, 1 N. C. C. 28.

(*m*) Hanbury *v.* Kirkland, 3 Sim. 271.

(*n*) 1 N. C. C. 28, and see Watts *v.* Girdlestone, 6 Beav. 188, 190.

(*o*) Brice *v.* Stokes, 11 Ves. 324; 424.

Meger *v.* Montrieu, 5 Beav. 146.

(*p*) Hanbury *v.* Kirkland, 3 Sim. 265;

Broadhurst *v.* Balguy, 1 N. C. C. 16.

(*q*) Matthews *v.* Brice, 6 Beav. 239.

(*r*) Lord *v.* Godfrey, 4 Mad. 455.

(*s*) See Walter *v.* Maunde, 19 Ves.

(*t*) Wood *v.* Harman, 5 Mad. 368.

¹ See Wormely *v.* Wormely, 1 Brocken. 330; 8 Wheat. 421, ante, page 474, note.

trusts to invest in the funds or real securities, with the consent of the tenant for life, and to be varied from time to time with the same consent. There was also a proviso, declaring that *it should be lawful* for the trustees, with the consent of the tenant for life, to invest the whole or any part of the moneys to be produced by the sale of the existing securities in the purchase of freehold or copyhold lands, or [*184] *of leaseholds having not less than sixty years to run. The tenant for life applied to the trustees to invest in leaseholds having nearly ninety years to run. One of the trustees was willing to do so, but the other refused, although the security was ample, and a bill was then filed to have the refusing trustee removed, on account of his unreasonable refusal. But it was held by Vice-Chancellor Knight Bruce, that the power was purely discretionary, and had not been corruptly exercised, and consequently that the court could not interfere.(u)¹

But it will be otherwise, where the exercise of the power is made *imperative* on the trustees by the terms of the trust. For instance, in a late case at the Rolls, certain trust funds were vested in trustees of a marriage settlement upon the usual trusts to invest in government or real securities, for the benefit of the husband and wife, and their children, and there was a subsequent proviso, that it should be lawful for the trustees, “and they were thereby authorized *and required*” by and with the consent and direction in writing of the *cestui que trusts* for life, to sell and call in the existing securities, and with the like consent and direction, to invest in the purchase of freehold, copyhold, or of *leasehold* hereditaments for a term not less than sixty years. The tenants for life required the trustees to invest in the purchase of certain leaseholds of more than sixty years’ duration, and upon the trustees refusing to do so, a suit was instituted to compel them. The Master of the Rolls (Lord Langdale) reluctantly made a decree, declaring it to be *imperative on the trustees* to invest in the purchase of the leaseholds. But his Lordship added, that the trustees were fully entitled to refuse to make the investment without the sanction of the court, and that they were also entitled to every

(u) Lee v. Young, 2 N. C. C. 532.

¹ Where a testator, possessed of a large personal estate, consisting of various foreign securities, bequeathed to his trustees so much of his personal estate, as should at his death, produce a certain income; and he directed that the same should be selected, and appropriated, and set apart, as soon as conveniently might be after his decease, by his trustees, in their uncontrolled discretion, and the trustees refused to exercise the discretion; it was held by the House of Lords, affirming the decision of Lord Cottenham, on bill filed by the annuitant, that the court could not exercise any discretion in the matter, but must follow its common rule, and order the investment in the three per cents. *Prendergrast v. Prendergrast*, 3 Engl. L. & Eq. 1; 3 H. L. Cas. 195.

assistance and protection in ascertaining the title to the proposed purchases, and in satisfying themselves that they were not of precarious value or attended with any onerous or objectionable obligations.(x)

But even where the power is framed in such terms, that its exercise in a proper case would be imperative on the trustees, yet they will not be bound to exercise it, if there have been such a change of circumstances, as could not have been in the contemplation of the parties at the time of the creation of the trust. For instance, in a late case the trustees of a marriage settlement were empowered *and required* upon the request in writing of the wife, to lend part of the trust funds to the husband, on his personal security. *The husband took the benefit of the Insolvent Act*, and the wife afterwards made a written application to one of the trustees to advance part of the trust-moneys to her husband, which the trustee refused to do. A bill was then filed by the wife to have the trustee removed from the trust, on account of his refusal, but it was held by the Vice-Chancellor (Knight Bruce) that the insolvency created so total a change in the circumstances and position of the husband, that the clause in the settlement ceased to have any effect, and that the trustee did his duty in refusing to lend the money. There had been some improper conduct on ~~the~~ part of the trustee in other respects, on which [*485] account the dismissal of the bill was without costs.(y)

A power to change the securities is a usual and proper power, and as such, will be properly inserted in a settlement made under articles, which direct the insertion of all usual and customary powers.(z)

IV.—OF DISCRETIONARY POWERS.

The term “discretionary power” carries with it its own meaning. Wherever an authority is given to trustees, which it is either not compulsory upon them to exercise at all, or if compulsory, the time or manner, or extent of its execution is left to be determined by the trustees, that is obviously a discretionary power, though the extent and nature of the discretion may vary in each case. The powers already discussed in the preceding heads of this section are also to a certain extent discretionary, but their character rendered it more convenient to make them the subject of separate consideration.

A discretionary power may be conferred on trustees either by the

(x) *Beauclerk v. Ashburnham*, Rolls, C. 618, 19; [and *Prendergrast v. Prendergrast*, 3 Engl. L. & Eq. 1.]
 15th and 26th Feb., 1845, MS. [8 Beav. 322]; and see *Boss v. Godsall*, 1 N. C. C. 617.
 (y) *Boss v. Godsall*, 1 N. C. C. 617.
 (z) *Sampayo v. Gould*, 12 Sim. 426.

express terms of the trust, or by implication from the nature of the duty imposed on them.¹

An express discretionary power may either apply to the doing, or abstaining from doing, a contemplated act. As where the trustees are *empowered* to do the act,—or it is directed to be done “*if*” the trustees “*should think fit*,”(a) or “*proper*,”(b) or “*at their discretion*.”(c) Or, again, the performance of the act may be rendered imperative by the trust, and the discretion of the trustees confined to the time or mode of performing it, or to the selection from amongst several objects. For instance, where a trust fund is directed to be paid or distributed “*when*,” or “*in such manner*,” or “*proportions*,”(d) in favor of “*one*,”(e) or “*such one or more*”(f) of several objects, as the trustees shall appoint.

Again, a discretionary power may be created by necessary implication from the nature of the act to be done by the trustee—as where it calls for the exercise of judgment and discretion in its performance. For instance—where the approbation or consent of the trustees is required to a settlement, or sale, or marriage,(g) or where they are required to decide upon the good or ill conduct of a party;(h) or upon the necessity or expediency of any particular act or payment.(i) Thus, in *French v. Davidson*,(k) the trustees were directed to pay an annuity, “*unless circumstances should render it unnecessary, inexpedient, and impracticable* ;” *and Sir J. Leach, V. C., said, [*486] that must mean “*should, in their opinion, render it unnecessary*,” &c.

In some of the earlier cases, where trustees neglected or refused to exercise the discretionary powers vested in them, the court itself

(a) *Maddison v. Andrew*, 1 Ves. 53.

(b) *Crossling v. Crossling*, 2 Cox, 396; *Kemp v. Kemp*, 5 Ves. 849; *Longmore v. Broom*, 7 Ves. 124; *Pink v. De Thuissey*, 2 Mad. 157.

(c) *Morice v. Bishop of Durham*, 9 Ves. 399; *Keates v. Burton*, 14 Ves. 434; *Potter v. Chapman*, Ambl. 98; *Gibbs v. Rumsey*, 2 V. & B. 294.

(d) *Duke of Marlborough v. Godolphin*, 2 Ves. 61; *Walsh v. Wallinger*, 2 R. & M. 78.

(e) *Brown v. Higgs*, 4 Ves. 708.

(f) *Duke of Marlborough v. Godolphin*, 2 Ves. 61; *Grant v. Lynam*, 4 Russ. 292.

(g) *Brereton v. Brereton*, 2 Ves. 87, cited; *Clarke v. Parker*, 19 Ves. 1; *Mortlock v. Buller*, 10 Ves. 314.

(h) *Walker v. Walker*, 5 Mad. 424; *Robinson v. Smith*, 6 Mad. 194; *Eaton v. Smith*, 2 Beav. 236.

(i) *French v. Davidson*, 3 Mad. 396; *Gower v. Mainwaring*, 2 Ves. 87.

(k) 3 Mad. 402.

¹ In *Downer v. Downer*, 9 Vermont, 231, where there was a bequest to be applied to the benefit of the *cestui que trusts*, as should be found necessary “in the judgment and discretion of the Judge of Probate, of the District of Hartford,” it was held that in the exercise of the discretion and judgment confided to him, the Judge of Probate acted personally, and not officially, and that no appeal lay from his decision in the matter.

assumed that discretion, and exercised the power in the manner which it conceived to be most beneficial for the *cestui que trusts*.^(l)

However, this jurisdiction has been long since repudiated; and it is settled that the court will never exercise a mere discretionary power, either in the lifetime of the trustees, or upon their death or refusal to act.^(m) Although, where a *trust* is created for a certain class of objects, and the discretionary power applies only to the selection from, or distribution amongst those objects, the court, while it disclaims the exercise of the discretion reposed in the trustees, will, if necessary, enforce the performance of the *trust* by decreeing the distribution of the property *amongst all the objects equally*.⁽ⁿ⁾

And an exception must be made to this general rule in the case of a charity: for the court, upon the death or refusal of the trustees, will exercise a discretionary power of administering a charity estate, by virtue of its general jurisdiction to govern and regulate charities.^(o)

A distinction was taken on one occasion by Sir J. Leach, V. C., between a discretion given to a trustee to be exercised on a matter of *opinion and judgment*, and one to be exercised on a matter of *fact*. In the former case, his Honor held, that the court could not substitute the Master for the trustee, but in the latter that the court would refer it to the Master. In *Walker v. Walker*^(p) (the case alluded to), a testator gave unto three trustees, their executors, administrators, and assigns, a freehold estate, upon trust to permit and suffer the plaintiff, during his natural life, to receive and apply all the benefit and advantage thereof to his own proper use and benefit, and "in case the conduct and behavior of the plaintiff after the testator's decease should be, and continue to be for not less a time than the space of seven years, at the least, from and after the testator's decease, to the entire satisfaction and approbation of the said three trustees, agreeing, and signifying their unanimous approbation of the conduct and behavior of the plaintiff for the space of seven

(l) *Wareham v. Brown*, 2 Vern. 153; *Warburton v. Warburton*, Id. 420; 1 Bro. P. C. 34; *Carr v. Bedford*, 2 Ch. Rep. 77; *Hewit v. Hewit*, Ambl. 508; *Gower v. Mainwaring*, 2 Ves. 87, 110; *Clarke v. Turner*, 2 Freem. 198; *Wainwright v. Waterman*, 1 Ves. jun. 311; *Flanders v. Clark*, 1 Ves. 10. [See *Armstrong v. Park*, 9 Humph. 195.]

(m) *Maddison v. Andrew*, 1 Ves. 60; *Alexander v. Alexander*, 2 Ves. 640; *Kemp v. Kemp*, 5 Ves. jun. 849, 859; *Keates v. Burton*, 14 Ves. 437; 2 Sugd. Pow. 190, 6th edit. See *Gower v. Mainwaring*, 2 Ves. 88; *Brereton v. Brereton*, Ibid, cited; *Potter v. Chapman*, Ambl. 98; see *Lee v. Young*, 2 N. C. C. 532. [See *Prendergrast v. Prendergrast*, stated ante, 484, note.]

(n) *Gibson v. Kinfen*, 1 Vern. 66; *Kemp v. Kemp*, 5 Ves. 849; *Longmore v. Broom*, 7 Ves. 124; *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.

(o) *Gower v. Mainwaring*, 2 Ves. 89; see *Moggridge v. Thackwell*, 7 Ves. 36; *Mahon v. Savage*, 1 Sch. & Lef. 111. [See ante, p. 466 and note.]

(p) *Walker v. Walker*, 5 Mad. 424.

years from and after the testator's decease," then, and in that case, the testator gave the same estate to the plaintiff, his heirs, and assigns for ever. "But, should the conduct and behavior of the plaintiff not be such as to merit and procure the confidence and good opinion of" the said three trustees, the estate was given to the plaintiff for life, with remainder to his children at the age of twenty-four, [*487] as tenants in common in fee; and the will *declared that if the plaintiff never should, by his conduct and behavior, merit and entitle himself to the confidence and good opinion of the trustees, the survivors, or survivor of them, and the executors, administrators and assigns of such survivors, so as to entitle himself to the estate absolutely, nor leave any child or children arriving at the age of twenty-four, the estate should go over. The bill prayed, that the trustees might signify, in such manner as the court should direct, their approbation of the plaintiff's conduct and behavior for the space of seven years from the testator's decease, and might convey the fee simple of the estate to the plaintiff, and deliver to him the title-deeds. One of the trustees, by his answer, stated that he had not such confidence in the conduct and discretion of the plaintiff, as to think it proper or conformable to the testator's intentions to give the plaintiff the absolute control over the estate. Sir J. Leach, V. C., after taking the distinction above mentioned, made a decree referring it to the Master, to inquire whether the plaintiff's conduct and behavior for not less a time than seven years, at least, from the testator's death, had been to the entire satisfaction and approbation of the trustees, and whether they had agreed and signified their unanimous approbation of his conduct and behavior for that time.(q) It does not appear, whether his Honor considered that the discretion of the trustees in this case was to be exercised on a matter of opinion and judgment, or on a matter of fact: although there can be little doubt, but that the subject in question was purely a matter of private judgment. The case in fact decides little or nothing, for the decree, it will be observed, merely directed an inquiry, whether the approbation required by the will had been given by the trustees. It is to be remarked, that the trustees in this case were still living and acting, and there was no suggestion of improper conduct.

This distinction between a discretion on matters of fact and opinion seems in some measure to be countenanced by the earlier case of *Gower v. Mainwaring*.(r) There three trustees were directed by deed to give the residue of the settlor's estate "among his friends and relations, where they should see most necessity, and as they should think most equitable and just." The settlor afterwards made a will giving his whole estate to the husband of the plaintiff, who

(q) *Walker v. Walker*, 5 Mad. 424.

(r) 2 Ves. 87, 110.

was one of his daughters. *Two of the trustees died and the other refused to act.* The bill was filed by the daughter as executrix of her husband, who was dead, to obtain the benefit of the settlor's will. Lord Hardwicke seems to have considered, that an absolute trust was created by the deed for the next of kin of the settlor, with a discretionary power of distribution by the trustees amongst those objects according to their necessity. Upon the question whether the court would take upon itself this discretion, in consequence of the failure of the trustees to exercise it, his Lordship is reported to have said, "*the trustees are to judge on the necessity and occasions of the family; the court cannot judge of such necessity of the family. That is a judgment to be made on facts existing; so that the court can make the judgment as well as the trustees; and when informed by evidence of the necessity, can judge what is equitable and just on this necessity.*"(s) His Lordship ultimately *decided, that the plaintiff having had her share of the residue as one of the [488] next of kin could not have any more, and that the remainder was to be divided between the brother of the plaintiff and a son of a deceased sister *according to their necessities and circumstances, which the Master was to inquire into and consider, how it might be most equitably and justly divided.*(t) The circumstances of the case were very peculiar, and were moreover tainted with fraud. Lord Hardwicke's words as quoted above are also somewhat unintelligible, if not inconsistent with themselves; and on several other occasions,(u) and indeed in the course of his judgment in *Gower v. Mainwaring* itself,(x) he expressly disclaimed any jurisdiction of exercising discretionary powers in general. And the current of the more recent authorities renders it very doubtful whether the case in question would meet with a similar decision at the present day. At all events it would be found extremely difficult to make any practical application of this distinction between matters of fact and those of mere judgment and opinion, and it remains yet to be seen, whether that distinction would meet with the sanction of the judges at the present time.

As a court of equity will not in general assume the exercise of a discretionary power vested in trustees, so it will not interfere to control the trustees acting *bona fide* in the exercise of their discretion.(y)¹

(s) 2 Ves. 89.

(t) 2 Ves. 110.

(u) *Brereton v. Brereton*, 2 Ves. 87, French *v. Davidson*, 3 Mad. 396; *Clarke v. Potter v. Chapman*, Ambl. 98; *v. Parker*, 19 Ves. 11; see *Wood v. Maddison v. Andrew*, 1 Ves. 60.

(x) See 2 Ves. 89.

(y) *Potter v. Chapman*, Ambl. 98;

Pink v. De Thuissey, 2 Mad. 157, 162;

Richardson, 4 Beav. 177; *Cowley v.*

Hartsronge, 1 Dow. 378.

¹ A court of equity will not interfere with the exercise of a discretionary power while trustees are acting in good faith and with ordinary prudence. *Gochenaur v.*

Nor will a suit be entertained to compel the trustees to exercise their power.^(z)¹ And the refusal of a trustee to exercise a purely discretionary power is not a breach of trust, for which he can be removed from his office, although the trustee assigns no conclusive reason for the refusal, and the proposed act is apparently beneficial to the trust estate.^(a)

However, if a trustee is actuated by fraudulent or improper motives in exercising, or refusing to exercise, his discretionary powers, a court of equity upon proof of the improper conduct interposes its jurisdiction on a totally different principle—not for the purpose of exercising the discretion committed to the trustee, but to check or relieve from the consequences of an improper exercise of that discretion.^(b)

Discretionary powers, like other authorities, must be exercised in the manner prescribed by the trust instrument. And if a deed or writing be required, that direction must be complied with; and if the power be exerciseable only by *will*, an execution by *deed* will be im-

(z) *Brereton v. Brereton*, 2 Ves. 87, *v. Kemp*, 5 Ves. 849; *Dashwood v.* cited; *Pink v. De Thuissey*, 2 Madd. 157; *Lord Bulkley*, 10 Ves. 245; *Mesgrett v.*
Lee v. Young, 2 N. C. C. 532. *Mesgrett*, 2 Vern. 580; 10 Ves. 243;

(a) *Lee v. Young*, 2 N. C. C. 532. *D'Aguilar v. Drinkwater*, 2 V. & B. 225;

(b) *Clarke v. Parker*, 19 Ves. 12, 18; *Peyton v. Bury*, 2 P. Wms. 628.
French v. Davidson, 3 Mad. 396; *Kemp*

Froelick, 8 Watts, 19; *Arnold v. Gilbert* 3 Sandf. Ch. 556; *Mason v. Mason*, 4 Id. 639; *Bunner v. Storm*, 1 Id. 356; *Hawley v. James*, 5 Paige, 485; *Clove v. Martin*, 1 Dev. & Batt. 307; *Cowles v. Brown*, 4 Call, 477; *Morton v. Southgate*, 28 Maine, 41; *Prendergrast v. Prendergrast*, 3 Eng. L. & Eq. 1; *Att.-Gen. v. Mosely*, 2 De G. & Sm. 398, 12 Jur. 889; *Costabadie v. Costabadie*, 6 Hare, 414; though see *Berry v. Hamilton*, 10 B. Monroe, 135. See notes to *Aleyn v. Belchier*, 1 Lead. Cas. Eq. (1 Am. Ed.) 303.

¹ But in *Costabadie v. Costabadie*, 6 Hare, 410, where there was a direction by will that the testator's widow should receive "all the income of his real and personal estate, and pay and apply the same to and for the use of herself and the children of their marriage, agreeably and according to her own discretion," which it was held the court could not interfere with, so long as it was reasonably and honestly exercised, it was said by the Vice-Chancellor (Wigram), that the plaintiff, one of the children, having an interest subject to the mother's discretion, had a right to the discovery of the property, in respect of which the interest existed, and also to the discovery of all the acts which had been done, and the reason for doing them, which the defendant (the mother), might be able to give. "She has that right," he observed, "in order that the court may be able to see whether the discretion which has been exercised by the party intrusted with it, is within the limits of a sound and honest execution of the trust. . . . If a bill be filed, the court will of course inquire into the acts which have been done in the administration of the trust, and may possibly (as has been done in many cases), require the trustee to exercise the discretion under the view of the court," in order to prevent a multiplicity of suits.

proper, and *vice versa*.(c) Although a technically defective execution may be relieved against in equity in proper cases.(d)

So these powers can be exercised only by those persons, to whom they *are expressly confided by the trust instrument, and they will not devolve upon the heir or personal representatives [*489] of the original trustee, unless they are so limited on the creation of the trust.(e) And where the authority is given jointly to co-trustees without words of survivorship, it will be determined on the death of one.(f) So trustees appointed by the court cannot usually execute powers of this nature.(g)

However, where the power is annexed to the *office of trustees*, and one or more of the trustees *refuse to accept the trust*, it is settled, that those *who accept* may exercise the power. For instance, in a late case,(h) a testator appointed three executors and trustees, and empowered his *said* trustees and the survivor of them, and the executors and administrators of such survivor, to give his son an equal share of his estate with his other children in the event of his conduct changing. *Two of the executors renounced*, and it was held by the M. R. (Lord Langdale), that the power vested in the *sole acting trustee*.(i)

A fortiori, a discretionary power cannot without an express authority be delegated to a stranger by assignment *inter vivos*.(k) And it seems, that a trustee is equally incapacitated from *devising* his powers by will, for a devise is equally a delegation of the trust; and consequently a *devisee* of a trustee cannot exercise any discretionary power, which is not expressly limited to the *assigns* of the trustee.(l) Indeed, from the observations of the Vice-Chancellor in the recent case of *Cooke v. Crawford*,(m) it is very doubtful whether *in any case* it is competent for a trustee to transfer the trust by will to a devisee.¹

If a discretionary power be well exercised on some points, an at-

(c) *Doe v. Thorley*, 10 East, 438; *Kennedy v. Kingston*, 2 J. & W. 431; *Walsh v. Wallinger*, 2 R. & M. 81. [4 Kent. Com. 330, &c.]

(d) 2 Sugd. Pow. 94, et seq. 6th edit.

(e) *Cole v. Wade*, 16 Ves. 44, and cases cited; *Down v. Worrall*, 1 M. & K. 561.

(f) *Moor*, 61, Pl. 172; 16 Ves. 45; *Townsend v. Wilson*, 1 B. & Ald. 608. [Ante, 471, &c., and notes.]

(g) *Hibbard v. Lambe*, Ambl. 309; ante, p. 190. [See *Newman v. Warner*, 1 Sim. N. S. 457.]

(h) *Eaton v. Smith*, 2 Beav. 236.

(i) See *Flanders v. Clark*, 1 Ves. 9; *Clarke v. Parker*, 19 Ves. 19; *Worthington v. Evans*, 1 S. & St. 165; *Hawkins v. Kemp*, 3 East, 410. [Ante, 471, and notes.]

(k) *Alexander v. Alexander*, 2 Ves. 643; *Att.-Gen. v. Berryman*, Ibid. cited; *Bradford v. Belfield*, 2 Sim. 264; *Hitch v. Leworthy*, 2 Hare, 200.

(l) *Cole v. Wade*, 16 Ves. 27; *Cooke v. Crawford*, 13 Sim. 91.

(m) 13 Sim. 97.

¹ See ante, 283, and notes.

tempt by the trustee to delegate the power on some remaining points will not vitiate the exercise of the power, so far as it has been rightly made.(n)

The discretionary powers usually given to trustees appear to fall under four principal heads.¹—1st.. Where it is left to the discretion of the trustees to make, or to withhold, a gift or appointment of trust property to a specified donee or class of donees.—2d. Where the discretionary power is confined to the selection from or distribution amongst the objects of a declared trust.—3d. Where the discretion applies to some ministerial act connected with the management of the trust estate—such as powers of leasing, selling, appointing new trustees, felling timber, or the like;—and 4th. Where the subject-matter of the discretion to be exercised is entirely a matter of personal judgment—as where the consent or approbation of the trustees is required to a marriage, or to the conduct and behavior of an individual.

And first, where trustees have a discretionary power of making or giving effect to a gift out of the trust property.

[*490] *If it be a condition precedent to a gift of a legacy or other interest, that the trustees should exercise their power in favor of the object—whether the power require an appointment by them, or merely their assent to the gift,—no interest will vest in the donee until the power be duly exercised, and if the trustees refuse or neglect to exercise it, the gift cannot be enforced.(o) And in such cases the court cannot decide upon the propriety or impropriety of the refusal by the trustees to give their assent.(p) Unless the refusal be shown to proceed from a vicious, corrupt, or unreasonable cause. And it will rest with the other party to prove the existence of an improper motive, and not with the trustees to show a reason for their refusal.(q)

In *Pink v. De Thuissey*,(r) a testator gave and bequeathed 1,000*l.* unto J. E., adding that he made the said legacy “*under the condition thereafter written,*” and in a subsequent part of the will, he requested his executor to place that sum in the manner he should think most advantageous, and to give every year the revenues of it

(n) *Hitch v. Leworthy*, 2 Hare, 200. the “Lower Swell Estate;” Duke of

(o) *Pink v. De Thuissey*, 2 Mad. 157; *Marlborough v. Lord Godolphin*, 2 Ves. 61.

see *Walker v. Walker*, 5 Mad. 424; 61. (p) 2 Mad. 162.

Weller v. Weller, 2 Mad. 160, cited; (q) *Clarke v. Parker*, 19 Ves. 11, 18,

French v. Davidson, 3 Mad. 396; see 22; *French v. Davidson*, 3 Mad. 402.

Brown v. Higgs, 4 Ves. 719; 5 Ves. 508; 8 Ves. 568, on the question as to (r) 2 Mad. 157.

¹ See on these powers, New York, Rev. St., Part II. Ch. 1, Tit. 2, Article 3, § 9, &c.

to J. E., "and to give him the principal *only* in case of an establishment or acquisition for him which might seem advantageous to my executor, *this disposition being an essential condition of the legacy I make to the said J. E.* I, however, leave my executor at liberty to give to the said J. E. the said sum of 1,000*l.* *if he found the thing proper*, although there should be found at the moment neither establishment nor acquisition for the said J. E." J. E. died, having disposed of the 1,000*l.* by his will, and the bill was filed by persons claiming under the will of J. E., to compel the payment of the legacy of 1,000*l.*: the defendant, the executor, by his answer denied that J. E. had ever obtained a proper establishment or acquisition. Sir J. Leach, V. C., held 1st, That the gift of the principal of the legacy was conditional on the legatee's obtaining an acquisition or establishment such as might seem advantageous to the executor; 2d, That that condition had not been satisfied; and 3d, That the legatee was not entitled under the final clause of the will; for the executor said, *he did not think proper to advance the legacy*. His Honor observed, "Nothing appears in the conduct of the young man which disqualified him from taking, but it would be quite contrary to the provisions of the will to hold, that the power given to the executor at his discretion to advance the legacy, gave the legatee a right to claim it absolutely. If that were so, the condition in the will, and the power given to the executor of dispensing with it, would be useless; the whole will would be frustrated. Is the court to decide upon the propriety of the executor withholding the legacy? That would be assuming an authority, which is confided by the will to the discretion of the executor. It would be to make a will for the testator, instead of expounding it." And his Honor concluded thus, "The executor did not think fit to advance the principal of this legacy to (the legatee), and therefore he could not claim it as absolutely entitled. The consequence is, the bill must be dismissed."(*s*)

*So in *Weller v. Weller*,(*t*) which was cited in the argument of *Pink v. De Thuissey*, a testator gave his son a sum of [*491] money with power for his executors to advance more, *if they thought proper*. The creditors of the son filed a bill against the executors to compel the payment of the additional sum, but the Master of the Rolls thought the bill would not lie.(*t*)

Again, in *French v. Davidson*, there was a direction for trustees to pay an annuity to a party, "unless circumstances should render it unnecessary, inexpedient, and impracticable." And the same learned judge considered that the state of circumstances upon which the

(*s*) *Pink v. De Thuissey*, 2 Mad. 157, (*t*) *Weller v. Weller*, 2 Mad. 160, cited. 162.

annuity was to cease, was to be determined by the opinion of the trustees; and if they had discontinued the payment of the annuity, because, using their best discretion on the subject, they had come to a conclusion, that circumstances had rendered it unnecessary, inexpedient, and impracticable, and had distinctly stated as much in their answer, the court could not have controlled their judgment, unless there were *mala fides*. But as this did not appear to have been the case, his Honor declared, in the words of the will, that the annuity was to be paid unless in the judgment of the executors, circumstances should render it unnecessary, inexpedient, and impracticable.^(u) It will doubtless be observed, that in this last case, the power of stopping the payment of the annuity was in the nature of a condition subsequent, unless it could be considered that the gift of the annuity amounted to a substantive legacy of each annual payment, each being made dependent on the precedent and continuing assent of the trustees.

If the will in the first instance contain a direction, which amounts to a direct gift, and a *subsequent* discretionary power be given to the trustees, enabling them to annul the gift, it is clear that the donee will be entitled, unless and until the trustees defeat the bequest by the exercise of their power. And the court will endeavor as far as possible to affix this limited construction to powers of this description.

Thus in *Wainwright v. Waterman*,^(x) the testator directed his executors to appoint his grandson John, a partner, and gave him a legacy of 4,000*l.* when he should become a partner. By a subsequent codicil he declared, *that it should be entirely at his executor's discretion to appoint John a partner, notwithstanding the former direction; and if they should not think proper to appoint him, the legacy of 4,000*l.* was to be void.*

One of the executors, the father of John, wished to make him a partner, the other two were against it. The Lord Chancellor (Lord Thurlow) said, that "if the executors had united in declaring, that John was unfit to be admitted, and without collusion or fraud, that they had a right to exclude him, and he must have lost the 4,000*l.*" But as the circumstances were, *and as they made no such declaration*, his Lordship declared John to be entitled both to be admitted a partner, and to his legacy.^(x)

So in *Keates v. Burton*,^(y) a testator, after giving a legacy of 2,000*l.* to his natural son, added a discretionary power for his executors to pay him the interest on the principal. The executors renounced probate, and the legatee became insolvent. Sir Wm. Grant, M. R., [^{*492}] held, that as the **bequest* was in the first instance absolute, and the executors had not exercised their power, and having

^(u) *French v. Davidson*, 3 Mad. 396.

^(y) *Keates v. Burton*, 14 Ves. 434.

^(x) 1 Ves. jun. 311.

renounced, could no longer exercise it, the legatee continued absolutely entitled.(y)

And the decision in the case of *French v. Davidson*,(z) already stated, is of a similar tendency.

However, there has been already occasion to observe, that powers of this description are very frequently treated in equity as in the nature of trusts.(a) And the court in these cases will always strive to adopt a construction, by which the objects of the settlor's bounty will take a vested interest in the gift at all events, independently of the exercise of the power, which in that case will be restricted to the selection from, or the distribution amongst, the class of objects.(b)

And this brings us to the consideration of the second class of discretionary powers, viz., those which are confined to the selection from, or the distribution amongst, the objects of the trust.¹

Where a vested interest in trust property is given to a class of individuals, as to the testator's children, subject to a discretionary power in the trustees, to appoint the fund to any one or more objects from the class; upon the execution of the power, those who are named in the appointment, will take to the exclusion of the others.(1) And so where the power is, to fix the relative proportions or the time and mode of application of the shares, the directions of the trustee, made in exercise of his power, will govern the relative rights of the parties in those respects.(c)

But if the power be not exercised, and until its exercise, the whole class of objects will be entitled to the property in equal shares.(d)

Where the trust is for the testator's "relations," or "family," *with a power of selection* by the trustees amongst those objects, the trustees in exercising that power may appoint to any persons coming within the testator's description, although *not within the degree of his*

(y) *Keates v. Burton*, 14 Ves. 434.

(z) 3 Mad. 396.

(a) Ante, Pt. I. Div. I. Ch. II. Sects. 2, 3, 4, [page 68, &c., and notes.]

(b) Ibid.

(c) *Forbes v. Ball*, 3 Mer. 440; 1 Rep. Legs. 96, 98, and cases cited.

(d) *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; *Kemp v. Kemp*, 5 Ves. 849; *Longmore v. Broom*, 7 Ves. 124; *Ken-*

nedy v. Kingston, 2 J. & W. 431; *Keates v. Burton*, 14 Ves. 434; *Walsh v. Wallinger*, 2 R. & M. 78; *Brown v. Pocock*, 6 Sim. 257; 2 Sugd. Pow. 179, 180, 6th edit.; *Fowler v. Hunter*, 3 Y. & J. 506. [*Withers v. Yeadon*, 1 Rich. Eq. 324; *Collins v. Carlisle*, 7 B. Monr. 14; *Bull v. Bull*, 8 Conn. 47, ante, 68, and notes; 72, and notes.]

(1) For the expressions, which will create an exclusive power of appointment or selection, see 1 Sugd. Pow. 561, et seq., 6th ed., where the subject is fully considered. [4 Kent's Comm. 345.]

¹ See, on these powers, in New York, Rev. Stat., Part ii. Ch. 1, Tit. 2, Art. 3, § 95, &c.

next of kin.(e) But if the power be not exercised by the trustees, the court will confine the trust to those who are the testator's next of kin, according to the statute, at the death of the *donee of the power.*(f)

But the terms "family" and "relations" will, as a general rule, be construed to mean "next of kin;" and if the trustee have no power of *selection* from amongst these objects, but only a power of *distributing* their several shares, he can give nothing to any one, except [*493] the testator's *next of kin; and if the power be not exercised, the testator's next of kin at the time of *his* death will be all equally entitled.(g)

Although the court may have acquired jurisdiction over the trust property, by the institution of a suit for the administration of the estate, or to determine the construction of the will, yet in making its decree, it will not interfere with a discretionary power of selection or distribution, if the trustees be living and competent to act; but the right and facility of exercising the power will be expressly reserved to them by the decree.(h)

However, on one occasion, where the trust had come under the direction of the court, the decree fixed the period within which the power was to be exercised.(i)

And in a late case, where trustees, who had a discretionary power of distribution amongst the testator's nephews, *could not agree amongst themselves* as to the division, the court, on a bill filed by some of the trustees, made a decree, directing the division of the trust property amongst all the nephews equally, *per capita.*(k)

Trustees in the exercise of these discretionary powers cannot exceed their authority, or infringe upon any of the other trusts. Therefore, where a trustee is empowered to *distribute or apportion* the shares of a fund amongst the several objects, but he is not invested with any exclusive power of *selection*, he is not at liberty to exclude any of the objects, but in making his appointment must give some share to each.(l) And previously to the recent change of the

(e) *Mahon v. Savage*, 1 Sch. & Lef. 111; *Hardyng v. Glyn*, 1 Atk. 469; *Bennett v. Honeywood*, Ambl. 708; *Tytcher v. Byles*, 1 T. R. 435; *Cruwys v. Colman*, 9 Ves. 435; *Birch v. Wade*, 3 V. & B. 198; *Grant v. Lynam*, 4 Russ. 392; *Supple v. Lowson*, Ambl. 728.

(f) *Ibid.* [Ante, 76, and notes; see *Bull v. Bull*, 8 Conn. 47.]

(g) *Cole v. Wade*, 16 Ves. 27, 43; *Pope v. Wichcombe*, 3 Mer. 689; 1 Rop. Legs. 96, &c.

(h) *Bennett v. Honeywood*, Ambl.

708; *Mahon v. Savage*, 1 Sch. & Lef. 711; *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 M. & K. 59. [See *Costabadie v. Costabadie*, stated, ante, 488, in note.]

(i) *Piper v. Piper*, 3 M. & K. 159.

(k) *Tomlin v. Hatfield*, 13 Sim. 167.

(l) *Bennett v. Honeywood*, Ambl. 708; *Att.-Gen. v. Price*, 17 Ves. 371; *Kemp v. Kemp*, 5 Ves. 849; 1 Sugd. Pow. 561, et seq., 6th edit. [See *Cowles v. Brown*, 4 Call. 477.]

law, such a share could not have been merely nominal or illusory;(m) although now, by the act 1 Will. IV. c. 46, any appointment in exercise of a power, which is valid at law, will be good in equity, and consequently the gift of the smallest nominal share will in future be sufficient to satisfy the power.(n)¹ However, in these cases, the appointment need notice only those objects who are living at the time of the exercise of the power, and the whole fund may be appointed to the survivors, to the exclusion of the representatives of those who are then dead: and even where there is only one surviving object, the power of appointment is not extinguished on that account, (though a power of *selection* must then necessarily be gone), and an appointment in favor of the sole survivor will be good.(o)

So where there was a bequest of an annuity, to be applied for the maintenance and benefit of the legatee, "*in such manner*" as the trustees in their absolute and uncontrolled discretion shall think fit, it was held by Sir K. Bruce, V. C., that the direction to apply the annuity for the legatee's benefit being absolute, *the whole* was to be applied for that purpose. "The trustees' discretion was as to the *manner* of the application, not *whether there should or should not be any application at all."(*p*) Again, where the discretionary power of appointment is confined to a particular class of persons, it is almost needless to state, that the trustees will not be at liberty to travel out of that class. For instance, where the power was to appoint to *relations*, it must be exercised in favor of some *relation*, and an appointment to a brother's widow who is not a relation, is bad.(*q*)

If a power of distribution or application be improperly exercised,

(*m*) *Maddison v. Andrew*, 1 Ves. 57; 1 Ves. jun. 299; 3 Bro. C. C. 242; *Alexander v. Alexander*, 2 Ves. 640; *Butcher v. Butcher*, 1 V. & B. 89; *Woodcock v. Woodcock*, Phill. 72.

Kemp v. Kemp, 5 Ves. 849; *Butcher v. Butcher*, 1 V. & B. 79; *Mocatta v. Lousada*, 12 Ves. 123. (*p*) *Stephens v. Lawry*, 2 N. C. C. 87. [See *Cowles v. Brown*, 4 Call. 477.]

(*n*) 1 Sugd. Pow. 568, &c., 6th edit.

(*q*) *Harvey v. Harvey*, 5 Beav. 134.

(*o*) *Boyle v. Bishop of Peterborough*,

¹ As to the doctrine of illusory appointments, see notes to *Alleyn v. Belchier*, 1 Lead. Cas. Eq. 290, 303 (1st Am. Ed.); 4 Kent's Comm. 342. In New York, by the Revised Statutes (Pt. II. Ch. 1, Tit. 2, Art. 3, §§ 97, &c.), it is provided, that where a disposition under a power is directed to be made to, or among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion. But where the terms of the power import that the fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others. If the trustee of a power, with a right of selection, shall die, leaving the power unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons designated.

the objects of the power will take equally, as in default of any appointment.(r)

The next class of discretionary powers are those which apply to the management of the trust estate.

The court is much more ready to control the trustees in the exercise of discretionary powers of this last description, than in matters of private opinion and judgment. The reason is, that on these matters of fact the court is equally competent, or even more competent than the trustees to determine what will be most beneficial to the trust estate:(s) and it will enter into the consideration of the motives of a trustee in exercising, or refusing to exercise, such a power, and will not suffer him to exercise his discretion in an arbitrary or capricious manner.

In *Lord Milsington v. Earl Mulgrave*,(t) trustees were empowered by the settlement to renew church leases "from time to time, as occasion should require, *and as they should think proper.*" The trustees refused to make the usual renewal of a lease at the expiration of the first seven or fourteen years of the term, and the bill was filed by the *cestui que trusts* to compel them to renew. To this bill the defendants put in general demurrers, and it was argued in support of the demurrers, that the trustees had a discretionary power to renew at any time, and that the court would not interfere with that discretion: but the Vice-Chancellor (Sir J. Leach) overruled the demurrers without hearing the plaintiff's counsel. His Honor observed, "I cannot allow these demurrers without holding that the trustees have an arbitrary and capricious power with respect to the renewal of this lease, and are not required to give any explanation, why the lease has not hitherto been renewed. The trustees are to renew as occasion may require, and as they may think proper; by which is to be understood, as they may think proper for the interests of their *cestui que trust*. The exercise of a power of renewal does indeed require a discretion,—but not an arbitrary and capricious discretion."

Again, where trustees are invested with a discretionary power of appointing new trustees, if the court have acquired jurisdiction over the property by the institution of a suit (though for a different object), it will assume a control over the discretion of the trustees, and will not suffer them to appoint new trustees, except under its own sanction.(u)

(r) *Gibson v. Knyven*, 1 Vern. 66; *Kemp v. Kemp*, 5 Ves. 849; 1 Sugd. Pow. 579.

(s) 3 Mad. 491. [See *Mortimer v. Watts*, 9 Engl. L. & Eq. 126.]

(t) 3 Mad. 491; see *Hewit v. Hewit*, Amb. 508. [Ante, 433, &c., 480, &c.]

(u) *Webb v. Earl of Shaftesbury*, 7 Ves. 480, 487; *Att.-Gen. v. Clack*, 1 Beav. 467; but see *Cafe v. Bent*, 3 Hare, 245. [See ante, 185, and note.]

So it has been already seen, (x) that if there be a trust to invest at discretion on "some good or sufficient security," or "at discretion," the *court will not allow the trustees to exercise any discretion as to the nature of the security, but will decide upon [*495] the goodness or sufficiency of the investment, according to its own rules. (y) And so it has also been stated, that a trust to invest "with all convenient speed," must in general be executed within a twelve-month. (z)

So it has been previously stated, (a) that a power of sale, or of varying trust securities, though to a certain extent discretionary, must not be exercised in an arbitrary or mischievous manner, but only for the benefit of the trust estate; and the court, on a bill being filed, will enter into the consideration of the circumstances, and decide upon the propriety or impropriety of exercising such powers. (b)

However, in all these cases, if the trust instrument expressly declare, that the power may be exercised by the trustee, at his uncontrolled discretion, and the terms are such as preclude the court from entering into the trustee's motives in exercising this discretion, the jurisdiction of the court is excluded, and it cannot interfere, except in the case of fraud, or improper motive, which is an exception to every such general rule. (c)

Powers of sale, of leasing, and of varying the securities, also come within the class of discretionary powers which is now under consideration; but they have been discussed at large in the three preceding heads of this section. (d)

The fourth and last class of discretionary powers is, where the discretion is to be exercised on a matter of pure personal judgment. For instance, where the trustees are empowered to give their opinion on the good, or ill-conduct, or merits of an individual; (e) or to determine the propriety, or impropriety, of continuing the payment of an annuity; (f)¹ or to give their approbation to a settlement, (g) &c.

(x) Ante [368, &c., and notes.]

(y) *Booth v. Booth*, 1 Beav. 125; see *De Manneville v. Crompton*, 1 V. & B. 359; *Pocock v. Reddington*, 5 Ves. 794.

(z) *Parry v. Warrington*, 6 Mad. 155.

(a) See the last two preceding Sections.

(b) *De Manneville v. Crompton*, 1 V. & B. 359; *Brice v. Stokes*, 11 Ves. 324; *Lord v. Godfrey*, 4 Mad. 459; *Broadhurst v. Balguy*, 1 N. C. C. 28; see *Hitch v. Leworthy*, 2 Hare, 205, 208.

(c) *Milsington v. Mulgrave*, 3 Mad. 493; *Lee v. Young*, 2 M. C. C. 536; and see Pl. II. and III. of this section.

(d) Vide supra, Pl. I., II. and III. of this section.

(e) *Cole v. Wade*, 16 Ves. 27; *Walker v. Walker*, 5 Mad. 424; *Eton v. Smith*, 2 Beav. 236.

(f) *French v. Davidson*, 3 Mad. 396.

(g) *Brereton v. Brereton*, 2 Ves. 87, cited.

¹ In *Mason v. Mason*, 4 Sandf. Ch. 631, it was held, that a discretionary power

The trustees alone are competent to exercise these powers, for they may have private and peculiar grounds for arriving at a proper conclusion, into which the court could not providentially inquire, and which the trustees might refuse to disclose. The exercise of such authorities cannot, therefore, in general, be assumed, or even controlled by the court. (h)

A power for trustees to consent to a marriage, is obviously a discretionary power of this last description, and it is one which has been a fruitful source of litigation. From the nature of the subject, such authorities are on a footing peculiar to themselves, and will, therefore, require to be separately discussed.

Courts of equity, following the maxims of the civil law, have always discountenanced any conditions in restraint of marriage. (i) Hence, if *an interest in a *legacy* be vested in a party with a [*496] *subsequent* provision for divesting that interest, in case of the legatee's marriage without the required consent, *and there is no gift over* to take effect on the marriage without such consent, the condition will be treated merely as one *in terrorem*, and will not be enforced. (k) But this doctrine will be applied only to a *pecuniary legacy*, and will not extend to a charge on real estate. (l) And even where the condition is *subsequent*, yet if the *legacy be given over on*

(h) *Clarke v. Parker*, 19 Ves. 11.

364; *Lloyd v. Branton*, 3 Mer. 117; 1

(i) *Stackpole v. Beaumont*, 3 Ves. 96; *Rop. Legs.* 715; *Harvey v. Aston*, 1 Atk. 378, 9; *Jervoise v. Duke*, 1 Vern. 20.

(k) *Semphill v. Hayley*, Prec. Ch. 562; *Garret v. Pretty*, 2 Vern. 293; S. C. 3 Mer. 120; *Wheeler v. Bingham*, 3 Atk. 364; *Harvey v. Aston*, 1 Atk. 379; *Reynel v. Martin*, 3 Atk. 333; see *Berkley v. Ryder*, 2 Ves. 535; *Stackpole v. Beaumont*, 3 Ves. 89.

to increase an annuity, which has been once exercised, will not authorize a further execution by a reduction to the original amount.

Where executors are authorized to advance to a legatee any sum or sums of money not exceeding an amount specified, an exercise of the power for a less amount will not preclude a further advance. *Webster v. Baddington*, 16 Simons, 177.

Under the amended provision of the New York Revised Statutes, which authorizes the rents and profits of a devised estate to be applied, generally, to the use of a *cestui que trust*, it was said by the Chancellor, in *Gott v. Cook*, 7 Paige, 538 (approved in *Mason v. Jones*, 2 Barb. S. C. 248), that a certain degree of discretionary power was vested in the trustee; and that, though in case he should attempt, without any justifiable cause, to exercise a control over the application of the trust fund, it would be a breach of trust; yet, it would be equally so to pay it over after it was received into the hands of a lunatic, or a drunkard, who, he had reason to suppose, would waste it, without applying it to any beneficial use; and so it would be, if he purchased articles of food, or other property, himself, and placed it in the hands of such a person, when he had reason to believe that it would be wasted, instead of being used for the benefit of such *cestui que trust*, or his family.

the failure of the donee to satisfy the condition, the court will recognise the interest of the party who is entitled under the limitation over, and the forfeiture will be enforced in his favor, if the donee marry without the required sanction.^(m) It is somewhat doubtful, whether a mere *general residuary* gift will be a sufficient limitation over, so as to give effect to a forfeiture arising from a condition subsequent of this description.⁽ⁿ⁾ But it is clear, that an express direction, that the particular interest given to the donee shall *fall into the residue* on his marrying without consent, will be a sufficient gift over for this purpose.^(o)¹

However, where the consent of the trustees to a marriage is a condition *precedent* to a gift, so that nothing vests in the donee until his marriage with that consent,—as where there is a limitation to a party *upon his marriage*, or *in case he should marry*, with the proper consent—it is clearly settled (though the law was once otherwise),^(p) that the condition must be strictly complied with, and the *donee will take nothing*, unless he marry with the required consent.^(q) And in such a case, it is immaterial, whether there is,^(r) or is not,^(s) a limitation over in the event of the condition not being performed. And the condition will be equally valid, whether the consent to the marriage of the donee be required only until he attain a certain age,^(t) or during his whole life.^(u)

Where there was a devise to a party, if he should marry with the consent of trustees, and a gift over upon his marriage *against* their consent, “*against*” was held to mean “*without*” their consent, and the devise over was established upon the first devisee’s marriage

(m) *Garret v. Pretty*, 2 Vern. 293; 3 Mer. 120; *Harvey v. Aston*, 1 Atk. 375; *Wheeler v. Bingham*, 3 Atk. 364; *Scott v. Tyler*, 2 Bro. C. C. 431; *Lloyd v. Branton*, 3 Mer. 117; *Stratton v. Grymes*, 2 Vern. 357; *Dashwood v. Lord Bulkeley*, 10 Ves. 230.

(n) *Harvey v. Aston*, 1 Atk. 375; contra, *Wheeler v. Bingham*, 3 Atk. 364; see *Lloyd v. Branton*, 3 Mer. 118.

(o) *Wheeler v. Bingham*, 3 Atk. 368; *Lloyd v. Branton*, 3 Mer. 118.

(p) *Underwood v. Morris*, 3 Atk. 184; *Reynish v. Martin*, 2 Atk. 330.

(q) *Holmes v. Lysight*, 2 Bro. P. C. 261; *Hemmings v. Munckley*, 1 Bro. C. C. 303; *Scott v. Tyler*, 2 Bro. C. C. 489; 2 Dick. 712; *Creagh v. Wilson*, 2 Vern.

572; *Gillet v. Wray*, 1 P. Wms. 284; *Harvey v. Aston*, 1 Atk. 375, 8; *Knight v. Cameron*, 14 Ves. 389.

(r) *Hemmings v. Munckley*, 1 Bro. C. C. 303; *Clarke v. Parker*, 19 Ves. 8, 9; *Malcolm v. O’Callaghan*, 2 Mad. 349; *Long v. Ricketts*, 2 S. & St. 179.

(s) *Stackpole v. Beaumont*, 3 Ves. 89; *Scott v. Tyler*, 2 Bro. C. C. 431; *Creagh v. Wilson*, 2 Vern. 572; *Gillet v. Wray*, 1 P. Wms. 286; 1 Rep. Legs. 658.

(t) *Hemmings v. Munckley*, 1 Bro. C. C. 303; *Scott v. Tyler*, 2 Bro. C. C. 489; *Stackpole v. Beaumont*, 3 Ves. 89.

(u) *Clarke v. Parker*, 19 Ves. 1; *Malcolm v. O’Callaghan*, 2 Mad. 349, 354; *Gillet v. Wray*, 1 P. Wms. 284; *Lloyd v. Branton*, 3 Mer. 108, 116.

¹ See ante, 395, note; and notes to *Scott v. Tyler*, 2 Lead. Cas. Eq. p. i., 333, (1 Am. ed.), and cases cited.

[*497] *without* such consent, *although it did not appear that the trustees opposed the marriage.(x) Where the limitation over is made to take effect on the *death* of the first donee, without marrying with the required consent, it is uncertain, whether the donee could entitle himself to the gift by a *second* marriage with the proper consent, where he had been previously married without such consent.(y) Upon principle, it would seem, that he might do so. However, it is clearly settled, that a condition, requiring consent, will be satisfied by the *first* marriage without the required consent. And a *second* marriage without consent will not, therefore, prejudice the legatee.(z)

Where the interest is given so as to vest absolutely in the donee at a certain period, with a general and unlimited condition, that he should not marry without the trustees' consent, the necessity of obtaining the consent will cease, when the interest becomes vested. For instance, where a legacy is given to a child at twenty-one, provided that if he marry without the consent of trustees, there should be a forfeiture. The legatee will take, absolutely discharged from the condition, upon attaining twenty-one.(a) It will doubtless be observed that this is in the nature of a *subsequent* condition.

Where a testator, by his will, requires the consent of his executors or trustees to the marriage of his daughter, who is single at the date of the will, and the daughter afterwards marries in the testator's lifetime *with his approbation*, the condition will be dispensed with; nor will it be applicable to a second marriage of the daughter after the testator's death.(b)

The court, in construing these conditional gifts, will struggle more earnestly to dispense with the condition in favor of children, or where the donor stands *in loco parentis* to the donees, than where the will or settlement is made by a mere stranger.(c)

Having thus considered generally how far these provisions, requiring the consent of the trustees to a marriage, will be enforced—

(x) *Long v. Ricketts*, 2 S. & St. 179; but see *Harvey v. Aston*, 1 Atk. 375; *Pollock v. Croft*, 1 Mer. 184.

(y) *Malcolm v. O'Callaghan*, 2 Mad. 349.

(z) *Hutcheson v. Hammond*, 3 Bro. C. C. 128, 146; *Crommelin v. Crommelin*, 3 Ves. 227; *Lowe v. Manners*, 5 B. & Ald. 917; 1 Rep. Legs. 709, 10.

(a) *Pullen v. Ready*, 2 Atk. 587; *Desbody v. Boyville*, 2 P. Wms. 547; *Knapp v. Noyes*, Ambl. 662; *Osborn v. Brown*, 5 Ves. 527; see *Stackpole v. Beaumont*, 3 Ves. 89; but see *Malcolm v. O'Callaghan*, 2 Mad. 354; and *Lloyd v. Branton*, 3 Mer. 108; see *Graydon v. Hicks*, 2 Atk. 18.

(b) *Clarke v. Berkeley*, 2 Vern. 720; *Crommelin v. Crommelin*, 3 Ves. 227; *Parnell v. Lyon*, 1 V. & B. 479; *Wheeler v. Warner*, 1 S. & St. 304; *Smith v. Cawdery*, 2 S. & St. 358; *Coventry v. Higgins*, 8 Jur. 182.

(c) *Berkley v. Ryder*, 2 Ves. 537; *Burleton v. Humfrey*, Ambl. 256.

we will now proceed to examine in what manner a power to consent to a marriage must be exercised by the trustees.¹

And first, What will be a sufficient consent by the trustees to a marriage, in order to satisfy the condition. And this consent may be, in some cases, either "express" or "implied."

It is not absolutely necessary to the validity of an express consent, that it should be given to some particular marriage then in contemplation; but a general license, giving the party "free leave and consent to marry whomsoever she choosed," will be sufficient, if acted upon.(d) And where a consent *in writing* by the trustee was not expressly required by the will, a general *verbal* consent, by him, for the legatee to marry "whomsoever *she pleased," under which she afterwards married, has been held to satisfy the condi- [*498] tion.(e)

And the court, in its anxiety to get rid of conditions of this description, has construed very loose and inconclusive expressions of the trustee into an express consent. Thus, statements in a letter, that the trustee "would be obliged to consent;"(f) or "that he would never stand in the way of any arrangement by the co-trustees;"(g) or "that he should not oppose" the marriage;(h) or "you know you have my consent;"(i) or that the trustees "were ready to consent;"(k) have been held sufficient.

It is settled that, if a consent *in writing* be not expressly required, there may be an *implied or tacit* consent arising from the conduct of the trustees, where the facts in evidence show that the consent has been given substantially, though not in terms(l)—as where they have been privy to, and have encouraged, or, at any rate, have not discouraged the courtship.(m) And it will be an additional reason for adopting this construction, if the party by whom the consent is to be given, himself takes a beneficial interest in the property in case of the forfeiture of the first donee; although there may be no suggestion of fraud.(n) However, the most proper ground on which these decisions are to be rested, appears to be this, viz., that it would amount to a con-

(d) *Mercer v. Hall*, 4 Bro. C. C. 328.

(e) *Pollock v. Croft*, 1 Mer. 181.

(f) *Daley v. Desbouverie*, 2 Atk. 261; but see *Clarke v. Parker*, 19 Ves. 12; and see *Dashwood v. Lord Bulkeley*, 10 Ves. 241.

(g) *D'Aguilar v. Drinkwater*, 2 V. & B. 225.

(h) *Merry v. Ryves*, 1 Ed. 1.

(i) *Worthington v. Evans*, 1 S. & St. 165.

(k) *Le Jeune v. Budd*, 6 Sim. 441.

(l) *Harvey v. Aston*, 1 Atk. 375;

Mesgrett v. Mesgrett, 2 Vern. 581;

Clark v. Parker, 19 Ves. 12, 24; *O'Callaghan v. Cooper*, 5 Ves. 126.

(m) *Mesgrett v. Mesgrett*, 2 Vern. 580; *Daley v. Desbouverie*, 2 Atk. 261; *Campbell v. Lord Netterville*, 2 Ves. 534, cited; *Lord Strange v. Smith*, Ambl. 263.

(n) *D'Aguilar v. Drinkwater*, 2 V. & B. 225; see *Mesgrett v. Mesgrett*, 2 Vern. 530.

¹ See notes to *Scott v. Tyler*, 2 Lead. Cas. Eq., p. i. 315, &c. (1st Am. ed.)

structive fraud on the legatee, to hold that there was a want of a proper consent, when the parties have been induced to entangle their affections, and ultimately to complete the marriage, on the faith of the apparent approval of the match on the part of the trustees.(o) For it is a settled rule of equitable construction, that an innocent party shall not be held responsible for the breach of a condition, which is occasioned by the fraud or misrepresentation of another.(p)

But it is clear, that where the consent is required to be given in *writing*, an *implied* or *tacit*, or even an express *verbal*, consent will not satisfy the condition.(q) However, in case of fraud, the court will interpose, even where there is no written consent, and relieve from the forfeiture.(r)

Where a consent *in writing* is all that is required by the trust instrument, the condition will be satisfied by any writing, however informal or incomplete, in which the consent is sufficiently expressed, and which is signed by the persons who have the power of giving their consent.(s) A *deed*, or other formal instrument, is not necessary, unless expressly required by the terms of the trust. And it is [*499] immaterial, that a regular deed of consent has been prepared for the signature of the trustees, and that it was their intention to execute the more formal instrument.(t)

A distinction was once attempted to be established between the terms "consent" and "approbation." In *Burleton v. Humfrey*,(u) a trust of real and personal estate was declared in favor of the testator's daughter, if she married with the *consent and approbation* of the trustee, with a devise over, if she married without such consent or approbation. The daughter married without the trustee's consent or knowledge, *but he subsequently gave his approbation* to the marriage; and Lord Hardwicke determined, that the condition required only the consent or the approbation of the trustee, and the subsequent approbation was therefore sufficient.(x) However, his Lordship did not venture to rest his decree on the distinction thus taken by him, which was afterward disapproved of both by Lord Thurlow and Lord Eldon.(y) Again, in the case of *Berkley v. Ryder*,(z) where the marriage was to be with the consent *and approbation* of the trustees, Lord Hardwicke himself did not attempt to

(o) *Clarke v. Parker*, 19 Ves. 12, 18, 165; *Daley v. Desbouverie*, 2 Atk. 261; 19; *Dashwood v. Lord Bulkeley*, 10 Merry v. Ryves, 1 Ed. 1; *D'Aguilar v. Ves. 243*; *D'Aguilar v. Drinkwater*, 2 Drinkwater, 2 V. & B. 225; *Le Jeune v. Budd*, 6 Sim. 441.

(p) *Clarke v. Parker*, 19 Ves. 17, 18.

(t) *Worthington v. Evans*, 1 S. & St. 165.

(q) *Clarke v. Parker*, 19 Ves. 12; *D'Aguilar v. Drinkwater*, 2 V. & B. 230.

(u) *Ambl.* 256.

(r) *Lord Strange v. Smith*, *Ambl.* 263; *Clarke v. Parker*, 19 Ves. 18, 19; see *Farmer v. Compton*, 1 Rep. Ch. 1.

(x) *Burleton v. Humfrey*, *Ambl.* 256.

(y) See 19 Ves. 21.

(z) 2 Ves. 533.

(s) *Worthington v. Evans*, 1 S. & St.

maintain this distinction, and in several subsequent cases, where the same expressions occurred, such a distinction has not been raised. (a) The *dictum* of Lord Hardwicke in *Burleton v. Humfrey* must therefore be regarded as overruled, and the two terms treated as having the same operation in conditions of this nature.

This leads to the observation, that the consent or approbation of the trustees, must be given *previously to the marriage*. It was observed by Lord Hardwicke in the case of *Reynish v. Martin*, (b) that if the legatee "married without the consent of the trustees, their consent or approbation *afterwards* was immaterial,—because no subsequent approbation could amount to a performance of the condition, or dispense with a breach of it." (b) And as it was forcibly put by Lord Thurlow when remarking on the decision in *Burleton v. Humfrey*, "If subsequent approbation were sufficient after eleven months, he did not see why it would not do at any time during the whole life of the trustee; during which it must be quite uncertain, whether the marriage was had in conformity with the condition or not." (c) The only case opposed to this doctrine, is that of *Burleton v. Humfrey*, (d) which has just been discussed, and which has been completely overruled on this point by a series of subsequent decisions. (e)

However, it appears from the observations of Sir J. Leach, V. C., in the modern case of *Worthington v. Evans*, (f) that if a trustee had actually approved of a marriage, *and was prevented from executing a previous formal consent in writing by some accident*, and not from any change of purpose, the court would consider his consent to have been substantially given according to the will. In that case the formal consent was executed by the trustee *a few hours after the solemnization of the marriage*, but as there was a letter from him, which was held to amount to a sufficient previous consent in writing, it was not necessary to decide *the case on the principle above stated*. But there can be little doubt, that [*500] the court if necessary would act upon that principle, and relieve from strict non-performance of the condition under similar circumstances, on the ground that the condition was in fact substantially, though not literally performed. And such a jurisdiction would depend upon the broad equitable principle of relieving from the consequences of innocent mistake or accident. (g)

(a) See *Hemmings v. Munckley*, 1 Bro. C. C. 304; *Malcolm v. O'Callaghan*, 2 Mad. 349. *Berkley v. Ryder*, 2 Ves. 532; *Clarke v. Parker*, 19 Ves. 1; *Malcolm v. O'Callaghan*, 2 Mad. 349; *Long v. Ricketts*, 2 S. & St. 179.

(b) *Reynish v. Martin*, 3 Atk. 331. (f) 1 S. & St. 172.

(c) See *Clarke v. Parker*, 19 Ves. 21.

(d) *Ambl.* 256.

(g) *O'Callaghan v. Cooper*, 5 Ves.

(e) *Reynish v. Martin*, 3 Atk. 331; 117, 125; ante, Pt. I. Div. II. Ch. II.

If a trustee once gives his absolute consent to a marriage after full information of all the circumstances connected with it, he cannot afterwards withdraw that consent.(h) And the reason is, that the parties are to be considered to have acted upon the license, and it would be doing violence to their feelings, as well as to the intentions of the testator, to permit the consent to be countermanded without some new reason, which goes to the propriety of the original assent.(i)

But if previously to the solemnization of the marriage, the trustees become informed of circumstances, which ought to have operated at first to make them withhold their consent, it would become their duty, and they would unquestionably have the power, to retract their consent.(k)

So the consent may be given "conditionally," if there be nothing unreasonable or improper in the condition reserved. Thus an assent to a marriage, *provided the husband make a settlement according to a previous proposal*;(l) or, *if the co-trustees will consent*;(m) will be a conditional assent. And if the parties afterwards fail or refuse to perform the condition on which the consent was given, it may properly be withdrawn.(n) But where the consent is given conditionally on the making of a settlement, it is settled, that a settlement, made *after* the marriage in pursuance of a previous proposal, will be a sufficient substantial performance of the condition, although strictly a settlement *before the marriage* was in the contemplation of the parties.(o)

Where the consent of two or more trustees is required to a marriage, the consent must be given by *all* who accept the trust.(p) Unless indeed the dissenting trustee be actuated by an unreasonable or improper motive in refusing his assent.(q)

A contrary *dictum* is attributed to Lord Chief Baron Comyns, in the case of *Harvy v. Aston*;(r) as reported in *Atkyns*, where the Chief Baron is stated to have said, that the consent of the *major part of the trustees* would be sufficient; but in *Clarke v. Parker*;(s)

(h) *Le Jeune v. Budd*, 6 Sim. 441; 117; *Dashwood v. Lord Bulkeley*, 10 Farner v. Compton, 1 Rep. Ch. 1; Ves. 230.
(m) *D'Aguilar v. Drinkwater*, 2 V. Lord Strange v. Smith, Ambl. 263; & B. 235, 6.
(n) *Dashwood v. Lord Bulkeley*, 10 Merry v. Ryves, 1 Ed. 1; *Dashwood v. Lord Bulkeley*, 10 Ves. 242; *D'Aguilar v. Drinkwater*, 2 V. & B. 234. Ves. 230.

(i) 1 Rep. Legs. 699; see 2 V. & B. 234.

(k) *Clarke v. Parker*, 19 Ves. 13; *Dashwood v. Lord Bulkeley*, 10, Ves. 242.

(l) *O'Callaghan v. Cooper*, 5 Ves.

(o) 5 Ves. 117; 10 Ves. 244.

(p) *Clarke v. Parker*, 19 Ves. 1.

(q) *Peyton v. Bury*, 2 P. Wms. 626, 8; *Mesgrett v. Mesgrett*, 2 Vern. 580; *Clarke v. Parker*, 19 Ves. 12, 18.

(r) 1 Atk. 375.

(s) 19 Ves. 13, 24.

Lord Eldon in dissenting from that doctrine said, that the Chief Baron expressed no such *dictum*; and that eminent judge observed, that there was no case in which it had been *held, that the consent of *three* trustees being required, the consent of *two* [*501] would do, the third not having been at all consulted.(t)

And it is immaterial, that the testator, by requiring the consent of the trustees, or the survivors, or the representatives of the survivors, shows that he did not attach any importance to the consent of the particular parties who are named; for if he have expressed that those persons whom he states shall give their consent, the court has no authority to strike out that condition, and deprive those who under an express devise over have an interest given to them.(u)

However, it is conceived, that one trustee may properly authorize his co-trustees to give the required consent on his behalf, and the condition will be satisfied by the consent of those, who are thus authorized, on behalf of their whole number.(x) For such an authority would be construed into an express assent on the part of the trustee, by whom it was given, provided that his co-trustees should also assent.(y)

And it has been decided, that in general the power of giving or withholding consent to a marriage, is vested in executors and trustees only *in that character*, and not *personally*; and therefore the consent of those who have not acted, or who renounce the trust, will not be requisite.(z)

If, however, it be evident, that the power is intrusted to the donee from confidence in his *personal* discretion, and not merely in his character of executor or trustee, his renunciation of the office will not remove the necessity of obtaining his consent.(a)

Even where there is a condition *precedent*, requiring the consent of trustees to a marriage, if one or more of the trustees should die, the condition, so far as it regards the deceased parties, will be dispensed with by their death; for the strict performance of the condition is rendered impossible by the act of God.(b)

And it follows from the same principle, that on the death of *all* the persons whose consent is rendered necessary, the condition, though precedent, will be altogether gone, and the legatee will take absolutely.

And if the condition be *subsequent*, and the consent of the *executors* or *trustees* in the plural number only be required, and one of the

(t) *Clarke v. Parker*, 19 Ves. 17.

(u) Per Lord Eldon, 19 Ves. 15.

(x) *Daley v. Desbouverie*, 2 Atk.

261; *Clarke v. Parker*, 19 Ves. 17;

D'Aguilar v. Drinkwater, 2 V. & B. 225.

(y) 2 V. & B. 235, 6.

(z) *Worthington v. Evans*, 1 S. & St.

165; see *Clarke v. Parker*, 19 Ves. 16.

(a) *Graydon v. Graydon*, 2 Atk. 16,

19; as stated and explained, 1 Rep.

Legs. 695, 696.

(b) 1 Rep. Legs. 691.

two executors or trustees die, the condition is gone, inasmuch as it can no longer be literally performed, and the consent of the surviving executor or trustee will not be requisite.(c) *A fortiori*, therefore, the condition will be extinguished by the death of *all* the parties, whose consent is required.(d)

It is perhaps unnecessary to add, that these last decisions cannot apply where the death of the original trustee is provided for, and the power of giving the required consent is extended by the trust instrument to the surviving trustees, and the representatives of the survivor.(e)

The exercise of a discretionary power of assenting to a marriage is under the control of a court of equity. The court will not suffer [502] that *power to be abused, but will examine into the conduct and motives of the persons intrusted with it, in order to ascertain whether a refusal to consent proceeds from a vicious, corrupt, or unreasonable cause: and in that case it will relieve from the legal forfeiture incurred by a marriage without consent.(f) This equitable jurisdiction has been characterized by Lord Eldon as a "dangerous power," and one which it is difficult and delicate to exercise.(g) However, there is no question as to the power and readiness of the court to exercise it in a proper case. Thus in *Mesgrett v. Mesgrett*,(h) the property was to go over to the daughter of one of the guardians upon a marriage without consent. He encouraged the proposal, and then affected to say he had not given his consent, for the purpose of obtaining the property for his daughter. The court considered that an abuse of the power, and relieved against the want of the formal consent.(h)

And the court will also relieve, where the required consent is refused from motives of personal pique or resentment, or for some capricious and insufficient reason, more especially if the previous conduct of the trustee had encouraged or facilitated the engagement.(i) And Lord Hardwicke rested his decision in *Daley v. Desbouverie*(k) upon the principle now under discussion, rather than on the sufficiency of the actual consent there given.(l)

Upon the same principle, where a trustee refuses to exercise his

(c) *Peyton v. Bury*, 2 P. Wms. 626; see *Jones v. Suffolk*, 1 Bro. C. C. 528.

(d) *Graydon v. Hicks*, 2 Atk. 16, 18; *Aislabie v. Rice*, 3 Mad. 256; 8 Taunton, 459.

(e) See *Clarke v. Parker*, 19 Ves. 15.

(f) 1 Rep. Legs. 697.

(g) See *Dashwood v. Bulkeley*, 10 Ves. 245; *Clarke v. Parker*, 19 Ves. 12, 18.

(h) *Mesgrett v. Mesgrett*, 2 Vern. 580; see 10 Ves. 243.

(i) *Lord Strange v. Smith*, Ambl. 264; see 10 Ves. 242, 243; *Merry v. Ryves*, 1 Ed. 1; see *Peyton v. Bury*, 2 P. Wms. 628.

(k) 2 Atk. 261.

(l) See 19 Ves. 19.

power of giving his consent to a marriage, the court, contrary to the practice in other cases, will itself assume the exercise of that discretion, and upon the trustee by his answer refusing to interfere, it will refer it to the Master to consider, whether the marriage be a proper one, and to receive proposals for a settlement.^(m)

*CHAPTER III.

[*503]

OF THE POWERS AND DUTIES OF TRUSTEES AS BETWEEN THEM AND THIRD PERSONS.

It has been already stated,^(a) that where the legal title is vested in trustees, all actions at law relating to the trust property must be brought by them, or in their names.¹ And *at law*, the power of releasing or compromising the claim, on which an action is founded, is commensurate with that of bringing and maintaining the action.^(b) However, a trustee will not be suffered to exercise his legal powers to the prejudice of the *cestui que trusts*, and a release by the trustee without any consideration, would unquestionably be set aside in equity, although the party released *had no notice of the trust*. And the case for relief would of course be still stronger, if the party released *had actual notice of the trust*. Thus where a bond had been taken by a person in the name of a trustee, and the bond was afterwards put in suit by the *cestui que trust* in the trustee's name, and judgment was entered up against the defendant for the amount, the defendant, with full knowledge of the trust, paid the money to the trustee, but he was decreed to repay it with costs to the representatives of the *cestui que trust* on a bill filed by them for that purpose.^(c) And the *cestui que trust* in such a case will also have his remedy against the trustee personally. And in an early case, where a trustee had released a recognisance without any consideration, he was decreed on the suit of the *cestui que trust* to repay the principal and interest.^{(d)²}

Upon the same principle, if an action were compromised by a trustee without any special authority, the *cestui que trust* would doubtless be entitled to annul the compromise, and to hold the party to his original obligation. Even *at law*, a *fraudulent* release of an

^(m) Goldsmid v. Goldsmid, 19 Ves. 368; S. C. Coop. 225.

^(a) Ante, p. 274, 316.

^(b) Ante, ubi supra.

^(c) Pritchard v. Langher, 2 Vern. 197. [Ante, 449.]

^(d) Jevon v. Bush, 1 Vern. 342.

¹ See ante, page 274, and notes.

² See ante, page 274, note (1).

action by a trustee, will not be a good plea to the action, and the release will be ordered to be cancelled.(e) It has been laid down, that a tender to the *cestui que trust* of money due on a bond, is a good plea for the debtor at law to an action by the trustee on the bond;(f) and this decision might probably still be supported, on the ground that the *cestui que trust* was the trustee's agent for the purpose of receiving the debt. However, it is now settled, that the debtor in an action by a trustee cannot set off a debt due from the *cestui que trust*.(g)

It has been already stated, that where the trustee neglects to bring [*504] an *action within the time fixed by the Statute of Limitation, the remedy as against the stranger will be barred; and this though the *cestui que trust* is an infant.(h)¹ And conversely from these decisions it must follow, that the Statute of Limitation will not run as long as the trustee, having the legal right of bringing an action, is under disability.(i) And so on the other hand, the acknowledgment of a debt by the trustees, or by one of several trustees, for the payment of debts, will take the debt out of the Statute of Limitation in favor of the creditor.(k)

In dealings between purchasers and trustees for sale, where the late Act 7 & 8 Vict. c. 76 applies, a *bona fide* purchaser may in general safely pay over the purchase-money to the trustees, upon their receipt only. And even before the passing of that act, a purchaser would have been equally safe in dealing with the trustees, if there was a provision in the trust instrument empowering the trustees to give sufficient discharges for the money paid to them.(l) It was contended by counsel in argument in the case of *Binks v. Lord Rokeby*,(m) that a power for the trustees to give acquittances, was not equivalent to a provision that the purchaser should not be bound to see to the application of the purchase-money, and that an express negative declaration was requisite for that purpose. It was not neces-

(e) *Legh v. Legh*, 1 B. & P. 447; *Danerman v. Radenius*, 7 T. B. 670, b; *Payne v. Rogers*, Dougl. 407; *Hickey v. Birt*, 7 Taunt. 48; *Anon.* 1 Salk. 260; *Manning v. Cox*, 7 Moore, 617; *Barker v. Richardson*, 1 Y. & J. 362. [See ante, 274, note (1).] P. Wms. 309; and see *Earl v. Countess of Huntingdon*, lb. 310, n.; sed vide *Allen v. Sayer*, 2 Vern. 368; see ante, p. 264, &c.

(i) Ante, ubi supra.

(k) *St. John v. Boughton*, 9 Sim. 219. [Toft v. Stephenson, 9 Engl. L. & Eq. 86.]

(f) *Lynch v. Clemence*, 1 Lutw. 577; 7 Bac. Abr. 186; [contra, *Chahoon v. Hollenbach*, 16 S. & R. 425.]

(g) *Tucker v. Tucker*, 4 B. & Ad. 745. [Ante, 274, note (y).]

(h) *Wych v. East India Company*, 3

(l) *Binks v. Lord Rokeby*, 2 Mad. 227; *Drayson v. Pocock*, 4 Sim. 283; *Roper v. Halifax*, 2 Sugd. Pow. App. 3; *Keon v. Magawly*, 1 Br. & W. 401.

(m) 2 Mad. 238.

¹ See ante, 264, &c., and notes.

sary to decide the point in that case; but it is conceived, that a simple power for the trustees to give discharges is abundantly sufficient for all purposes, and the decision in *Drayson v. Pocock*(*n*) is an authority to that effect.

And the nature and objects of the trust might also enable the trustees to discharge a purchaser for the money paid to them by him, although the trust instrument conferred on them *no express power* to give such discharges.¹ For instance, where there was a general trust for sale, and the purposes to which the money was to be applied, were unlimited and undefined,—as where there was a trust for the payment of debts generally in the first place,(*o*) or a direction that the money should form part of the personal estate,(*oo*) or where the trusts were not capable of immediate satisfaction, as in the case of a trust for the payment of debts *to be ascertained at a future period*,(*p*) or a trust *for reinvestment in the purchase of land*,(*q*) or for the benefit of persons, who were *infants* or *unborn* at the time of the sale.(*r*)(1) So it has been already stated,(*s*) *that under a [*505] trust for the payment of debts, a purchaser from the trustee was not in general bound to ascertain the existence of any debts, or the necessity of the sale:(*t*) and also that if there were a primary trust for the payment of debts, the purchaser would be equally exonerated from seeing to the application of the money, although there might be also a trust to pay legacies,(*u*) or annuities.(*x*)

(*n*) 4 Sim. 283.

(*r*) *Sowarsby v. Lacy*, 4 Mad. 142;

(*o*) *Culpepper v. Aston*, 2 Ch. Ca. 115; *Lavender v. Stanton*, 6 Mad. 46; *Breedon v. Breedon*, 1 R. & M. 413.

Anon. Salk. 153; *Dunch v. Kent*, 1 Vern. 160; *Jenkins v. Hiles*, 6 Ves. 654, n.;

(*s*) Ante, p. 397.

Williamson v. Curtis, 3 Bro. C. C. 96;

(*t*) *Johnson v. Kennett*, 3 M. & K.

Barker v. Duke of Devonshire, 3 Mer. 631; 6 Sim. 384; *Langley v. Earl of*

310; *Binks v. Lord Rokeby*, 2 Mad. 238;

Oxford, Ambl. 797; *Forbes v. Peacock*,

Shaw v. Borrer, 1 Keen, 559; *Forbes v.*

11 Sim. 152, 160; *Eland v. Eland*, 4

Peacock, 11 Sim. 152, 160; *Jones v.*

M. & Cr. 428; 1 Beav. 235; *Page v.*

Price, Ib. 557; *Rogers v. Skillicome*,

Adam, 4 Beav. 269, 283; *Shaw v.*

Ambl. 188; *Ball v. Harris*, 8 Sim. 485;

Borrer, 1 Keen, 559.

4 M. & Cr. 264; *Eland v. Eland*, 1 Beav.

(*u*) *Rogers v. Skillicome*, *Ambl. 188*;

235; 4 M. & Cr. 420; *Page v. Adam*,

Jebb v. Abbott, and *Benyon v. Collins*,

4 Beav. 269; *Glyn v. Locke*, 3 Dr. &

Co. Litt. 290, b; Butl. note (1), Sect. 12.

W. 11.

(*x*) *Johnson v. Kennett*, 3 M. & K.

(*oo*) *Smith v. Guyon*, 1 Bro. C. C. 186.

627; *Eland v. Eland*, 1 Beav. 241; 4

(*p*) *Balfour v. Welland*, 16 Ves. 151,

M. & Cr. 420; *Page v. Adam*, 4 Beav.

156.

269, 284.

(*q*) *Doran v. Wiltshire*, 3 Sw. 699.

(1) There is a material distinction between a *trust to sell* for the benefit of infants, and a *charge* of a certain sum for an infant. In the latter case a purchaser can only take the estate subject to the charge. *Dickenson v. Dickenson*, 3 Bro. C. C. 19.

¹ On the liability of a purchaser to see to the application of the purchase-money, see notes, ante, 342, 363.

But (previously to the act 7 & 8 Vict. c. 76), if the trusts were of a defined and limited character, and the trust instrument contained no express declaration, that the receipts of the trustees should be sufficient discharges, a purchaser from the trustees with notice of the trust, would have been bound to ascertain that the purchase-money was duly applied according to the trusts; and if he paid over the money to the trustees, and they misapplied it, the parties interested under the trust would have been entitled to come upon the estate in the hands of the purchaser, and compel the performance of the trust.^(y) Thus we have seen that this equity has been enforced against a purchaser, where the trust was for the payment of certain legacies,^(z) or of debts which were scheduled or specified,^(a) or where a decree had been made for the payment of debts.^(b) Although according to the latter practice, a purchaser would have been exonerated in these cases by paying the money into court, for that would be considered a payment to the trustees, and for the security of all parties, as the court would see to the due application of the fund.^(c) And so where a trust for sale was created by act of parliament, and the money was directed to be applied to certain purposes, such as building and stocking a printing-house, and purchasing land to be settled to the uses of a settlement, it was determined to be incumbent on a purchaser to see the money laid out and employed according to the act.^(d)

Hence, according to the law, as it stood prior to the late alteration, it was essential to the security of a purchaser from trustees to obtain releases from the several legatees or creditors;^(e) for such evidence of the discharge of the estate was requisite to perfect the title in case of a resale. And where the amount of any charge was at all considerable, or they were few in number, it was usual and convenient to make the persons, entitled to the charges, parties to the conveyance.^(f)

Where, however, the trust was to invest the purchase-money in the funds, &c., upon trusts, the purchaser in practice was considered to have sufficiently ascertained the application of the money, if he saw it invested by the trustees according to the trust, and procured them to execute a declaration of the trust. It was the [*506] opinion of Mr. Booth, and also of Mr. Wilbraham, that the

(y) 2 Sugd. V. & P. 30, et seq. 9th edit.; ante p. 476 [Power of Sale.]

(z) *Horn v. Horn*, 2 S. & St. 448; *Johnson v. Kennet*, 3 M. & K. 630; ante, p. [363, note; *Duffy v. Calvert*, 6 Gill, 487.]

(a) *Dunch v. Kent*, 1 Vern. 260; *Spalding v. Shalmer*, Id. 301; *Abbott v. Gibbs*, 1 Eq. Ca. Abr. 358; *Binks v.*

Lord Rokeby, 2 Mad. 238; ante, p. [342, note; *Duffy v. Calvert*, 6 Gill, 487.]

(b) *Lloyd v. Baldwin*, 1 Ves. 173; *Welker v. Smallwood*, Amb. 676; ante, p. 342.

(c) *Binks v. Lord Rokeby*, 2 Mad. 239; 2 Sugd. V. & P. 34, 9th edit.

(d) *Cotterell v. Hampson*, 2 Vern. 5.

(e) 2 Sugd. V. & P. 49, 9th edit.

(f) 2 Sugd. V. & P. 49, 50, 9th edit.

liability of the purchaser did not extend further in such cases; and this view of the law has also been corroborated by Sir E. Sugden, in his work on Vendors and Purchasers.(g)

In this state of the law, wherever the trust instrument contained no power for the trustees to give sufficient discharges, a purchaser could very rarely be advised to pay over to them the purchase-money without the concurrence of the parties beneficially interested; unless indeed there were a general trust for the payment of debts overriding the other trusts.(h) The principles upon which this *prima facie* liability of purchasers has been held not to apply in any other case, besides that of a trust for the payment of debts, are so indefinite and so difficult of practical application, that a purchaser would have run great risk in acting upon them on his own responsibility.

It may be observed, that the question, whether a trustee could give discharges for the purchase-money, was one of title and not of conveyance.(i)

The law on this subject has been materially simplified, and the facilities of dealing with trustees in the purchase of property increased, by the recent act of 7 & 8 Vict. c. 76. The 10th sect. of that statute enacts, "That the *bona fide* payment to, and the receipt of, any person to whom any money shall be payable upon any express or implied trust, or for any limited purpose, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust." Therefore, for the future, in all cases coming within the act, *bona fide* purchasers, or other persons paying money to trustees, will be bound only to ascertain that the money is *payable* to the party or parties whose receipt they take. And upon this point there can seldom be much doubt, as wherever the power of ulterior disposition or application is vested in the trustees—as for the purpose of reinvestment or distribution, &c.—the trustees are unquestionably the proper persons to receive payment.

However, the act further requires, that the payment shall be *bona fide*. Therefore, any collusive or fraudulent transaction between the trustees and persons dealing with them, either to the detriment of the *cestui que trusts*, or to the undue advantage of the parties themselves, is not within the benefit of the act; and in such cases, according to the old law, the estate will remain affected with the trust in the hands of the purchaser, notwithstanding the fullest powers for the trustees to give discharges, or a general charge of debts over-

(g) 2 Sugd. V. & P. 37, 9th edit.; 2 Cas. & Op. 114.

(h) Forbes v. Peacock, 11 Sim. 152, 160.

(i) Forbes v. Peacock, 12 Sim. 528.

riding the other trusts.(k) Thus, if a purchaser from a trustee in trust to sell and pay debts, and legacies, and annuities, have *express notice* before paying the money, *that all the debts have been paid*, he would be liable to the legatees or annuitants, in case the money is not duly applied by the trustees.(l)¹

[*507] *And the conveyance itself may furnish intrinsic evidence of the intended misapplication, so as to fix the purchaser with notice of the breach of trust—as where the consideration is a personal debt, due from the trustee,(m)—or where it appears from the deed that the money is to be applied for the benefit of the trustee, and not upon the purposes of the trust.(n)

But it must be shown by positive evidence, that the purchaser was aware of the breach of trust committed, or intended, by the trustees;(o) and it will not be inferred, from the form or mode of the conveyance, that he knew that the sale was not required for the purposes of the trust.(p) Therefore, where there is a general trust for the payment of debts, a purchaser may, in general, safely take a conveyance from the trustees, although the debts, in fact, have been all paid previously to the sale, *provided that he has no notice*, either actual or constructive, that the payment has been, in fact, made.

And the mere delay, on the part of the trustees in effecting the sale, will not, of itself, necessarily affect a purchaser with constructive notice, that the debts have been paid, or render it incumbent on him to inquire as to the existence of any debts.(q) And it has even

(k) *Watkins v. Cheek*, 2 S. & St. 199; *Eland v. Eland*, 4 M. & Cr. 427; see *Thompson v. Blackstone*, 6 Beav. 470.

(l) See *Johnson v. Kennett*, 3 M. & Cr. 205, 6.

K. 631; *Ewer v. Corbet*, 2 P. Wms. 149; *Forbes v. Peacock*, 12 Sim. 528,

547; but see *Page v. Adam*, 4 Beav. 269.

(m) *Watkins v. Cheek*, 2 S. & St. 205;

(n) *Watkins v. Cheek*, 2 S. & St. 205; 631; *Eland v. Eland*, 4 M. & Cr. 429; *Paige v. Adam*, 4 Beav. 283.

¹ The case of *Forbes v. Peacock*, 12 Sim. 528, in which this position was laid down, was reversed on appeal by Lord Lyndhurst (1 Phillips, 717), and the rule established in accordance with *Page v. Adam*, 4 Beav. 269, that where there is a trust to sell for the payment of debts and legacies, and the purchaser has notice that the debts have been paid, he will nevertheless not be liable: *Mather v. Morton*, 8 Engl. L. & Eq. 255, *accord*. From the Reporter's note (1 Phillips, 722), it appears that Lord Lyndhurst did not intend this rule to apply to the case where there were no debts at the testator's death, and the purchaser knew it. But in *Stroughill v. Anstey*, 12 Engl. L. & Eq. 369, Lord St. Leonards disapproved of the distinction, and held that in both cases the purchaser would be discharged; and with this *Mather v. Morton*, ut supra, seems to agree. But see *Gosling v. Carter*, 1 Coll. C. 648; and the remarks in 17 Jurist, pt. ii. 251; and *Marshall, C. J.*, in *Garnett v. Macon*, 2 Brockenb. 238; 6 Call, 388. Vide ante, notes to 342 and 363.

been decided, that the purchaser's *knowledge* of the debts having been paid, is immaterial.(r)

However, in a recent case before the Vice-Chancellor of England, an estate was devised to a trustee in trust for the payment of debts, and subject to that charge for the benefit of certain individuals; the devisee in trust put up the estate for sale *twenty-five years after the testator's death*; and, upon being asked by the purchaser, whether there were any debts unpaid, *he declined answering the question*. It was held by the Vice-Chancellor, that, after the lapse of time, and under the circumstances, the debts *must be presumed to have been paid*, and that the purchaser was bound to see to the application of the money upon the ulterior trusts: *the refusal by the trustee to answer the question being tantamount to notice to the purchaser that the debts were not paid*. And his honor emphatically refused to be bound by Lord Langdale's decision, in *Page v. Adam*, in which his Lordship had held, that a purchaser from a trustee, *with knowledge that all the debts were paid*, was not bound to see to the application of the money.(s)¹ However, it seems, from his honor's observations in the course of his judgment, that if the purchasers *had made no inquiry as to the existence of debts*, he might have safely taken a conveyance from the trustees alone, and that the circumstances and lapse of time *did not render it incumbent on him to make the inquiry*.

In *Pierce v. Scott*,(t) an estate was devised to trustees in trust to sell for the payment of debts on the insufficiency of the personal and another real estate. *Fifteen years after the testator's death* the trustees contracted for the sale of this estate, and filed a bill to compel the performance of **that contract, alleging the existence of* [*508] debts. It was held, however, that the length of time was a reason for suspecting the existence of debts, *and that what was ground for suspicion might be deemed notice to a purchaser*; and the relief was consequently refused.(t) It seems extremely difficult to reconcile the principle of this decision with the other authorities on the same subject; and on the whole, the authorities on the point in question are so conflicting, that a purchaser could rarely be advised to accept a title from a trustee for the payment of debts, where there had been an interval of several years since the creation of the trust.

It has been already stated, that a general power for the trustees to lay out and invest the trust moneys, is an authority for them to do all acts essential to that trust. Therefore, where it becomes ne-

(r) *Page v. Adam*, 4 Beav. 283.

(t) *Pierce v. Scott*, 1 Y. & Coll. 257.

(s) *Forbes v. Peacock*, 13 Law. Journ.

N. S., Chanc. 46; 12 Sim. 528.

¹ But see note to the preceding page.

cessary to call in any of the securities, the trustees, without any express authority, are able to give sufficient discharges to the borrowers of the money without the concurrence of the persons beneficially interested.(u)

Where the legal interest with the general power of management is vested in the trustees, it is clear, that the tenants and persons indebted to the trust estate, may safely pay, and, indeed, are bound to pay, the rents and debts to the trustees, who will be fully competent to give discharges for such payments.

It has been already observed, that trustees cannot be required to enter into any covenants for title in a conveyance of the trust estate beyond the usual covenant that they have not incumbered.(x)¹ But, if they should enter into any such personal covenants, they will be liable in an action at law by the covenantees in case of a breach.(y) And trustees, whilst in the legal possession of any real, or leasehold estate, will, of course, be liable to strangers in respect of any covenants which run with the land. Therefore, if the covenants are such as create any serious personal liability (which is very frequently the case with regard to leasehold property), they will be entitled to an indemnity from the *cestui que trusts* in respect of those covenants;(z) as will also be the case where a trustee enters into personal covenants with the lessor on taking or renewing a lease.(a) But it seems, that the court will be anxious to relieve trustees from the effect of any personal covenants which they may have entered into with third parties. And where trustees of a charity estate had granted an improper lease, which contained *personal covenants* with the lessee for quiet enjoyment, the court set aside the lease *in toto*, and would not suffer those covenants to remain in force against the trustees.(b) And in a late case, where trustees had joined their *cestui que trust* in a contract of sale, and *personally* agreed to exonerate the estate from incumbrances; and it turned out, that the incumbrances were very heavy, the court refused to enforce a specific performance of the agreement against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his action at law for damages.(c)

(u) Wood v. Harman, 5 Mad. 368; ante, p. 483 [Power of changing Securities.]

(x) 4 Cruis. Dig., Tit. 32, Ch. 26, s. 87; ante, Pt. II., Ch. IV., Sect. 1.

(y) See Att.-Gen. v. Morgan, 2 Russ. 306; and Wedgwood v. Adams, 6 Beav. 600.

(z) Simons v. Bolland, 3 Mer. 547; Cochrane v. Robinson, 11 Sim. 378; ante, p. 438.

(a) Marsh v. Wells, 2 S. & St. 90; ante, 432 [Trustees of Leaseholds.]

(b) Att.-Gen. v. Morgan, 2 Russ. 306.

(c) Wedgwood v. Adams, 6 Beav. 600.

¹ See ante, 281, note.

*We have already seen, that a contract of sale will not be specifically enforced by the court of equity where it is a breach of trust, and in such cases it is immaterial that the conduct of the purchaser is perfectly fair and proper.(d) [*509]

There has been already occasion to state, that a purchaser from a trustee (though for valuable consideration) will be bound by the trust in the same manner and to the same extent as the trustee, from whom he purchased, if the purchase be made with notice of the trust:(e) and the title of the purchaser will not be strengthened by levying a fine.(f) And we have also seen, that this rule applies equally, whether the trust is expressly created(g) or arises only by construction of law.(h)¹

However, the 25th section of the late Statute of Limitation (3 & 4 Will. IV. c. 27) provides, that where any land or rent is vested in a trustee upon any *express trust*, time shall run in favor of a purchaser from the trustee for valuable consideration from the time of the conveyance. And the same principle would doubtless be applied *à fortiori* to *constructive trusts*. In future therefore *bona fide* purchasers of *real estate* from a trustee for valuable consideration cannot be called in question by the *cestui que trusts*, after twenty years have elapsed from the time of the conveyance, whether the purchase was made with or without notice of the trust;(i) unless the *cestui que trusts* were under disability at that time, in which case they or their representatives will be allowed ten years from the termination of their disability or from their death;(k) although in no case could such a conveyance be questioned after a lapse of forty years.(l) However, this protection is not extended to cases of fraud; for the 26th section of the same statute provides, that time shall run only from the discovery of the fraud by the party beneficially interested, or from the period when with reasonable diligence it might have been discovered. Moreover, time operates as a bar to the claim of the *cestui que trusts* only as against the *purchaser* and those claiming

(d) *Mortlock v. Buller*, 10 Ves. 311; vide supra [Powers of Sale]. Ante, 477, and see 281.

(e) Ante, p. 164; *Winged v. Lefebury*, 1 Eq. Abr. 32; *Mead v. Orrery*, 3 Atk. 238; *Earl Brook v. Bulkeley*, 2 Ves. 498; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Adair v. Shaw*, 1 Sch. & Lef. 262.

(f) *Bovey v. Smith*, 1 Vern. 145; *Kennedy v. Daly*, 1 Sch. & Lef. 379.

(g) *Sanders v. Dehew*, 2 Vern. 271; *Pye v. George*, 1 P. Wms. 128; *Mansell v. Mansell*, 2 P. Wms. 681.

(h) *Brook v. Bulkeley*, 2 Ves. 498; *Molony v. Kernan*, 2 Dr. & W. 31; *Butcher v. Stapely*, 1 Vern. 363.

(i) See section 2.

(k) Sect. 16.

(l) Sect. 17.

¹ Ante, 164, &c., and notes.

under him; and the remedies for the *cestui que trusts* against the trustee still remain untouched by the statute.(m)

The provisions of the act are confined to interests in land or real estate, therefore a purchaser from a trustee with notice of chattels *personal* may still be called to account by the *cestui que trusts* notwithstanding his length of enjoyment; subject to the rule of equity against affording relief upon stale demands.(n)

But where a trustee, being in possession of the trust estate, makes a *bona fide* conveyance of it for valuable consideration to a purchaser, who has no notice of the trust, the title of the purchaser will be good both at law and in equity, for he has equal equity with the *cestui que* [510] trust, and the *legal conveyance of course gives him the priority at law.(o) And hence it is an important subject for consideration, in dealings between trustees and third persons, to ascertain what will be sufficient notice of a trust to a purchaser.

This notice may be either actual or constructive, and there is no difference between actual and constructive notice in its consequences.(p)

Of actual notice little can be said. It requires no definition; and it need only be remarked, that to constitute a binding notice, it must be given by a person interested in the property, and in the course of the treaty for the purchase. Vague reports from persons having no interest, will not affect the purchaser's conscience; nor will he be bound by notice in a previous transaction, which he may have forgotten.(q)¹ Thus in *Wildgoose v. Weyland*,(r) a man came to the purchaser of a house, and told him to take heed how he bought it, for the vendor had nothing in it but in trust for A. However, the

(m) See Section 25.

(n) Ante, Pt. I. Div. II. Ch. II. Sect. 1; [p. 168, and notes.]

(o) Millard's case, 2 Freem. 43; *Finch v. Earl of Winchelsea*, 1 P. Wms. 278, 9; 1 Cruis. Dig., Tit. 12, Ch. 4, s. 12.

(p) *Sheldon v. Cox*, Ambler 626; 2 Sugd. V. & P. 276, 9th edit.

(q) 2 Sugd. V. & P. 276, 9th edit.

(r) Ibid. Goulds, 147, Pl. 67, [but see the remarks on this case in *Lewis v. Bradford*, 10 Watts, 79; and *Curren v. Hart*, Hardin, 37,] and *Cornwallis's case*, Toth. 254; and see *Jones v. Smith*, 1 Hare, 43, 53; [1 Phill. 244.]

¹ See notes to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. p. i. 145, 1st Am. Ed.; *Kerns v. Swope*, 2 Watts, 78; *Jaques v. Weeks*, 7 Id. 267; *Epley v. Witheron*, Id. 176; *Bradford v. Weeks*, 10 Id. 79; *Miller v. Cresson*, 5 W. & S. 284; *Flagg v. Mann*, 2 Sumn. 491; *Lewis v. Madisons*, 1 Munford, 303; *King v. Travis*, 4 Heyw. 280; *Meals v. Brandon*, 16 Penn. St. R. 225; *Boggs v. Varner*, 6 W. & S. 471; *Butler v. Stevens*, 26 Maine, 484. But when the information is sufficiently clear to put the purchaser on inquiry, it has been held immaterial whether it comes from the party interested or a stranger. *Curtis v. Mundy*, 3 Metc. 406; *Jackson v. Cadwell*, 1 Cowen, 622; *Pearson v. Daniel*, 2 Dev. & Batt. Eq. 360; *Curren v. Hart*, Hardin, 37.

purchaser was held not to have notice, although this information proved correct, because such flying reports were many times fables and not truth, and if it should be admitted for sufficient notice, then the inheritance of every man might easily be slandered. So in a more modern case,(s) it was held not to be sufficient notice, to assert that some other person claims a title.(s) And notice of a mere general claim, as by telling the intended purchaser, that "he would purchase at his peril," will not affect him with notice of an instrument, of which he has no other knowledge.(t) However, according to the advice of Sir E. Sugden, no person could be advised to accept a title, concerning which there were any such reports or assertions, without having them elucidated; because what one judge might think a flying vague report, or a mere assertion, another might deem a good notice.(u)

The notice will also be insufficient, unless it is given to the purchaser *in the same transaction*; for a purchaser is not bound to carry in his recollection a notice, which he may have received on a former occasion:(x) and we shall presently see, that the same rule applies with even greater force to persons acting as agents.(y)

Verbal declarations will constitute sufficient actual notice of a trust, if such a notice be properly proved.(z)

Constructive notice in its nature is no more than evidence of notice, the presumptions of which are so violent, that the court will not allow even of its being controverted.(a) But this definition often leaves it very difficult to say, what will or will not amount to constructive notice,(b) and the decisions on this point are not universally satisfactory or even consistent.

*A public act of parliament binds all mankind; therefore, a trust created or noticed by such an act will be binding on [*511] a purchaser for valuable consideration from the trustees in the ab-

(s) *Jolland v. Stainbridge*, 3 Ves. 478, 486.

(t) 3 Ves. 486.

(u) 2 Sugd. V. & P. 277, 9th edit.; see the remarks of Hale, C. B., in *Fry v. Porter*, 1 Mod. 300; and see *Butcher v. Stapely*, 1 Vern. 363.

(x) *East Grinstead's case*, Bridgm. Duke Char. Use, 638; *Hamilton v. Royse*, 2 Sch. & Lef. 315, 327; 2 Sugd. V. & P. 276, 7, 9th edit. [See *Farnsworth v. Childs*, 4 Mass. 640; but see *Bellas v. Lloyd*, 2 Watts, 401; and remarks in 2 Lead. Cas. Eq. pt. i. page, 154, 1 Am. Ed.]

(y) Post.

(z) See *Weymouth v. Boyer*, 1 Ves. jun. 425. [*Mense v. McLean*, 13 Missouri, 298; *Nelson v. Sims*, 1 Cushm. (Miss.) 383; *Ingram v. Phillips*, 3 Strobb. R. 369.]

(a) 2 Sugd. V. & P. 278, 9th edit. [See *Rogers v. Jones*, 8 N. H. 264; *Farnsworth v. Childs*, 4 Mass. 640; *Griffith v. Griffith*, 1 Hoff. Ch. 156.]

(b) See *Jones v. Smith*, 1 Hare, 43, 55 [aff'd, 1 Phill. 244]; where the law and all the authorities on the question of constructive notice are elaborately considered by V. C. Wigram.

sence of any positive notice.(c) But a private act of parliament does not, of itself, amount to notice;(d) and it is immaterial that the act contains a direction that it shall be judicially taken notice of as a public act.(e)

So a *lis pendens* respecting a trust, will, of itself, be notice to a purchaser.(f)¹ And when a bill is filed, the *lis pendens* begins from the service of the *subpœna*, although a *subpœna* served will not amount to a sufficient *lis pendens* unless a bill be filed.(g) The question in the suit must relate to the estate itself, and not solely to money secured on it,(h)² although a bill to perpetuate testimony, and

(c) 2 Sugd. V. & P. 280, 9th edit.; Bishop of Winchester v. Paine, 11 Ves. Earl of Pomfret v. Lord Windsor, 2 194; Landon v. Morris, 5 Sim. 247. Ves. 480.

(d) 2 Ves. 480.

(e) 2 Sugd. V. & P. 280; see 3 Bos. & P. 578.

(f) Style v. Martin, 1 Ch. Ca. 150; Sorrell v. Carpenter, 2 P. Wms. 482; Worsley v. Earl of Scarborough, 3 Atk. 392; Gore v. Stackpole, 1 Dow. 30; (g) Anon. 1 Vern. 318. [See Lyttle v. Pope, 11 B. Monr. 318; Drew v. Earl of Norbury, 3 J. & Lat. 282. Publication as to a non-resident defendant, is equivalent to service of subpœna. Chaudron v. Magee, 8 Alab. 570.] (h) Worsley v. Earl of Scarborough, 3 Atk. 392.

¹ Murray v. Ballou, 1 J. C. R. 566; Murray v. Finster, 2 Id. 155; Heatley v. Finster, Id. 158; Murray v. Lylburn, Id. 441; Jackson v. Ketcham, 8 Johns. R. 479; Zeiter v. Bowman, 6 Barb. S. C. 133; Owings v. Myers, 3 Bibb. 279; Bolling v. Carter, 9 Alab. 921; Green v. White, 7 Blackf. 242; Harris v. Carter, 3 Stewart, 233; Tongue v. Morton, 6 H. & J. 21; Price v. White, Bail. Eq. 244; Blake v. Heyward, Id. 208; Walker v. Butz, 1 Yeates, 574; Griffith v. Griffith, 1 Hoffm, Ch. 153. Such purchase, indeed, though *bona fide*, is void at law, as champertous. Jackson v. Andrews, 7 Wend. 152; Jackson v. Ketcham, 8 John. R. 479; but see Camp v. Forrest, 13 Alab. 114. In Newman v. Chapman, 2 Rand. 93, however, the policy of the recording acts was considered to have changed the rule on the subject in this country; and in City Council v. Page, Spear's Eq. 159, it was held that *lis pendens* would not supply the defect of registry. The general doctrine applies equally to choses in action, such as mortgages: Murray v. Lylburn, 2 J. C. R. 441; see Scudder v. Van Amburgh, 4 Edw. Ch. 29. The bill must, however, refer with sufficient certainty to the lands in question, at least, to put the purchaser on inquiry: Price v. White, Bail. Eq. 244; Lewis v. Mew, 1 Strobh. Eq. 180; Green v. Slayter, 4 J. C. R. 38; Lodge v. Simontown, 2 Pa. Rep. 449; see Holt v. Dewalt, 4 Hare, 446. But *lis pendens* will not affect a prior legal or equitable right. Stuyvesant v. Shore, 1 Sandf. Ch. 419, 2 Barb. Ch. 151; Parks v. Jackson, 11 Wend. 452; Trimble v. Boothby, 14 Ohio, 109; Gibler v. Trimble, Id. 323.

² The order for the appointment of a receiver on the petition of a judgment creditor, is not *lis pendens*, so as to affect a purchaser with notice of the judgment. Tenison v. Sweeny, 1 J. & Lat. 710. But in Scudder v. Van Amburgh, 4 Edw. Ch. 29, it was thought that a purchaser pending a creditor's bill had constructive notice. So of an administration suit: Drew v. Earl of Norbury, 3 J. & Lat. 282. So of a suit to avoid a conveyance as fraudulent: Copenheaver v. Huffaker, 6 B. Monr. 18. But a suit for divorce and for alimony out of the husband's land is not *lis pendens*, as against a *bona fide* purchaser of the land: Brightman v. Brightman, 1 Rhode Island, 120.

to establish a will, is a sufficient *lis pendens*.⁽ⁱ⁾ There must also be a continuance of the *litis contestatio*; and although it is not essential to continue a constant and vigorous prosecution of the suit (according to the rule laid down by Lord Bacon,^(k)) yet something must be done to keep the *lis* alive and in activity, otherwise the purchaser will not be affected with notice of its existence.^(l) Lord Redesdale appears to have considered, that a purchase, made after the dismissal of a bill, was a purchase *pendente lite*, if an appeal were afterwards brought, since it was still a question whether the bill were rightly dismissed.^(m) However, it was not necessary to decide whether a purchaser, under such circumstances, would be fixed with constructive notice of the adverse title.⁽ⁿ⁾ (1)

Decrees of courts of equity, where there is no longer any *lis pendens*, are not, of themselves, notice to a purchaser.^(o) But it is otherwise, where the decree does not put an end to the suit, as a decree for account; for, in that case, there is still a *litis pendencia*.^(oo) And the purchaser will of course be bound by any decree, of which he has actual notice: and his presence in court, when the decree is pronounced, will constitute sufficient actual notice for this purpose.^(p)

The registration of a deed will not, of itself, fix a purchaser with constructive notice of its trusts.^(q)¹ But it will be otherwise, if the

(i) *Garth v. Ward*, 2 Atk. 174.

(k) See *Bishop of Winchester v. Paine*, 11 Ves. 200.

(l) *Kinsman v. Kinsman*, 1 R. & M. 617, 622; see *Preston v. Tubbin*, 1 Vern. 286; *Bishop of Winchester v. Paine*, 11 Ves. 194; *Landon v. Morris*, 5 Sim. 260. [See *Clarkson v. Morgan*, 6 B. Monr. 441; *Shiveley v. Jones*, Id. 274; *Watson v. Wilson*, 2 Dana, 406; *Gibler v. Trimble*, 14 Ohio, 323; *Trimble v. Boothby*, Id. 116; *Price v. McDonald*, 1 Maryl. R. 483.]

(m) *Gore v. Stackpole*, 1 Dow. 31; [*Debell v. Foxworthy*, 9 B. Monr. 228; *Watson v. Wilson*, 2 Dana, 406.]

(n) See 2 Sugd. V. & P. 282, 9th edit.

(o) *Worsley v. Earl of Scarborough*, 3 Atk. 392; 2 Sugd. V. & P. 283, 9th edit.

(oo) *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Kinsman v. Kinsman*, 1 R. & M. 622. [*Turner v. Crebill*, 1 Ohio, 370; *Blake v. Heyward*, Bail. Eq. 208; *Price v. White*, Id. 234; see *Winborn v. Gorrell*, 3 Ired. Eq. 117.]

(p) *Harvey v. Montague*, 1 Vern. 124.

(q) *Morecock v. Dickens*, Ambl. 678; *Cater v. Cooley*, 1 Cox. 82; *Williams v. Sorrel*, 4 Ves. 389; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Underwood v. Ld. Courtown*, 2 Sch. & Lef. 64; *Wiseman v. Westland*, 1 Y. & J. 117; *Hodgson v. Dean*, 2 S. & St. 221.

(1) By 2 & 3 Vict. c. 11, s. 7, no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless a memorandum or minute is duly registered as directed by the act.

¹ The rule is otherwise under the Recording Acts, in force generally in the United States, and it is held that the registry of a deed or mortgage, is notice of its contents, and of equities created thereby, or arising therefrom, to all persons claiming under the grantor, any title held by him at the time of the conveyance: 4 Kent's Comm. 174; *American notes to Le Neve v. Le Neve*, 2 Lead. Cas. Eq. p. i. 160; and cases cited, among which are *Cushing v. Ayer*, 25 Maine, 383; *McMechan*

purchaser *search the register*, for, in that case, he will be deemed to have had notice *of the deed ;(r) unless indeed the search be [*512] expressly confined to a limited period, in which case it has been

(r) *Bushell v. Bushell*, 1 Sch. & Lef. 103.

v. Griffing, 3 Pick. 11 ; *Peters v. Goodrich*, 3 Conn. 146 ; *Parkist v. Alexander*, 1 J. C. R. 394 ; *Wardell v. Wadsworth*, 20 Johns. R. 663 ; *Plume v. Bone*, 1 Green's R. 63 ; *Evans v. Jones*, 1 Yeates, 174 ; *Irvin v. Smith*, 17 Ohio, 226 ; *Martin v. Sale*, Bail. Eq. 1 ; *Shultz v. Moore*, 1 McLean, 520 ; *Hughes v. Edwards*, 9 Wheat. 489 ; see *Mundy v. Vawtier*, 3 Gratt. 518, where the record of a deed of all the grantor's property, real and personal, was held not notice. This does not, however, apply where the recording of the instrument is not legally requisite, or it is defectively executed or acknowledged : cases in notes to *Le Neve v. Le Neve*, ut supra ; *Moore v. Auditor*, 3 Henn. & Munf. 445 ; *Sumner v. Rhodes*, 14 Conn. 135 ; *Walker v. Gilbert*, 1 Freem. Ch. 85 ; *Harper v. Reeves*, Id. 323 ; *Isham v. Bennington Iron Co.*, 19 Vern. 230 ; *Graham v. Samuel*, 1 Dana, 166 ; *Pitcher v. Barrow*, 17 Pick. 371 ; *Thomas v. Grand Gulf Bank*, 9 Sm. & M. 201 ; *Green v. Drinker*, 7 W. & S. 440 ; *Shultz v. Moore*, 1 McLean, 520 ; *Brown v. Budd*, 2 Carter (Ind.), 442 ; *Choteau v. Jones*, 11 Illinois, 300 ; nor where it is recorded in a different county from that in which the lands lie : *Astor v. Wells*, 4 Wheat. 466 ; *Kerns v. Swope*, 2 Watts, 15 ; or, *a fortiori*, in another State. *Hundley v. Mount*, 8 S. & M. 387 ; *Lewis v. Baird*, 3 McLean, 56 ; *Crosby v. Huston*, 1 Texas, 203. The record also is not notice to those not claiming title under the same grantor, ante, p. 172, note 2 ; 2 Lead. Cas. Eq. pt. i. 162.

An unrecorded deed is, in general, good between the parties : 4 Kent, 456, cases cited. And where a subsequent purchaser has knowledge of the existence of such a deed, it is equivalent as to him, to registry, and is treated as such both at law and in equity : *Jackson v. Leek*, 19 Wend. 339 ; *Jackson v. Sharp*, 9 John. R. 163 ; *Porter v. Cole*, 4 Greenl. 20 ; *Farnsworth v. Childs*, 4 Mass. 637 ; *Martin v. Sale*, Bail. Eq. 1 ; *Correy v. Caxton*, 4 Binney, 140 ; *Solms v. McCullough*, 5 Barr, 473 ; *Pike v. Armistead*, 1 Dev. Eq. 110 ; *Van Meter v. McFadden*, 8 B. Monr. 442 ; *Ohio Ins. Co. v. Ledyard*, 8 Alab. 866 ; *McRaven v. McGuire*, 9 Sm. & M. 34 ; *McConnel v. Reed*, 4 Scamm. 117 ; Notes to *Le Neve v. Le Neve*, ut supra. But see, in Ohio, as to mortgages : *Mayham v. Coombs*, 14 Ohio, 428.

But the authorities are at variance with regard to the character of the notice, which will postpone a recorded to a prior unrecorded deed. The cases in England, since *Hine v. Dodd*, 2 Atkyns, 275, place the relief given against the subsequent purchaser, which is there only in equity, on the ground of fraud (see *Le Neve v. Le Neve*, ut supra ; *Fleming v. Burgin*, 2 Ired. Eq. 584 ; *Ohio Ins. Co. v. Ross*, 2 Mary. Ch. Dec. 35), on which alone, it is supposed, the act of parliament could be broken in upon ; and, therefore, require clear proof of actual notice, which is considered equivalent to fraud. In some of the States, this doctrine has been adopted, and constructive notice is held to be insufficient : *Norcross v. Widgery*, 2 Mass. 509 ; *Bush v. Golden*, 17 Conn. 594 ; *Harris v. Arnold*, 1 Rhode Island, 125 ; *Frothingham v. Stacker*, 11 Missouri, 77 ; *Martin v. Sale*, Bail. Eq. 1 ; *Fleming v. Burgin*, 2 Ired. Eq. 584 ; *Ingram v. Phillips*, 3 Strobb. R. 369 ; see *Burt v. Cassety*, 12 Alab. 734 ; *McCaskle v. Amarine*, 12 Alab. 17. Thus, possession of the prior grantee, except, perhaps, where distinctly brought home to the knowledge of the purchaser, is held to be insufficient : *Harris v. Arnold* ; *Frothingham v. Stacker*. In Maine and Massachusetts, there are statutory provisions to the same effect : *Spofford v. Weston*, 29 Maine, 140 ; *Butler v. Stevens*, 26 Maine, 489 ; *Curtis v. Murphy*, 3 Metcalf, 405 ; *Hennessey v. Andrews*, 6 Cush. 170. In Pennsylvania and New York, the

held that the limited search will exclude the presumption of a general search, and the purchaser will not be deemed to have notice of any instrument not registered *within the limited period.*(s)

A similar rule prevails with regard to the court rolls of a manor, for a purchaser of a copyhold will be affected with notice of all instruments appearing on the court rolls, so far back as a search is necessary for the security of the title.(t)

Although the deed creating or giving notice of the trust was attested by the purchaser as a witness, he will not on that account be fixed with notice of its contents; for an attesting witness is not bound to read the instrument.(u)

But it is settled, that whatever is sufficient to put a purchaser upon an inquiry, which would lead to a discovery of the trust, will be good constructive notice.(x)¹ And on this ground a purchase from a trustee, *who is not in actual possession* of the estate, could rarely if ever

(s) *Hodgson v. Dean*, 2 S. & St. 221; *Wms.* 393; *Welford v. Beezley*, 1 Ves. affirmed by Lord Chancellor, July, 1825. 6; *Beckett v. Cordley*, 1 Bro. C. C. 357;

(t) *Pearce v. Newlyn*, 3 Mad. 186; 2 *Sugd. V. & P.* 296, 9th edit. [But see *Boling v. Ewing*, 9 Dana, 76.]

Hansard v. Hardy, 18 Ves. 462, and *Bugden v. Bignold*, 2 N. C. C. 300. (x) *Smith v. Low*, 1 Atk. 489; *Taylor v. Baker*, 1 Dan. 71; 2 *Sugd. V. & P.*

(u) *Mocatta v. Murgatroyd*, 1 P. 290, 9th edit.

decisions are not consistent. In *Scott v. Gallagher*, 14 S. & R. 333, and *Boggs v. Varner*, 6 W. & S. 469, the language of the court is in accordance with the doctrine just stated. But there is no doubt that in the former State, open and notorious possession is sufficient notice of an unrecorded deed: *Krider v. Laffarty*, 1 Wharton, 303; *Randall v. Silverthorn*, 4 Barr, 173. So in New York, *Tuttle v. Jackson*, 6 Wend. 213, has established, contrary to *Dey v. Dunham*, 2 J. C. R. 162, and other cases, that constructive notice is enough to postpone a subsequent purchaser; and in *Grimstone v. Carter*, 3 Paige, 421, it was held, in general, that equities and agreements to convey, were not within the recording acts. In Maryland, in the case of *Price v. McDonald*, 1 Maryl. R. 414, a similar doctrine was held by the Court of Appeals; though in *Ohio Ins. Co. v. Ross*, 2 Maryl. Ch. Dec. 3, and *Gill v. McAltee*, Id. 268, the English rule was supported and followed by Chancellor Johnson. That possession is notice, has been also held in *Webster v. Maddox*, 6 Maine, 256; *Kent v. Plummer*, 7 Id. 464 (before the statute referred to above); *Buck v. Holloway*, 2 J. J. Marsh. 100; *Hopkins v. Garrard*, 7 B. Monr. 312; *Colby v. Kenniston*, 4 N. H. 262; *Griswold v. Smith*, 10 Vermont, 452; and in *Landis v. Brant*, 10 How. U. S. 348, where indeed, the point was even considered to be unquestioned. This, however, is a mistake. This subject is treated of with great ability and acuteness in the notes to *Le Neve v. Le Neve*, ut supra, where the cases will be found collected.

¹ *Jackson v. Caldwell*, 1 Cowen. 622; *McGeher v. Gindrat*, 20 Alab. 100; *Barnes v. McClinton*, 3 Pa. R. 69; *Westervelt v. Huff*, 2 Sandf. Ch. 98; *Flagg v. Mann*, 2 Sumn. 486; *Sigourney v. Munn*, 7 Conn. 324; *Bingaman v. Hyatt*, 1 Sm. & M. Ch. 437; *Blaisdell v. Stevens*, 10 Verm. 179; *Laselle v. Barnett*, 1 Blackf. 150; *Doyle v. Teas*, 4 Scamm. 202; *Tardy v. Morgan*, 3 McLean, 358; *Oliver v. Piatt*, 3 How. U. S. 333; *Hood v. Fahnestock*, 1 Barr, 470; *Knouff v. Thompson*, 16 Penn. St. R. 357.

be supported where the interest purchased is not reversionary; for knowledge of the possession of the *cestui que trust* would be notice of an interest in the estate, the nature and extent of which the purchaser would be bound to ascertain.¹ And it would be extremely difficult to conclude a *bona fide* purchase, without the fact of a third party's being in possession becoming known.(y) Indeed, it has been laid down by Lord Eldon, that a plea of a purchase for valuable consideration without notice, must always contain an averment, *that the vendor was in possession*,(z) from which it would follow that the trustee's being in possession is in every case essential to the validity of the sale by him of a present interest in an estate; although this rule of course cannot apply where the interest is in reversion.(a)

So if the purchaser be aware that the title-deeds are in the possession of the *cestui que trust*, he will be held to have constructive notice of the interest claimed by the possessor of the deeds.(b) But the mere absence of title-deeds is not sufficient of itself to put him upon inquiry.(c) Again, if the purchaser be informed of the existence of any settlement affecting the estate, he will be bound to inquire into and ascertain its provisions; and if he complete his purchase without making this inquiry, he will be affected with constructive notice of any trust created by the settlement.(d) However, the knowledge of [*513] *the draft of a deed being prepared*, will not affect a purchaser with notice of the execution of the deed, although it was in fact afterwards executed; for a purchaser is not bound by the knowledge of a mere *intention* to execute a deed.(e) And where a

(y) *Daniels v. Davidson*, 17 Ves. 433; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Allen v. Anthony*, 1 Mer. 282; *Jones v. Smith*, 1 Hare, 60; *Hierne v. Mill*, 13 Ves. 120; *Powell v. Dillon*, 2 Ball. & B. 416. [*Bailey v. Richardson*, 15 Engl. L. & Eq. 218.]

(z) *Walwyn v. Lee*, 9 Ves. 32; and see *Jackson v. Rowe*, 4 Russ. 523; *Trevarian v. Mosse*, 1 Vern. 246.

(a) See *Hughes v. Garth*, 2 Ed. 168; *Ambl.* 421.

(b) *Hierne v. Mill*, 13 Ves. 114, 122; *Jones v. Smith*, 1 Hare, 61; [1 Phill. 244.]

(c) *Plumb v. Fluitt*, 2 Anstr. 432; *Evans v. Bicknell*, 6 Ves. 174; *Jones v.*

Smith, 1 Hare, 63. [1 Phill. 244; see *Allen v. Knight*, 11 Jur. 527; aff'g. S. C. 5 Hare, 272; *Berry v. Ins. Co.*, 2 J. C. R. 603 (a).]

(d) *Ferrars v. Cherry*, 2 Vern. 383; *Dunch v. Kent*, 1 Vern. 319; *Kelsall v. Bennett*, 1 Atk. 522; *Taylor v. Baker*, 5 Price, 306; *Jackson v. Rowe*, 2 S. & St. 472; *Jones v. Smith*, 1 Hare, 55; *Hall v. Smith*, 14 Ves. 426; *Eyre v. Dolphin*, 2 Ball. & B. 301. [See *Proddy v. Williams*, 3 J. & Lat. 1; *Price v. McDonald*, 1 Maryl. R. 414.]

(e) *Cothay v. Sydenham*, 2 Bro. C. C. 391.

¹ See *Chesterman v. Gardner*, 5 J. C. R. 29; *Sailor v. Hertzog*, 4 Wharton, 259; *Krider v. Lafferty*, 1 Whart. 303; *Hardy v. Summers*, 10 G. & J. 316; *Buck v. Holloway*, 2 J. J. Marsh, 178; *Kent v. Plummer*, 7 Greenlf. 464; *Flagg v. Mann*, 2 Sumn. 556; *Scroggins v. McDougald*, 8 Alab. 385; and Am. notes to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. pt. i. 150. See as to the effect of possession under the Recording Acts, note, ante, p. 511.

purchaser is informed, that a settlement had been made on the marriage of the vendor, but upon inquiry, he is told that the settlement did not include the property in question, it has been decided in a recent case, that it is not incumbent on him to have it produced and examined before completing the purchase.(f)

Where the purchaser has actual or constructive notice of the existence of any instrument, he will also be fixed with notice of all deeds or other instruments referred to or mentioned in that instrument, and will be bound by the trusts created by them.(g)¹ It has been decided, however, that the obligation for a purchaser to inquire into such earlier documents will not usually extend beyond the time, which has been fixed as the proper root of a marketable title, viz., the period of sixty years.(h)

A purchaser cannot protect himself from the consequences of constructive notice by wilfully and designedly abstaining from making any inquiries, for the very purpose of avoiding notice; but such conduct would render him liable as a participator in the fraud of the trustee.(i) And even in the absence of proof of a wilful blindness, he might be considered guilty of such *crassa negligentia*, as in equity amounts to actual fraud.(k)

It will in general be presumed, that every purchaser has investigated his vendor's title before completing his purchase; and if the title cannot be made out, but through a deed, which gives or leads to notice of a trust, he will be assumed to have had notice of that trust;(l) unless, indeed, he can show why he had not inquired into the title with a view to his protection.(m) And if the deed, which carries notice of the trust, be found in the possession of the purchaser, that

(f) *Jones v. Smith*, 1 Hare, 43. [Aff. 1 Phill. 244; see, however, the remarks in *Price v. McDonald*, 1 Maryl. R. 414.]

(g) *Bisco v. Earl of Banbury*, 1 Ch. Ca. 287; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Mertins v. Joliffe*, Ambl. 311; *Davies v. Thomas*, 2 Y. & Coll. 234; *Jones v. Smith*, 1 Hare, 55 [1 Phill. 254]; *Neeson v. Clarkson*, 2 Hare, 173; *Pearce v. Newlyn*, 3 Mad. 186; 2 Sugd. V. & P. 293, 9th edit.

(h) *Prosser v. Watts*, 6 Mad. 59.

(i) *Kennedy v. Green*, 3 M. & K. 699; *Whitbread v. Jordan*, 1 Y. & Coll. 303;

Jones v. Smith, 1 Hare, 55; see *Surman v. Barlow*, 2 Ed. 165; *Hiern v. Mill*, 13 Ves. 120.

(k) *Hiern v. Mill*, 13 Ves. 119; *Jones v. Smith*, 1 Hare, 56. [1 Phill. 224; see *Doyle v. Teas*, 4 Scamm. 202.]

(l) *Moor v. Bennett*, 2 Ch. Ca. 246; *Mertins v. Joliffe*, Ambl. 311; *Jackson v. Rowe*, 2 S. & St. 475; *Neeson v. Clarkson*, 2 Hare, 173. [*Leiby v. Wolf*, 10 Ohio, 83; *Woods v. Farmere*, 7 Watts, 385; *Oliver v. Piatt*, 3 How. U. S. 333.]

(m) See *Neeson v. Clarkson*, 2 Hare, 173.

¹ See *Wormely v. Wormely*, 1 Brock. 330; 8 Wheat. 42; *Hagthorp v. Hook*, 1 G. & J. 301; *Johnston v. Gwathmey*, 4 Litt. 318; *Scott v. McCullough*, 13 Missouri, 14; *Leiby v. Wolf*, 10 Ohio, 83; *Honore v. Blakewell*, 6 B. Monr. 73; *Oliver v. Piatt*, 3 How. U. S. 333; *Woods v. Farmere*, 7 Watts, 385; *Christmass v. Mitchell*, 3 Ired. Eq. 535; *Nelson v. Allen*, 1 Yerg. 360; *McAleer v. McMullin*, 2 Barr, 32.

will *prima facie* be sufficient to fix him with notice.(n) And so where a trust is noticed, by recital or otherwise, on the face of the very conveyance under which the purchaser holds, it would be yet more difficult to maintain that he purchased without notice.(o)

Notice, either actual or constructive, will be equally binding, whether it be given to the purchaser himself, or to a person acting as [*514] his agent,(p) *or solicitor,(q) or counsel.(r) And the same rule prevails, although the agent, attorney, or counsel, be himself the vendor,(s) or be employed for both vendor or purchaser.(t) And so notice to the town agent of the purchaser's attorney has been held to be notice to the purchaser.(u) But it has been held that the agent must be confidentially employed by the purchaser, or the latter will not be affected with notice to the former.(x)¹

And the notice to the agent, or attorney, or counsel, must be in the same transaction, because he may very easily have forgotten it;(y) although there may be special circumstances which would render the knowledge acquired by an agent, &c., in one transaction, sufficient notice to the employer or client in another; as where the prior trans-

(n) *Whitfield v. Fausset*, 1 Ves. 387; *Mertins v. Joliffe*, Ambl. 313.

(o) *Maples v. Ackland*, 3 Russ. 273; *Neeson v. Clarkson*, 2 Hare, 172; *Newstead v. Searles*, 1 Atk. 267; *Kelsall v. Bennett*, 1 Atk. 522.

(p) *Alney v. Kendal*, 1 Ch. Ca. 38; *Brotherton v. Hutt*, 2 Vern. 574; *Jennings v. Moore*, 2 Vern. 609; *Blenkarn v. Jennings*, 2 Bro. P. C. 278; *Maddox v. Maddox*, 1 Ves. 61; *Ashley v. Baillie*, 2 Ves. 370; *Downes v. Powers*, 2 Ball & B. 491. [*Knouff v. Thompson*, 16 Penn. St. R. 359; see *Murray v. Ballou*, 1 J. C. R. 54; *White v. Carpenter*, 2 Paige, 217; *Boggs v. Varner*, 6 W. & S. 469.]

(q) *Newstead v. Searles*, 1 Atk. 267; *Le Neve v. Le Neve*, 1 Ves. 64; 3 Atk. 646; *Tunstall v. Trappes*, 3 Sim. 301; *Mountford v. Scott*, 3 Mad. 34; T. & R. 280.

(r) *Preston v. Tubbin*, 1 Vern. 287; *Le Neve v. Le Neve*, 3 Atk. 646.

(s) *Sheldon v. Cox*, Ambl. 624; *Dryden v. Frost*, 3 M. & Cr. 620. [See *Majoribanks v. Hoveden*, 1 Drury, 11.]

(t) *Le Neve v. Le Neve*, 3 Atk. 648; *Toulmin v. Steere*, 3 Mer. 210; *Kennedy v. Green*, 3 M. & K. 699; *Dryden v. Frost*, 3 M. & C. 670; *Fuller v. Benett*, 2 Hare, 394; *Winter v. Lord Anson*, 3 Russ. 493.

(u) *Norris v. Le Neve*, 3 Atk. 26.

(x) *Chandos v. Brownlow*, 2 Ridg. P. C. 394.

(y) *Fitzgerald v. Fauconberg*, Fitz. 297; *Warwick v. Warwick*, 2 Atk. 294; *Worsley v. Earl of Scarborough*, Id. 392; *Lowther v. Carlton*, 2 Atk. 242; *Ashley v. Baillie*, 2 Ves. 370; *Hiern v. Mill*, 13 Ves. 120; *Mountford v. Scott*, 3 Mad. 34. [*Bracken v. Miller*, 4 Watts & S. 102; *Hood v. Fahnestock*, 8 Watts, 489; *Henry v. Morgan*, 2 Binn. 497.]

¹ See as to notice through agent, ante, 165, and note. In *Howard Ins. Co. v. Halsey*, 4 Sandf. S. C. 571, it was said that this rule is based on the duty of the agent to communicate to his principal facts affecting the latter's interests; and therefore it was there held, that where an attorney on a suit to foreclose, had made searches, by which he obtained notice of a deed, but the proceeding, and thus his agency, was terminated suddenly, before the inquiry was completed, this was not notice to his client.

action was followed so close by the other, as to render it impossible to give a man credit for having forgotten it.(z)

Notice before actual payment of all the purchase-money (although it be secured),(a) and the conveyance actually executed),(b) or before the execution of the conveyance (notwithstanding that the money be paid),(c) is equivalent to notice before the contract.¹

The plea of a purchase for valuable consideration without notice, when pleaded in bar to a suit, should state the conveyance;(d) and it must contain an averment, that the vendor was seised, or pretended to be seised, at the time of the conveyance,(e) and, also, that he was then in possession(f) (unless the estate be reversionary, in which case the state of the title must be shown by the plea).(g) There must also be an averment, that the consideration-money was *bona fide* and truly paid.(h) However, a valuable consideration, such as that of marriage, will be sufficient to support a plea of purchase without notice, if it be properly stated.(i) Moreover, the plea must deny notice of the plaintiff's title or claim before the execution of the conveyance and payment of the consideration; *for till [*515] then the transaction is not complete;(k) and this denial must be made, whether the notice is charged in the bill or not.(l) And if

(z) *Mountford v. Scott*, T. & R. 280; *Hargreaves v. Rothwell*, 1 Keen, 154; see *Fuller v. Benett*, 2 Hare, 405, 6; *Perkins v. Bradley*, 1 Hare, 230. [*Majoribanks v. Hoveden*, 1 Drury, 11.]

(a) *Moore v. Mayhew*, 1 Ch. Ca. 34; *Tourville v. Naish*, 3 P. Wms. 307; *Story v. Lord Windsor*, 2 Atk. 630; *Hardingham v. Nicholls*, 3 Atk. 304.

(b) *Jones v. Stanley*, 2 Eq. Ca. Abr. 685.

(c) *Wigg v. Wigg*, 1 Atk. 384; 2 Sugd. V. & P. 274, 9th edit.

(d) *Aston v. Aston*, 3 Atk. 302; *Harrison v. Southcote*, 2 Ves. 396; 2 Sugd. V. & P. 304, 9th edit. [*Snelgrove v. Snelgrove*, 4 Desaus. 274, where the cases are cited.]

(e) *Story v. Lord Windsor*, 2 Atk. 630; *Head v. Egerton*, 3 P. Wms. 279; *Walwyn v. Lee*, 9 Ves. 32; *Jackson v. Rowe*, 4 Russ. 514. [*Snelgrove v. Snelgrove*, ut supra; *Tompkins v. Wheeler*, 4 Sandf. Ch. 97.]

(f) *Walwyn v. Lee*, 9 Ves. 32; *Jackson v. Rowe*, 4 Russ. 523; *Trevanian v. Mosse*, 1 Vern. 246. [*Snelgrove v. Snelgrove*, ut supra.]

(g) *Hughes v. Garth*, 2 Ed. 168; *Ambly* 421.

(h) *Moore v. Mayhew*, 1 Ch. Ca. 34; *Maitland v. Wilson*, 3 Atk. 814; *Molony v. Kerwan*, 2 Dr. & W. 31; see 2 Atk. 241. [*Highe v. Batte*, 10 Yerg. 535; *Bonnell v. Read*, 21 Conn. 592; see ante, 165, note.]

(i) *Jackson v. Rowe*, 2 S. & St. 475.

(k) *Lady Bodmin v. Vandebendy*, 1 Vern. 179; *Moore v. Mayhew*, 1 Ch. Ca. 34; *Story v. Lord Windsor*, 2 Atk. 630; *Att.-Gen. v. Gower*, 2 Eq. Ca. Abr. 685; 2 Sugd. V. & P. 306, 9th edit. [See ante, 165, note.]

(l) *Aston v. Curzon*, *Weston v. Berkely*, 3 P. Wms. 244, n.; *Brace v. Duke of Marlborough*, 2 P. Wms. 491, 6th Resolution. [*Snelgrove v. Snelgrove*, 4 Desaus. 274; *Scudder v. Van Amburgh*, 4 Edw. Ch. 19; *Bonnell v. Read*, 21 Conn. 592; *Moore v. Clay*, 7 Alab. 742; *Pillow v. Shannon*, 3 Yerg. 508; *Gallion v. McCaslin*, 1 Blackf. 91; *Caldwell v. Carrington*, 9 Peters, 86; *Denning v. Smith*, 3 J. C. R. 345.]

¹ See ante, 165, and notes.

there are particular charges of notice, they must be specially denied;(m) although, if there are no such particular charges, the denial of notice may be general.(n) However, the denial must be positive,(o) and it must not be confined to *personal* notice, for that would raise an inference that notice had been given to the defendant's agent, which is a fact equally material.(p)

If the notice be proved by only one witness, and it is positively and expressly denied by the answer, there will be no decree against the defendant,(q) unless the evidence of the witness be corroborated by other circumstances.(r) But the denial must be positive, and an answer as to *belief* only will not be sufficient, in contradiction to what has been positively sworn.(s) If the evidence of notice be not sufficiently clear for the court to make a decree, it will be sent to law to be tried.(t)¹

The counsel, attorney, or agent of the purchaser, cannot be admitted to prove the notice against him, upon the general principle of law, that parties in that confidential situation ought not to be allowed to disclose the secrets of their clients, where the knowledge of them has been acquired in their professional capacity only, and not independently of that character;(u) and this is the privilege of the client, which the attorney, &c., will not be suffered to violate, by making a voluntary deposition as to the fact to be proved;(x) although Lord Hardwicke, and also Sir J. Strange, appear to have maintained a contrary doctrine on this last point.(y)

We have already seen that possession of a deed is *prima facie* evi-

(m) *Meder v. Birt*, Gilb. Eq. Rep. Massey, 1 Ball & B. 234; *Cooke v. 185*; *Radford v. Wilson*, 3 Atk. 815; *Clayworth*, 18 Ves. 12;
Jerrard v. Saunders, 2 Ves. jun. 187; 4
 Bro. C. C. 322; 6 Dow. 230. [*Snelgrove v. Snelgrove*, ut supra.]

(n) *Pennington v. Beechey*, 2 S. & St. 282; *Thring v. Edgar*, Id. 274.

(o) *Cason v. Round*, Prec. Ch. 226. [*Gallatian v. Erwin*, 1 Cowen, 361;
Frost v. Beekman, 1 J. C. R. 288;
Walker v. Gilbert, 1 Freem. Ch. 85;
Jenkins v. Bodley, 1 Sm. & M. Ch. 338.]

(p) *Le Neve v. Le Neve*, 3 Atk. 650; 1 Ves. 66.
 (q) *Alam v. Jourdon*, 1 Vern. 161;
Kingdome v. Boakes, Prec. Ch. 19; *Le Neve v. Le Neve*, 3 Atk. 650; 1 Ves. 66; *Howarth v. Deane*, 1 Ed. 351; *Mortimer v. Orchard*, 2 Ves. jun. 243; *Evans v. Bicknell*, 6 Ves. 174; *Dawson v.*

Massey, 1 Ball & B. 234; *Cooke v. Clayworth*, 18 Ves. 12.

(r) *Walton v. Hobbs*, 2 Atk. 19; *Anon.* 3 Atk. 270; *Only v. Walker*, 3 Atk. 407; *Pember v. Mathers*, 1 Bro. C. C. 52; *East India Company v. M'Donald*, 9 Ves. 275; *Biddulph v. St. John*, 2 Sch. & Lef. 521. [*Mense v. McLean*, 13 Miss. 298.]

(s) *Arnott v. Biscoe*, 1 Ves. 97; *Piling v. Armitage*, 12 Ves. 78.

(t) 1 Ves. 95; 2 Sugd. V. & P. 301, 9th edit.

(u) 2 Sugd. V. & P. 298, 9th edit.

(x) 2 Sugd. V. & P. 299; *Sandford v. Remington*, 2 Ves. jun. 189.

(y) *Maddox v. Maddox*, 1 Ves. 62; *Bishop of Winton v. Fournier*, 2 Ves. 445.

¹ See, on the questions of pleading arising from this defence of purchaser without notice, notes to *Basset v. Nosworthy*, ut supra.

dence of notice of its contents;(z) and it lies upon the purchaser to rebut that presumptive evidence, by showing that it came into his possession after the purchase.(a)

The evidence must distinctly show, that notice was actually received; for the court will not act upon what amounts to mere suspicion:(b) and a purchaser is not obliged to enter into the interpretation of doubtful facts *or expressions.(c) But it is obviously [*516] very difficult to lay down any general rule as to what will amount to sufficient proof of actual or constructive notice. The gradation between mere rumor or suspicion and positive information, is so indefinite, that each case must necessarily depend on its own peculiar circumstances.(d)

It has been already observed, that notice by parol declarations is sufficient for all purposes.(e)

A purchaser for valuable consideration will not be affected by notice of a prior voluntary conveyance; and, therefore, where the owner of an estate has voluntarily constituted himself a trustee for other parties, he may, notwithstanding, make a good subsequent conveyance of it to a purchaser who has been made acquainted with the voluntary settlement.(f)¹ However, a purchaser who has notice of a voluntary settlement, could seldom be advised to complete without inquiring into all the circumstances connected with it; for if it should turn out, that the settlement, though apparently voluntary, was founded on any valuable consideration, the trusts would undoubtedly be enforced against him, although the settlement itself contained no actual recital or notice of that fact.(g) And parol evidence is admissible to prove the consideration in support of the settlement.(h)

It has been already seen, that a purchaser who takes, by a *voluntary* conveyance from a trustee, will be bound by the trust, although

(z) *Whitfield v. Fausset*, 1 Ves. 392; *Mertins v. Joliffe*, Ambl. 313.

(a) *Earl of Pomfret v. Lord Windsor*, 2 Ves. 486.

(b) *Hine v. Dodd*, 2 Atk. 276; *Howarth v. Deane*, 1 Ed. 351: [See *Fort v. Burch*, 6 Barb. S. C. 60.]

(c) *Kenney v. Brown*, 3 Ridg. P. C. 512; *Warwick v. Warwick*, 3 Atk. 291; *Senhouse v. Earle*, Ambl. 285; 2 Ves. 450; *Att.-Gen. v. Backhouse*, 17 Ves. 293.

(d) *Story*, Eq. Jur. § 400.

(e) *Weymouth v. Boyer*, 1 Ves. jun. 425; ante, 510.

(f) *Taylor v. Stile*, 2 Sugd. V. & P. 159, 9th edit.; *Evelyn v. Memplar*, 2 Bro. C. C. 148; *Buckle v. Mitchell*, 18 Ves. 112; *Pulvertoft v. Pulvertoft*, Ib. 84; *Powell v. Pleydell*, 1 Bro. P. C. 124. [See ante, p. 90, and note.]

(g) *Ferrars v. Cherry*, 2 Vern. 384.

(h) *Chapman v. Emery*, Coop. 278; 2 Sugd. V. & P. 170, 9th edit.

¹ But see as to many of the United States, where a different rule exists, notes to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 62, where the authorities are collected.

he may have had no notice.(i) And this equity would, doubtless, be enforced to the same extent where the consideration is merely nominal, or collusive, or so inadequate as to amount to evidence of some fraudulent dealing.(k) But, if the consideration be valuable, the court will not enter into the question of inadequacy, unless the disproportion be so gross as in itself to suggest fraud.(l) If the conveyance by the trustee be not only voluntary, but also with notice, the party taking under it will, *à fortiori*, be bound to execute the trust.(m)

Where a purchaser, with notice from a trustee, conveys for valuable consideration to another person, who has no notice of the trust, the estate will not be affected with the trust in the hands of the second purchaser.(n) However, in such a case, the first purchaser will not be discharged from his liability, but will be compelled to account with the *cestui que trust* for the purchase-money which he has received.(o)

Where an estate has once been purchased for valuable consideration, without notice of any trust, a subsequent purchaser will hold discharged from the trust, though he purchased with notice; for he [*517] will have the benefit *of the want of notice by the intermediate vendor. The reason is, to prevent the stagnation of property, and the injury which might otherwise be occasioned to an innocent purchaser.(p) But this rule will not be applied where the property is re-purchased by *the original trustee*, or by a previous purchaser with notice; for the consciences of such persons would remain affected with the original trust, which would re-attach on the property whenever and by whatever title it should return into their possession.(q)¹

(i) *Pye v. George*, 1 P. Wms. 128; *Mansell v. Mansell*, 2 P. Wms. 681; 1 1 Cruis. Dig., Tit. 12, Ch. 4, s. 16; ante, Pt. I., Div. II., Ch. II., Sect. 2; p. 172.

(k) *Bullock v. Sadlier*, Ambl. 776. [See *Jackson v. Summerville*, 13 Penn. St. R. 371; *Hanly v. Sprague*, 20 Maine, 431.]

(l) *Bullock v. Sadlier*, Ambl. 763; see *Gwynne v. Heaton*, 1 Bro. C. C. 8; *Gibson v. Heyes*, 6 Ves. 273.

(m) *Mansell v. Mansell*, 2 P. Wms. 681.

(n) *Ferrars v. Cherry*, 2 Vern. 383; *Mertins v. Joliffe*, Ambl. 313.

(o) *Ferrars v. Cherry*, 2 Vern. 383.

(p) *Harrison v. Forth*, Prec. Ch. 51; *Mertins v. Joliffe*, Ambl. 313; *M'Queen v. Farquhar*, 11 Ves. 788; *Lowther v. Carlton*, 2 Atk. 242; *Brandlyn v. Ord*, 1 Atk. 571. [Ante, 165, note.]

(q) *Kennedy v. Daly*, 1 Sch. & Lef. 379.

¹ A trustee who re-acquires the trust property conveyed in breach of trusts, takes, in general, subject to the old trusts. *Armstrong v. Campbell*, 3 Yerg. 201. But the *cestui que trust*, in such case, has the right either to insist upon this, or to claim the original purchase-money, or, whatever was substituted in its place; or to hold the trustees personally liable for the breach of trust. *Oliver v. Piatt*, 3 How. U. S. 401.

A purchase for valuable consideration, without notice, will not be a complete defence in a court of equity, unless the purchaser has clothed himself with the legal estate.(r) For it has been at length settled (although not until after much fluctuation of opinion), that a plea of such a purchase is no defence in equity to a claim under a legal title.(s)¹

But, although the purchaser has not secured the perfect legal title, the court will not compel him to make any discovery which may hazard his possession, even on the suit of a person who claims by an alleged legal title; for the defendant has, in conscience, an equal right with the plaintiff.(t)(1) And, as a general rule, a purchaser, for valuable consideration without notice, is regarded with favor in a court of equity, which will not take the least step against him.(u)

A mortgagee,(x) and for some purposes a lessee,(y) will be considered a purchaser for valuable consideration. For, although a lessee will be held to have notice of his lessor's title, so as to know that he was only a trustee; yet, if the lease were within the scope of

(r) See *Branlyn v. Ord*, 1 Atk. 571.

Pl. § 604 (a), 805.] See *Payne v. Compton*, 2 Y. & C. 457, 461.

(s) *William v. Lamb*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 R. & M. 284. [*Jenkins v. Bodley*, 1 Sm. & M. Ch. 338; *Blake v. Heyward*, 1 Bail. Eq. 208; *Larrowe v. Beam*, 10 Ohio, 498.] Vide *contra*, *Burlass v. Cooke*, 2 Freem. 84; *Parker v. Blythmore*, 2 Eq. Ca. Abr. 79; *Jerrard v. Saunders*, 2 Ves. jun. 454. [*Walwyn v. Lee*, 9 Ves. jun. 24; *Joyce v. De Moleyns*, 2 J. & Lat. 374; *Flagg v. Mann*, 2 Sumner, 486; Att.-Gen. v. *Wilkins*, 21 Law T. 260; see 2 Lead. Cas. Eq. p. i. 84, 90 (1 Am. ed.); *Story's Eq.*

(t) *Gait v. Obaldeston*, 1 Russ. 154; overruling S. C., 5 Mad. 428; *Jerrard v. Saunders*, 2 Ves. jun. 458; see *Wilkes v. Boddington*, 2 Vern. 600.

(u) *Jerrard v. Saunders*, 2 Ves. jun. 458.

(x) *Brotherton v. Hutt*, 2 Vern. 574. [See notes to *Bassett v. Nosworthy*, ubi sup.]

(y) Att.-Gen. v. *Backhouse*, 17 Ves. 293.

(1) However, if a defendant put in his answer raising the defence of purchase for valuable consideration, without notice, instead of protecting himself by *plea*, it is the settled practice of the court, that he may be compelled to answer all the allegations in the bill *fully*. *Bovey v. Leighton*, 2 S. & St. 234; *Portarlington v. Soulby*, 7 Sim. 28. [*Salmon v. Clagett*, 3 Bland. 125; but see *Hagthorp v. Hook*, 1 G. & J. 270; and see notes to 2 Lead. Cas. Eq., pt. i. 118; and see now Rules in Equity, Sup. Ct. U. S., No. 39; and of Pennsylvania, No. 37.]

¹ The prevailing doctrine in the United States is, that the purchaser of an equitable title takes it subject to all the equities to which it is charged. *Winborn v. Gorrell*, 3 Ired. Eq. 117; *Polk v. Gallant*, 2 Dev. & Batt. Eq. 395; *Shirras v. Caig*, 7 Cranch, 48; *Hallett v. Collins*, 10 How. U. S. 185; *Vattier v. Hinde*, 7 Peters, S. C. 252; *Boone v. Chilles*, 10 Peters, 177; *Chew v. Barnett*, 12 S. & R. 389; *Kramer v. Arthurs*, 7 Barr, 165; *Sergeant v. Ingersoll*, Id. 347; S. C., 15 Penn. St. R. 343, where taking the legal title at the same time, though under circumstances of suspicion, was held not to protect. But see *Flagg v. Mann*, 2 Sumn. 486.

the trustee's powers, the lessee will not be supposed to have known that it was actually a breach of trust, unless it be proved that he was aware of that fact.^(z) We have already seen, that marriage is a sufficient consideration to support a purchase for valuable consideration within the principles that have just been discussed.^(a)

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*DIVISION II.

OF THE LIABILITIES AND PRIVILEGES OF TRUSTEES.

CHAPTER I.

OF A BREACH OF TRUST, AND ITS CONSEQUENCES.

THE nature of a breach of trust is sufficiently obvious from what has gone before in the preceding pages, nor is it necessary to add anything here on that point. But we will now proceed to consider—1st. The nature of the remedies for a breach of trust; and 2d. What will amount to a discharge of a breach of trust.

And 1st. Of the remedies for a breach of trust.

A suit in equity is the usual and most effectual remedy for a breach of trust.¹ Indeed unless some *legal* debt has been created between the parties, or some engagement, the non-performance of which may be the subject of damages *at law*, a court of equity is the *only* tribunal to which the *cestui que trust* can have recourse for redress.⁽¹⁾ And in any case the jurisdiction and machinery of those

(z) 17 Ves. 293.

(a) Jackson v. Rowe, 2 S. & St. 475.

(1) An action at law for money had and received will not lie against a trustee, while the trust is still open, although *where a final account has been stated between the parties*, and the trust is closed, it seems, that such an action may be maintained. Case v. Roberts, Holt, N. P. C. 501; Edwards v. Bates, C. P., June, 1844; 13 Law Journ. N. S. 156, [7 M. & G. 590; see Dias v. Brunell's Ex., 24 Wend. 9; McCrea v. Purmont, 16 Wend. 460; New York Ins. Co. v. Roulet, 24 Wend.

¹ See ante, 42, note. A mere breach of confidence is not enough to entitle the party injured to relief in equity; Ashley v. Denton, 1 Litt. 86. Where the trust, also, is executed, so that it is cognizable at law, and nothing more remains to be done by the trustee, equity will leave the parties to their remedies at law; Baker v. Biddle, Baldw. C. C. 422. But a complete execution must be shown; Jordan v. Jordan, 2 Car. L. Rep. 409.

courts is so much better adapted to meet the exigencies of every case by enforcing the restriction of the trust property, and compelling an account against the guilty parties, that any other remedy is rarely resorted to.

A breach of trust in general creates only a simple contract debt, for which (previously to the statute 3 & 4 Will. IV. c. 104) the trustee's *personal* estate only was liable, and the *cestui que trust* had in general no remedy against the *real* estate.(a) The same rule also prevailed *at law* in those cases where the breach of trust created a *legal* debt:(b) and it was immaterial that the trust was created by a *deed*, executed by the trustee, and that the trust deed contained a provision, that the trustees should be liable for the moneys actually received by them.(c) However, the assets of the trustee would be marshalled in equity in favor of the claim of *the *cestui que trust*.(d) And there are authorities to show, that if the trustee bound themselves by a *covenant or engagement under seal* to apply the trust fund according to the trusts declared, any application of the fund in breach of that engagement would create a *specialty* debt against them.(e) However, since the late act,(f) which makes the real estate of debtors in all cases assets for the payment of simple contract debts, the distinction in question has become of little practical importance.¹

(a) *Kirk v. Webb*, Prec. 84; *Heron v. Heron*, Ib. 163; *Vernon v. Vawdry*, 2 Atk. 11; *Cox v. Bateman*, 2 Ves. 19; *Perry v. Phillipps*, 4 Ves. 108; *Lyse v. Kingdom*, 1 Coll. 184. 188. [*Adey v. Arnold*, 15 Eng. L. & Eq. 270; *Benbury v. Benbury*, 2 Dev. & Batt. Eq. 235.]

(b) *Bartlett v. Hodgson*, 1 T. R. 42. [See *Adey v. Arnold*, ut supr.]

(c) *Ibid.* [Ib.]

(d) *Cox v. Bateman*, 2 Ves. 19.

(e) *Bartlett v. Hodgson*, 1 T. R. 44; *Gifford v. Manley*, Com. Dig. Chancery, 4 W. 25; *Forrest*. 109. [*Adey v. Arnold*, 15 Eng. L. & Eq. 270.]

(f) 3 & 4 Will. IV. c. 104. [See *Cummins v. Cummins*, 3 J. & Lat. 90.]

505; *Hull v. Harris*, 3 Ired. Eq. 389; *Brown v. Wright*, 4 Yerg. 57; *Blue v. Patterson*, 1 Dev. & Batt. Eq. 457; *Beach v. Dorwin*, 12 Verm. 139. In Pennsylvania, however, equitable relief is given in such cases, by the action for money had and received, which is moulded to suit the exigencies of the case; *Martzell v. Stauffer*, 3 Pa. R. 398; *Aycinena v. Peries*, 6 W. & S. 398; so in Massachusetts; *Newhall v. Wheeler*, 7 Mass. 198. And, generally, if there be an express promise by the trustee, the action will lie. *Weston v. Barker*, 12 Johns. R. 276; *Dias v. Brunell's Ex.*, 24 Wend. 9.]

¹ In *Wood v. Hardisty*, 10 Jur. 489, 2 Coll. C. C. 542, in a deed to which A. and B. were parties, there was contained a declaration that A., his executors, administrators, and assigns, should stand possessed of certain specified funds in trust for B., her executors, &c., and Sir Knight Bruce, yielding "somewhat reluctantly," to authorities cited for the plaintiff, held, subject to farther argument, that a breach of trust by A. created a specialty debt in favor of B.'s representatives. The case appears never to have been again mentioned before the Vice-Chancellor. In the recent case of *Adey v. Arnold*, 15 Eng. L. & Eq. 268, the autho-

A suit in respect of a breach of trust may be instituted by all or any one or more of the *cestui que trusts* as plaintiffs; but if any of the parties beneficially interested do not join as plaintiffs, they must be brought before the court as defendants; or (as such a suit is in truth a creditor's suit) it must at all events be expressed to be brought on behalf of the plaintiffs, and all other persons interested in the debt created by the breach of trust.(g)

However, if the share of one of several *cestui que trusts* in a trust fund *has been ascertained and set apart*—as where it is a moiety or other aliquot part of the fund—a suit for a breach of trust may be maintained against the trustee by the person entitled to that share without joining the other *cestui que trusts* as parties.(h) Indeed

(g) *Alexander v. Mullins*, 2 R. & M. 568; *Munch v. Cockerell*, 8 Sim. 219, 231. [*Piatt v. Oliver*, 2 McLean, 30; *McKonley v. Irvine*, 13 Alab. 682; *Cassiday v. McDaniel*, 8 B. Monr. 519; *Story*, Eq. Plead. Ch. IV.; see ante, p. 338, note; and *Phillipson v. Gatty*, 6 Hare, 26.] *Perry v. Knott*, 5 Beav. 293, 297; [*Piatt v. Oliver*, 2 McLean, 307. But this, it seems, applies only where the fund is in existence, and forthcoming; *Lenaughan v. Smith*, 2 Phill. 302. See now, in England, under the 15 & 16 Vict. c. 86, s. 42; *McLeod v. Annesley*, 22 L. J. Ch. 657; 17 Jur. 612.] See *Mont-*

(h) *Smith v. Snow*, 3 Mad. 10; *Hutchinson v. Townsend*, 2 Keen, 675; *gomerie v. Lord Bath*, 3 Ves. 560.

rities were brought in review before Lord St. Leonards. Where by deed of endorsement under seal, appointing new trustees, and executed by them, a trust fund was assigned to the new trustees, "to hold unto them, their executors, &c., as their own money, property, and effects, but nevertheless upon the trusts and for the ends, and purposes, declared by the within indenture," but there was no declaration of trust by the new trustees. It was held that a breach of trust did not constitute a specialty debt. The Chancellor stated the result of the cases as follows: "There is no better established general proposition, than that a breach of trust does not constitute a specialty debt, *Vernon v. Vawdry*, 2 Atk. 119; *Lex v. Bateman*, 2 Ves. sen. 19. It is equally clear from the authorities, that where there is a deed executed by the trustees, containing a declaration that they will apply the trust fund in a particular way, that will amount to a covenant, and create a specialty debt; as Lord Eldon, said in *Lord Montfort v. Cadogan*, 19 Ves. 638. In all the cases where a breach of trust has been held to constitute a specialty debt, it has been where there was a debt due from a trustee in respect of a sum of money which he had agreed, under seal, to apply in a particular manner, but which he had misapplied. In those cases it constituted a specialty debt, because he had declared under seal, that he would not apply the fund, as he ultimately did apply it." See *Benbury v. Benbury*, 2 Dev. & Batt. Eq. 238.

In the United States, as in England, real estate is now assets for the payment of all debts, whether by specialty or simple contract; see ante, p. 344; and in Pennsylvania, and in many of the States, the distinction between the two classes of debts in the administration of decedent's estates, is abolished; 2 Kent's Comm. 419. So far, therefore, as these changes bear upon the question of the quality of debt, created by breach of trust, it has, as is stated in the text, "become of little practical importance." But where the general distinction in the administration of personal estate is retained, the rules above stated still apply; *Cummins v. Cummins*, 3 J. & Lat. 90; 2 Wms. Executors, 170; *Benbury v. Benbury*, 2 Dev. & Batt. Eq. 238. See *Richardson v. Jenkins*, 17 Jur. 446.

it has been held, that in such a case it will be improper to join the other *cestui que trusts*, and if made parties they may demur to the bill.(i)

So where one of several co-trustees has committed a breach of trust, a suit may be brought by the other trustees against the guilty trustee without joining the *cestui que trusts* as parties.(k) And if one or more of the *cestui que trusts* have concurred in, and benefited by, the commission of the breach of trust, a bill may be filed against them by the innocent trustee to compel them to reinstate the fund, and also to account for the benefit received.(l) And the representatives of a trustee after his death have the same right to the protection and assistance of the court in such cases as the trustee himself.(m)

But the *cestui que trusts* cannot be properly joined as co-plaintiffs in a suit by a trustee or his representatives against a co-trustee, who has been guilty of a breach of trust; for the assets of the plaintiff trustee may be eventually liable to make good the breach of trust, so that the interest of the plaintiff trustee would conflict with that of the *cestui que trusts*; and if this objection were taken at the hearing, the bill so framed would be dismissed with costs.(n) However, in such a case, where the equity of the *cestui que trust* against the trustee, his co-plaintiff, appears from the answer of the defendant trustee, the plaintiff on application by motion before the hearing, may obtain leave to amend the record, by striking out the name of the trustee as a plaintiff and making him a defendant, on giving security for the costs of the application.(o)

*All parties implicated in a breach of trust are equally liable, without any priority between them;(p) and this liability is joint and several; consequently they will all be properly joined as defendants in a suit respecting the breach of trust. Hence, where the breach of trust consists of an improper assignment or conveyance by the trustee to a third person, who has notice of the trust, the assignee and the trustee will both be equally responsible to the *cestui que trust*, and may be both joined as defendants to a suit,

(i) *Smith v. Snow*, 3 Mad. 10.

[*McGachen v. Dew*, 15 Eng. L. & Eq.

(k) *Franco v. Franco*, 3 Ves. 75;

97.]

May v. Selby, 1 N. C. C. 235. [In *Meyer v. Montrieu*, 9 Beav. 521, a decree was made against a trustee, though it was alleged the tenant for life concurred in the breach of trust.]

(m) *Greenwood v. Wakeford*, ubi supra.

(n) *Jacob v. Lucas*, 1 Beav. 436.

[*Griffith v. Vanheythusen*, 4 Eng. L. & Eq. 25.]

(l) *Greenwood v. Wakeford*, 1 Beav. 576; see *Payne v. Collier*, 1 Ves. jun. 170; *Fuller v. Knight*, 6 Beav. 205.

(o) *Hall v. Lack*, 2 N. C. C. 631.

(p) *Wilson v. Moore*, 1 M. & K. 127, 143. [*Att.-Gen. v. Wilson*, Cr. & Ph. 28.]

instituted for enforcing that responsibility.(g)¹ And so a *cestui que trust*, who has concurred in and benefited by the breach of trust, may also be joined as a defendant.(r)

The husband of a *feme covert* trustee is responsible for breaches of trust committed by her before marriage, and a suit may properly be instituted against him to enforce that liability.(s)

The executor or administrator of a deceased trustee is liable to the extent of the assets for a breach of trust committed by the testator or intestate in his lifetime; and this liability may be enforced by suit.(t)² And where there are several co-trustees, who have been all implicated in a breach of trust, the representatives of those dying first will be liable to the same extent jointly with the surviving trustees, or their representatives, if they are dead.(u) It is almost superfluous to add, that if the personal representative of a trustee be himself guilty of a breach of trust, his personal responsibility will be the same as that of any other person who has undertaken a trust.

However, although *all* the co-trustees *might properly* be made

(g) *Vandebende v. Livingston*, 3 Sw. 459; see *Carrol v. Connett*, 2 J. J. 625; *Burt v. Dennet*, 3 Bro. C. C. 225. Marsh. 195; *Elliott v. Lewis*, 3 Edw.

(r) *Trafford v. Boehm*, 3 Atk. 440; Ch. 40; *Redwood v. Reddick*, 4 Munf. 222.]

Greenwood v. Wakeford, 1 Beav. 576; (t) *Lyse v. Kingdom*, 1 Col. 184; *Fuller v. Knight*, 6 Beav. 205; Lord Knatchbull *v. Fearnhead*, 3 M. & Cr. 485. [See *Meyer v. Montrieu*, 9 Beav. 122. [See *Pharis v. Leachman*, 20 Alab. 521.] 683.]

(s) *Palmer v. Wakefield*, 3 Beav. (u) *Ibid.*
227. [*Moon v. Henderson*, 4 Desaus.

¹*Salomons v. Laing*, 12 Beav. 377; *Bailey v. Inglee*, 2 Paige, 278; *Oliver v. Piatt*, 3 How. U. S. 333; *Bush v. Bush*, 1 Strob. Eq. 377; *Bateman v. Margerison*, 6 Hare, 496; *Lund v. Blanshard*, 4 Hare, 28, &c., where the rules on the subject are laid down. See *Hutchinson v. Reed*, Hoff. Ch. 317. Those cases, however, show that such third person is not a *necessary* party. But see *Wright v. Wood*, 12 Jur. 595, where the third person having mortgaged the property transferred in breach of trust, was held a necessary party, with his mortgagee.

²In *Kirkham v. Booth*, 11 Beav. 273, 13 Jur. 525, where a breach of trust had been committed, and the trustees were all dead, and their personal representatives were ignorant of the matter, the court refused to hold them responsible in the first instance, but directed an inquiry. The representative of a trustee, never in default, is not a necessary party to a bill against the surviving trustee: *Simes v. Eyre*, 6 Hare, 137. So it seems, in general, where there are surviving trustees, it being the duty of the latter to place the trust fund in a proper position, and to recover from the representatives of the deceased trustee, anything that may be due from him: *Beattie v. Johnson*, 8 Hare, 177; see *London Gas Light Co. v. Spottiswoode*, 14 Beav. 264. But see *Hall v. Austin*, 10 Jur. 452; 2 Coll. 570; and *Penny v. Penny*, 4 Engl. L. & Eq. 55, as to a general administration suit. The representative of a defaulting trustee, fairly accounting, is entitled to deduct his costs of suit out of the assets, though they may be insufficient to repair the breach of trust: *Haldenby v. Spofforth*, 9 Beav. 195.

defendants in a suit by the *cestui que trusts* for relief against a joint breach of trust, yet (independently of the late general order of the court,^(x) which we shall consider presently), the *necessity* of making them all defendants was at one time far from being conclusively established. The doubt on this point was strongly countenanced by Lord Eldon's observations in the case of *Walker v. Symonds*,^(y) where his Lordship said, "when three trustees are involved in one common breach of trust, a *cestui que trust* suffering from the breach, and proving that the transaction was neither authorized nor adopted by him, *may proceed against either or all of the trustees*." And there are other cases, both before and since that of *Walker v. Symonds*, which tend to countenance the doctrine, that it was competent for the *cestui que trusts* to sue one or more of the parties guilty of a joint breach of trust, without joining the others as defendants.^(z) However, the general rule of the court requires that all persons who are jointly liable to satisfy the plaintiff's demand, shall be made parties to a suit.^(a) And in a very recent case it has been decided, that the cases that have been referred to do not establish any exception to the general rule with regard to trustees. In *Munch v. Cockerell*,^(b) a bill was filed by *cestui que trusts* against the two surviving trustees of a settlement, charging them with a breach of trust, but without joining as defendants the representatives of the two deceased trustees, who had been equally implicated; an objection was taken for want of these parties, and the Vice-Chancellor (Sir L. Shadwell), after reviewing all the authorities, allowed the objection, and held, that where several trustees were implicated in a breach of trust, the *cestui que trust* was not at liberty to file a bill to recover the trust fund against *some of them only*, but must bring before the court *all of the trustees who are living, and the representatives of such of them as are dead*.^(b) And the decision of Lord Langdale, M. R., in the more recent case of *Perry v. Knott*,^(c) is to the same effect.¹

However, where the breach of trust is such as amounts to a *wrong-*

(x) 32d Order of August, 1841.

(b) *Munch v. Cockerell*, 8 Sim. 219.

(y) 3 Swans. 75.

(c) 4 Beav. 179. [*Fowler v. Reynall*,

(z) *Ex parte Angle*, Barnard, 425; 2 Atk. 162; *Routh v. Kinder*, 3 Swanst. 114, n.; *Wilkinson v. Parry*, 4 Russ. 274; *Wilson v. Moore*, 1 M. & K. 126, 146.

2 De G. & Sm. 749; 13 Jur. 650, in note; see *Hall v. Austin*, 2 Coll. C. C. 570; *Wyllie v. Ellice*, 6 Hare, 505; but see *McGachen v. Dew*, 15 Engl. L. & Eq. 100.]

(a) 1 Dan. Pr. 339; 4 Russ. 274, n.; *Perry v. Knott*, 4 Beav. 103.

¹ Where two classes of trustees had committed a breach of trust, it was held that the *cestui que trusts* might proceed against one class without making the other class parties: *McGachen v. Dew*, 15 Engl. L. & Eq. 97.

ful act, as, for instance, where there has been a *fraudulent alienation of the trust estate*, every trustee is separately liable, and there is no contribution between them; but each case is distinct, depending upon the evidence against each party.(d)

Although the rule of the court requires the presence of all parties implicated in an alleged breach of trust, before it will make a decree; yet the decree, when made, will be against all the defendants *severally*, as well as jointly, and the plaintiffs at their option may proceed against any one or more of the co-defendants, and recover the whole amount from those who are so singled out. It will then be for the trustees who have been compelled to satisfy the whole claim, to enforce their right to a contribution as against their co-trustees.(e)

The rule of practice, requiring the presence of all the parties implicated in a breach of trust, was found to occasion considerable difficulty, and the 32d General Order of August, 1841, was made to remedy this inconvenience. That order provides, that in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto, "but the plaintiff may proceed against one or more of the persons severally liable." And this order has been judicially held to apply to suits by *cestui que trusts* against trustees for breach of trust.(f) And on the same principle, where the trust property has been assigned by the trustee, the plaintiff under this order might doubtless proceed against the *assignee* alone, without joining the trustee himself as a party. However, it is conceived that a *cestui que trust*, who is sued as having participated in the breach of trust, can scarcely be considered as coming within the order, for the demand against that *cestui que trust* and the trustees, could with difficulty be regarded as a joint and several demand.

The relief afforded in equity, in case of a breach of trust, is two-fold.¹ First, It is retrospective, in order to remedy the mischief already done; and secondly, prospective, with a view to the prevention of further injury.

(d) Att.-Gen. v. Wilson, Cr. & Ph. 1, 28; see Char. Corporation v. Sutton, 2 Atk. 400, 406; Att.-Gen. v. Brown, 1 Sw. 265, 306. [Cunningham v. Pell, 5 Paige, 612.]

(e) Ex parte Shakeshaft, 3 Bro. C. C. 198; Knatchbull v. Fearnhead, 3 M. & Cr. 124.

(f) Perry v. Knott, 5 Beav. 293; Kel-

laway v. Johnson, Id. 319. [Norris v. Wright, 14 Beav. 310; Hall v. Austin, 2 Coll. 570 (on the authority of Perry v. Knott, merely). But see Penny v. Penny, 4 Engl. L. & Eq. 55; Fowler v. Reynall, 2 De G. & Sm. 749, *contra*. The 52d rule in Equity of the U. S. courts; and the 49th in Penna., are the same as the above order.]

¹ In Goodwin v. Gornell, 2 Coll. C. C. 457, it was held that a solicitor advising a breach of trust, and profiting thereby, might be stricken off the rolls.

*The court in the first place endeavors as far as possible to [*522] replace the parties in the same situation as they would have been in, if no breach of trust had been committed. And for this purpose, where the trust property has been improperly disposed of, and is capable of being followed *in specie*, as where it consists of real estate, it will compel the trustee, or the party in possession (if the latter have taken with notice of the trust), to reconvey the estate to the purposes of the trust.(g)¹

But in general, trust property cannot be followed, unless it has actually consisted of real estate *before the commission of the breach of trust*. For if a trustee for the purchase of land misappropriate the trust funds, and *afterwards* purchase real estate in his own name; it has been held, that the *cestui que trusts* cannot maintain any specific claim to the lands so bought, unless they can show that the lands were actually purchased with the trust-moneys.(h) However, parol evidence will be admitted for the purpose of identifying the purchase as having been made with the trust-money.(i) And where the amount of the purchase-money paid by the trustee, corresponds very nearly with that of the trust fund to be invested, that will be an important fact of evidence to show that the purchase was made in execution of the trust.(k) And if it can be actually proved by means of the cheques or otherwise, that the payment was made with trust-money, that will unquestionably be the best evidence for this purpose.(l)²

(g) *Mansell v. Mansell*, 2 P. Wms. 681; *Gorges v. Pye*, 7 Bro. P. C. 221; 583.

1 P. Wms. 128.

(i) *Lowden v. Lowden*, 2 Bro. C. C.

583.

(k) *Ibid.*; and see *Small v. Attwood*,

Younge, 507.

(h) *Kirk v. Webb*, Prec. Ch. 84; *Perry v. Phillips*, 4 Ves. 108. [See *Roberts v. Brooms*, 1 Harringt. 571; *Pharis v. Leachman*, 20 Alab. 683.]

(l) *Price v. Blackmore*, 6 Beav. 507,

513.

¹ Ante, p. 164, &c., and notes; *Oliver v. Piatt*, 3 How. U. S. 333; *Bush v. Bush*, 1 Strobb. Eq. 377; *Bailey v. Inglee*, 2 Paige, 278. In *Heth v. Richmond R. R. Co.*, 4 Gratt. 482, the purchaser was, under the circumstances, only held liable for the purchase-money, with interest.

² As to the right to follow trust funds into land, see notes to p. 91, and p. 164; and *Pierce v. McKeehan*, 3 W. & S. 280; *Turner v. Petigrew*, 6 Humph. 438; *Moffit v. McDonald*, 11 Humph. 457; *Garrett v. Garrett*, 1 Strobb. Eq. 96; *Brothers v. Porter*, 6 B. Monr. 106; *Martin v. Greer*, 1 Geo. Dec. 109; *Cheshire v. Cheshire*, 2 Ired. Eq. 569; see *Blaisdell v. Stevens*, 16 Verm. 79; 1 Greenl. Cruise, 357. The *cestui que trust* has the election to take the land, or the securities for it: *Murray v. Lylburn*, 2 J. C. R. 441; *Bonsall's Appeal*, 1 Rawle, 474; *Kaufman v. Crawford*, 1 Watts & Serg. 134. In *Oliver v. Piatt*, 3 How. U. S. 333, the rule is thus laid down by Judge Story: "It is a clearly established principle in equity jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser, for a valuable

So, if a trust estate be sold under a power, and the trustees, or the person acting as their agent, at the same time or very shortly afterwards, make a purchase of another estate, this will be regarded as one transaction.^(m) And although the purchase-money paid for the second estate be of greater amount than the proceeds of the first sale, the same relief will, notwithstanding, be given, and the *cestui que trusts* will be decreed to have a lien on the estate so purchased, for the amount of the trust fund.⁽ⁿ⁾

If the property cannot be followed *in specie*, or if the holder, having taken without notice, cannot be made liable to the trust, the trustee will be decreed to compensate the *cestui que trusts* by payment of a sum equal to the value of the trust property, or by purchasing other property of equal value for their benefit.^(o) And in all cases he will further be decreed to account for all rent and interest or other profit or advantage, received from the trust estate, or in any way arising from the breach of trust.^(p)

And in taking the account against the trustee, he will invariably be charged with the amount of principal and income, which would or

(m) *Price v. Blackmore*, 6 Beav. 507. U. S. 333; though all the money be not paid; *Flagg v. Mann*, 2 Sumn. 459.]

(n) 6 Beav. 507.

(o) *Mansell v. Mansell*, ubi supra; (p) *Kaye v. Powell*, 1 Ves. jun. 408; *Earl Powlett v. Herbert*, 1 Ves. jun. 297; *Vandebende v. Livingston*, 3 Swanst. 625; *Forrest v. Elwes*, 4 Ves. 497; *Pocock v. Reddington*, 5 Ves. 794; *Bate v. French v. Hobson*, 9 Ves. 103; *Byrchall v. Bradford*, 6 Mad. 235; *Fyler v. Scales*, 12 Ves. 402; *Crawshay v. Collyns*, 15 Ves. 226; *Docker v. Somes*, 2 M. & K. 655.

6 Ired. Eq. 379; *Norman v. Cunningham*, 5 Gratt. 72; *Oliver v. Piatt*, 3 How.

consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the *cestui que trust*, is one which positively and exclusively belongs to him; and it is not in the power of the trustee to deprive him of it by any subsequent repurchase of the trust property, although in the latter case, the *cestui que trust* may, if he pleases, avail himself of his own right, and take back and hold the trust property upon the original trust; but he is not compellable so to do. The reason is, that this would enable the trustee to avail himself of his own wrong; and if he had made a profitable investment of the trust fund, to appropriate the profit to his own benefit, and by a repurchase of the trust fund to charge the loss or deterioration in value, if any such there had been, in the mean time, to the account of the *cestui que trust*,—whereas, the rule in equity is, that all the gain made by the trustee, by a wrongful application of the trust fund, shall go to the *cestui que trust*, and all the losses shall be borne by the trustee himself." See also, *Ex parte Montefiore*, De Gex, Bankr. R. 171.

A *cestui que trust* has no right, however, to be subrogated to the claims of creditors, to the payment of whose debts the trust fund has been misapplied. *Winder v. Diffenderffer*, 2 Bland. Ch. 198; see ante, 364, and note.

might have been received from the trust estate, if no breach of trust had been *committed.(q)¹ For instance, where the trust was [*523] to invest in stock, which the trustee neglected to do, and in the mean time the price of stock rose, the trustee was decreed to purchase as much stock, as might have been bought with the trust fund, at the time when it ought to have been invested ;(r) and many similar examples of the application of this doctrine might be adduced.(s)² Wherever a *prima facie* case of misconduct is made out against trustees, the plaintiff is entitled to a decree, that they shall account for whatever they might have received without their wilful default or neglect. And it is immaterial, that in a prior suit by other parties against them, for the same matter, a common decree for an account had been made in the usual way.(t)

Upon the same principle, a trustee will be charged with interest on any sums retained uninvested by him, or lost through his misconduct. And the ordinary rate of interest so charged is four per cent. ;(u) although where the trustees have been guilty of gross neglect, or have committed an active breach of trust,—as by employing the trust funds in trade or otherwise, for their own benefit,—or their conduct has been fraudulent or improper, the rate of interest will be five per

(q) *Shepherd v. Twogood*, T. & R. 379; *Pride v. Fooks*, 2 Beav. 430; *Roche v. Hart*, 11 Ves. 60.

(r) *Byrchell v. Bradford*, 6 Mad. 235, 240; *Pride v. Fooks*, 2 Beav. 430; see *Dimes v. Scott*, 4 Russ. 195; ut supra, p. 371.

(s) *French v. Hobson*, 9 Ves. 103; *Pocock v. Reddington*, 5 Ves. 794.

(t) *Shepherd v. Twogood*, T. & R. 379; see *Pybus v. Smith*, 1 Ves. jun. 193. [See on this point, *Coope v. Carr*, 15 Engl. L. & Eq. 591.]

(u) *Hicks v. Hicks*, 3 Atk. 274; *Denton v. Shellard*, 2 Ves. 239; *Lincoln v. Allen*, 1 Bro. P. C. 553; *Perkins v. Bayntun*, 1 Bro. C. C. 375; *Newton v. Bennett*, Ib. 359; *Littlehales v. Gascoigne*, 3 Bro. C. C. 73; *Franklin v. Frith*, Ib. 433; *Younge v. Combe*, 4 Ves. 101; *Longmore v. Broom*, 7 Ves. 124; *Roche v. Hart*, 11 Ves. 58; *Tebbs v. Carpenter*, 1 Mad. 290; *Mousley v. Carr*, 4 Beav. 49; *Hosking v. Nicholls*, 1 N. C. C. 478. [See *Merrick's Est.*, 1 Ashm. 305.]

¹ Where land has been sold in breach of trust, there has been some difference among the cases, as to the time at which its value is to be estimated, in holding the trustees liable. In *Hart v. Ten Eyck*, 2 J. C. R. 62, a case of fraud, the time of filing the bill was held to be the proper period, there having been a rise in value. In *Norman v. Cunningham*, 5 Gratt. 64, the court was equally divided on the point; but the time of sale of the property was that fixed by the decision; accord, *Ames v. Downing*, Bradf. Surr. 325; see *Heth v. Richmond, &c.*, R. R. Co., 4 Gratt. 482; *Johnson v. Lewis*, 2 Strob. Eq. 157. Where a trustee, in breach of trust, mixes slaves with his own, the *cestui que trust* is not confined to profits, but may have the usual rate of hire. *Johnson v. Richey*, 4 How. Miss. 233; see also *Rainsford v. Rainsford*, Rice's Eq. 369.

² See, on this subject, notes, ante, p. 371, 374; and the note to *Sellick v. French*, 1 Am. Lead. Cas. 529.

cent.(x) But mere ordinary negligence on the part of a trustee, will not be a sufficient reason for charging him with five per cent. interest.(y)¹

Where a strong case of corrupt or improper conduct is established against the trustee, or if he has acted in direct contravention of an express trust to accumulate, he will be charged in addition with annual or half yearly rests, in the nature of compound interest.(z) In *Walker v. Woodward*,(a) the husband of an administratrix had carried on a farming business with the assets of the intestate, and in his answer he admitted, that he had made a profit, but as he had kept no accounts, and had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits. The account was ordered to be taken against him, with annual rests, and interest at five per cent. on those annual rests. However, it has been [*524] laid down, that interest is never given on *the rents of real estate:(b) and it is also against the general practice to direct interest to be calculated on the arrears of an annuity.(c)²

The court will sometimes relax its general rule, and will refuse to charge a trustee with *past interest* in case of a breach of trust, although he is decreed to make good the *corpus* or capital of the trust fund:(d) or interest will be given only from the time of filing the bill.(e) However, this leniency will not be shown, unless the trustee had sufficient grounds for the misapprehension of his duties, and he must also have afforded the court every facility for the investigation of the claim.(f)

So interest has been refused on account of the staleness of the de-

(x) *Treves v. Townsend*, 1 Bro. C. C. Russ. 107; vide supra [Investment], p. 384; *Forbes v. Ross*, 2 Bro. C. C. 430; 379.

(y) *Pietz v. Stace*, 4 Ves. 620; *Pocock v. Reddington*, 5 Ves. 794; *Roche v. Hart*, 11 Ves. 60; *Dornford v. Dornford*, 12 Ves. 127; *Ashburnham v. Thompson*, 13 Ves. 402; *Bate v. Scales*, 12 Ves. 402; *Crackelt v. Bethune*, 1 J. & W. 586; *Heathcote v. Hulme*, Ib. 122; *Att.-Gen. v. Solly*, 2 Sim. 518; *Brown v. Sansome*, 1 M'Clel. & Y. 427; *Sutton v. Sharp*, 1 Russ. 146; *Mousley v. Carr*, 4 Beav. 49; supra, Pl. [Investment].

(z) *Roche v. Hart*, 11 Ves. 58. (a) 1 Russ. 107.
(b) *Macartney v. Blackwood*, 1 Ridg. L. & S. 602.
(c) *Robinson v. Cumming*, 2 Atk. 409; *Crewze v. Hunter*, 2 Ves. jun. 157; *Tew v. Earl of Winterton*, 1 Ves. jun. 451; *Booth v. Leycester*, 3 M. & Cr. 459; *Martin v. Blake*, 2 Dr. & W. 125. But see *Hyde v. Price*, 8 Sim. 578.

(d) *Bruere v. Pemberton*, 12 Ves. 386; *Massey v. Banner*, 4 Mad. 419; *Hooper v. Goodwin*, 1 Sw. 485, 493; *O'Brien v. O'Brien*, 1 Moll. 533.

(e) *Lee v. Brown*, 4 Ves. 369.
(f) See *Att.-Gen. v. Caius College*, 2 Keen, 150, 167; *Att.-Gen. v. Prettyman*, 4 Beav. 462.

¹ On the subject of interest against trustees, see ante, note to p. 374.

² As to compound interest, see ante, 374, and note.

mand;(g) and, in one instance, owing to the small amount of the sum in question.(h) It is, in the case of trusts for charities, however, that the discretion of the court has most frequently been exercised in refusing to direct a retrospective account against the trustees; and where there has been a *bona fide* misapprehension by the trustees, the account against them will usually be confined to the time of filing of the bill.(i)

It may be observed, that interest will not be given against a trustee, unless it be prayed by the bill.(k) And the question must be disposed of at the hearing on further directions, and cannot regularly be brought forward by petition.(l)

A trustee, against whom a decree is made with interest, will not necessarily be fixed with the costs, if the suit be not occasioned *entirely* by his misconduct.(m) But where his breach of trust is *the sole occasion* of bringing the parties into court, he will be decreed to pay the costs.(n) The discretion of the court on this point, will be governed by the conduct of the trustee in each individual case. But the further consideration of the subject will be reserved more conveniently for a future place.(o)

The relief against a breach of trust is, in the second place, prospective, in order to prevent further injury. And with this view, the old trustees will be dismissed from their office, and others appointed in their room.(p)¹ But it is not every act amounting to a breach of trust which will induce the court to remove a trustee. The acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or capacity *to execute the duties.(q) And where the failure in duty has proceeded from [*525]

(g) *Merry v. Ryves*, 1 Ed. 1.

(h) *Bone v. Cooke*, 13 Price, 343; 1 M'Clel. 168.

(i) *Ante*, Pt. III., Div. II., Ch. II., Sect. 2, XIII., p. 470, and cases cited.

(k) *Weymouth v. Boyer*, 1 Ves. jun. 426; *Bruere v. Pemberton*, 12 Ves. 389; see *Hooper v. Goodwin*, 1 Swanst. 493.

(l) *Crewze v. Lowth*, 4 Bro. C. C. 316; *Bruere v. Pemberton*, 12 Ves. 391.

(m) *Newton v. Bennett*, 1 Bro. C. C. 362; *Raphael v. Boehm*, 11 Ves. 111; *Ashburnham v. Thompson*, 13 Ves. 404; overruling *Seers v. Hind*, 1 Ves. jun. 294.

(n) *Crackelt v. Bethune*, 1 J. & W.

589; *Tebbs v. Carpenter*, 1 Mad. 308; vide *supra*, Pt. III., Div. I., Ch. II., Sect. 2, V., p. 368.

(o) *Vide post* (Costs), p. 551. [All parties concurring are liable in costs without regard to the degree of culpability. *Lawrence v. Bowles*, 2 Phill. 140.]

(p) *Att.-Gen. v. Mayor of Coventry*, 7 Bro. P. C. 235; *Ex parte Greenhouse*, 1 Mad. 92; *Att.-Gen. v. Shore*, 7 Sim. 309, n.; *Att.-Gen. v. Drummond*, 1 Dr. & W. 353; 3 Ib. 162.

(q) 2 Story, Eq. Jur. § 1289.

¹ See *ante*, p. 190, 191, and notes; *Parsons v. Winslow*, 6 Mass. 361; *Cooper v. Day*, 1 Rich. Eq. 26; *Gibbes v. Smith*, 2 Id. 131; *Thompson v. Thompson*, 2 B. Monroe, 161; *Johnson's Appeal*, 9 Barr, 416; *Matter of Mechanics' Bank*, 2 Barb. S. C. 446.

misunderstanding;(r) or from following the long uninterrupted practice of their predecessors without any improper motive, the court has refused to discharge them from the trust.(s)

In case of improvident or improper conduct on the part of a trustee, the court will refuse to order a trust fund, which had been paid into court, to be made over to him, but will retain it in court for the benefit of the persons beneficially interested.(t)¹

A receiver will also be appointed of the trust property, for its immediate and temporary protection against any further breaches of trust by the existing trustees, wherever the circumstances of the case render such a precaution advisable.(u)

A plaintiff, who seeks to charge a trustee with the consequences of a breach of trust, is bound so to state his case upon the bill, that the circumstances alleged, if proved, must necessarily and at all events constitute a breach of trust. Therefore, if certain payments by the trustees are complained of as illegal, but under certain circumstances, which are not negatived by the bill or information, the payments in question *might* be justifiable, a demurrer to the bill for want of equity will be allowed.(x)²

2d. Of the discharge of a breach of trust.³

A trustee may be exonerated from the consequences of a breach

(r) Att.-Gen. v. Coopers' Company, 19 Ves. 192.

(s) Att.-Gen. v. Caius Coll., 2 Keen, 150; vide supra, p. 166.

(t) Packwood v. Maddison, 2 S. & St. 232.

(u) Ante, p. 212. [Calhoun v. King, 5 Alab. 523; see a learned discussion of this point in Beverley v. Brooke, 4 Gratt. 208.]

(x) Att.-Gen. v. Mayor of Norwich, 2 M. & Cr. 406, 422.

¹ See Clagett v. Hall, 9 G. & J. 80; Contee v. Dawson, 2 Bland. Ch. 264. A party having a contingent interest, is entitled to have the trust fund, in a proper case, paid in. Ross v. Ross, 12 Beav. 89. See post, p. 550.

² The general presumption is, in the first instance, in favor of due discharge of the trust, especially where there may be two constructions of an act; and, therefore, the *cestui que trust* complainant must make out his case affirmatively. Maccubbin v. Cromwell, 7 G. & J. 157; McGinn v. Shaeffer, 7 Watts, 412. The trustee will not be liable for breaches of duty not specifically alleged. Smith v. Smith, 4 J. C. R. 445; see Cooper v. Cooper, 1 Halst. Ch. 9. In Harrison v. Mock, 10 Alab. 196, however, fresh malversations, after bill filed, were permitted under the circumstances of the case, to be proved, without amendment or supplemental bill. See as to the practice on directing inquiries with regard to wilful default, Coope v. Carter, 15 Eng. L. & Eq. 591.

³ Though, in general, none but the *cestui que trust* can interfere to set aside a purchase by the trustee of the trust property, Wilson v. Troup, 2 Cow. 195; Beeson v. Beeson, 9 Barr, 279; see ante, 159, &c., and notes; yet his right so to do may be one to which creditors are entitled; in which case a confirmation by him will not affect these intermediate rights. Iddings v. Bruen, 4 Sandf. Ch. 223; Bruch v. Lantz, 2 Rawle, 392.

of trust, either by an express release from the *cestui que trusts*, or by their having concurred or acquiesced in its commission.¹

A deed of release by *cestuis que trusts* to their trustees, must be made with full information of all the circumstances, and of the full extent of the liability of the trustees: and to avoid any question on this point it is highly desirable, that the whole of the facts should be fully recited in the deed. In the case of *Walker v. Symonds*,^(y) where the law on this subject was carefully considered by Lord Eldon, a deed of compromise by a *cestui que trust* was rescinded, and the co-trustees were held responsible for the loss of the trust fund, on the ground that the *cestui que trust* had not proper information of her own rights and the liabilities of the trustees at the time of executing the deed.

It is almost needless to add, that a release of this description is perfectly worthless, if obtained by any suppression of facts, or fraudulent representations, or other undue practice on the part of the trustee:^(z) and for this purpose imperfect information will be regarded as equivalent to concealment.^(a)

In the late case of *Wedderburn v. Wedderburn*,^(b) the executors and trustees of a testator, who were also his partners, had caused a valuation to be made of the testator's share of the partnership assets, and debited *themselves with the amount of that valuation, [*526] as held by them in trust for the residuary legatees. They then continued the partnership business, without taking out and investing the amount due to the testator's estate, and thus rendered themselves liable for a breach of trust. A release was taken from the several *cestui que trusts* in respect of their shares, as they respectively came of age; but, in accounting for their several shares, no allowance was made to them in respect of any share in the profits of the business, which had been carried on, partially, with the trust capital. A suit was brought against the trustees, to charge them with the amount of those profits, and a decree was made against them, one of the grounds of that decision being, that the release was obtained by the trustees without affording due information to the *ces-*

(y) 3 Swanst. 1; see 59.

(a) 3 Swanst. 73. [See *Ringgold v.*

(z) *Leonard v. Leonard*, 2 Ball & B. 171; *Jarvis v. Duke*, 1 Vern. 19; *Broderick v. Broderick*, 1 P. Wms. 239; *Cann v. Cann*, lb., 727, 8; *Gordon v. Gordon*, 3 Swanst. 400; *Underwood v. Stevens*, 1 Mer. 713.

Ringgold, 1 Har. & Gill, 11; *Briers v. Hackney*, 6 Geo. 419.]

(b) *Wedderburn v. Wedderburn*, 2 Keen, 722, 749; S. C., 4 M. & Cr. 41, 52.

¹ See ante, notes to p. 159, 168. A breach of trust may also be discharged by will, in which case it will not be necessary to show good faith in procuring the confirmation. *Stump v. Gaby*, 22 L. J. Ch. 352. As to when a legacy will be in satisfaction of a breach of trust, see *Bensusan v. Nehemias*, 4 Eng. L. & Eq. 143.

tui que trusts as to the real nature and effect of the transaction.(b) In this case, the bill was not filed until twenty-two years after the eldest, and more than ten years after the youngest, of the *cestui que trusts* had attained the age of twenty-one.

It is almost superfluous to remark, that a good release can only be made by a person who is *sui juris*.¹ Any such instrument, executed by a person under disability, as by an infant or *feme covert*, will be merely inoperative.(c) And the protection, in respect of infancy, will be continued after the infant has attained his full age, and until he has obtained all the information which might have been had in adult years.(d)²

However, it has been decided, that where unsettled demands between a trustee and his *cestui que trust* have been referred to arbitration, and the reference has been made a rule of court under the statute, a court of equity has no jurisdiction to set aside the award of the arbitrators, though it was made in ignorance of facts, which were in the exclusive knowledge of the trustee, and which had been unduly suppressed by him. For where the parties refer their differences to an arbitrator, they put themselves at arms' length from each other, and the *cestui que trust* is at liberty to ask the trustee all manner of questions. And this reasoning, unsatisfactory as it appears, was adopted and approved of by Lord Eldon in affirming the decision of Sir Thomas Plumer in the case referred to.(e)

The concurrence of the *cestui que trust* in the breach of trust, unquestionably precludes the party so concurring from afterwards questioning the propriety of that act.(f) Indeed, his participation in the improper act will render him *primarily* liable to make good any loss to the other *cestui que trusts* to the extent of his interests in the

(b) *Wedderburn v. Wedderburn*, 2 *Wedderburn v. Wedderburn*, 4 M. & Keen, 722, 749; S. C., 4 M. & Cr. 41, 52. Cr. 41, 50.

(c) See *Bateman v. Davis*, 3 Mad. 98; (e) *Auriol v. Smith*, T. & K. 121, 136. *Ryder v. Bickerton*, 3 Swanst. 82, n. (f) *Walker v. Symonds*, 3 Swanst. [See ante, 144, note, as to fraud.] 64; *Brice v. Stokes*, 11 Ves. 326; *Nail*

(d) *Walker v. Symonds*, 3 Swanst. *v. Punter*, 5 Sim. 555.
69; *Overton v. Banister*, 3 Hare, 503;

¹ So, where the interest of the *cestui que trust* is made inalienable (under the New York statute), his assent will not relieve the trustee from the consequences of a breach of trust, in selling the lands: *Hone v. Van Schaick*, 7 Paige, 221.

² Settlements between guardian and ward, just after the latter has come of age, are regarded with great suspicion; and proof of everything requisite to make them valid, is necessary: *Elliott v. Elliott*, 5 Binn. 8; *Say v. Barnes*, 4 S. & R. 114; *Luken's Appeal*, 7 W. & S. 48; *Stanley's Appeal*, 8 Barr, 431; *Waller v. Armistead*, 2 Leigh, 11; *Fish v. Miller*, 1 Hoff. Ch. 267; *Brewer v. Vanarsdale*, 6 Dana, 204; *Johnson v. Johnson*, 2 Hill's Eq. 277; *Williams v. Powell*, 1 Ired. Eq. 460. But in *Kirby v. Taylor*, 6 J. C. R. 242, it was said that such a release by the ward to the guardian, given freely and fairly, without any fraud, misrepresentation, or undue practices, would be valid.

trust estate.(g) However, this concurrence will not prejudice the *cestui que trust*, unless it be made with the knowledge, that the act in question was a breach of trust.(h) The remedy for a breach of trust may also be barred by the acquiescence of the parties, who are entitled to call it in question.(i) For instance, where a tenant for life had permitted the fund *to remain in the hands of one of two co-trustees alone for ten years without any complaint, he was [*527] not suffered to charge the other trustee with the interest.(k) And acquiescence for six years has been held a sufficient bar.(l) And where a party lies by for twenty-five(m) or eighteen years,(n) he has been held to be precluded by his laches from afterwards asserting his rights. But length of time will not have the same effect as a bar to the relief, where the relation of trustee and *cestui que trust* is still subsisting, but in that case, relief will be granted after a lapse of time which would otherwise have unquestionably operated as a bar. Thus, in *Wedderburn v. Wedderburn*,(o) the bill was not filed until twenty-two years after the eldest, and more than ten years after the youngest, of the *cestui que trusts* had reached twenty-one, and the relief was granted principally on the ground that the relation of trustee and *cestui que trust* was still subsisting between the parties.(o)¹

It has been already stated, that no acquiescence will prejudice a person who is ignorant of his rights:(p) and equity has repeatedly relieved against a breach of trust, notwithstanding the length of express or implied acquiescence, where the *cestui que trust* has not had due information of the circumstances.(q)

(g) *Booth v. Booth*, 1 Beav. 125, 130; *Greenwood v. Wakeford*, Ib. 576; *Kellaway v. Johnson*, 5 Beav. 319; *Lord Montfort v. Lord Cadogan*, 17 Ves. 490; *Lincoln v. Wright*, 4 Beav. 427; [*McGachen v. Dew*, 15 Eng. L. & Eq. 100.]

(h) *Walker v. Symonds*, 3 Sw. 64; *Buckeridge v. Glasse*, Cr. & Ph. 135, 6.

(i) *Brice v. Stokes*, 11 Ves. 319; *Langford v. Gascoigne*, Ib. 333; *Walker v. Symonds*, 3 Sw. 64; *Harden v. Parsons*, 1 Ed. 145; *Walmesley v. Booth*, 2 Atk. 25.

(k) *Brice v. Stokes*, 11 Ves. 326.

(l) *Walmesley v. Booth*, 2 Atk. 25.

(m) *Blennerhasset v. Day*, 2 Ball & B. 128. [*Villines v. Norfleet*, 2 Dev. Eq. 167.]

(n) *Gregory v. Gregory*, Coop. 201; Jac. 631.

(o) *Wedderburn v. Wedderburn*, 2 Keen, 749; 4 M. & Cr. 52.

(p) *Walker v. Symonds*, 3 Swanst. 64; *Cholmondley v. Clinton*, 2 Mer. 362; *Blennerhasset v. Day*, 2 Ball & B. 137; ante, p. 168, 265. [*Prevost v. Gratz*, Pet. C. C. 367; 6 Wheat. 487; *Mellish Est.*, 1 Pars. Eq. 486; *Beeson v. Beeson*, 9 Barr, 300.]

(q) *Ryder v. Bickerton*, 3 Sw. 80, n.; *Underwood v. Stevens*, 1 Mer. 712; *Adams v. Clifton*, 1 Russ. 207; *Bowes v. London Waterworks Company*, 3 Mad. 375; Jac. 324; *Randall v. Errington*, 10 Ves. 423; *Wedderburn v. Wedderburn*, 2 Keen, 749; 4 M. & Cr. 52; ante, p. 143, 250.

¹ See as to acquiescence, ante, page 168, 169, and notes; *Phillipson v. Gatty*, 7 Hare, 516; and *Munch v. Cockerell*, 5 My. & Cr. 178; *Villines v. Norfleet*, 2 Dev. Eq. 167.

It lies upon the trustee, who rests his defence on the acquiescence of the *cestui que trusts* in the breach of trust, to prove that they had knowledge or notice of the facts.(r) But where there is doubt on that point, the court will refer it to the Master to inquire and report as to the existence of such knowledge, or notice.(s) But this reference will not be directed where the defence of acquiescence is not raised by the answer, and is not satisfactorily proved by the evidence.(t)

However, even where the *cestui que trust* obtains a decree in his favor, after a considerable lapse of time, on the ground that he had no information of the breach of trust; yet if he have been guilty of negligence in not informing himself of his rights with a view to their due assertion, the court has shown its disapprobation of his *laches*, by limiting the account to the time of filing the bill, and by refusing the plaintiff his costs of the suit.(u)

The acquiescence must be by persons competent to bind themselves by their acts, for the consent of infants or married women to an act, which is a breach of trust, will not prejudice them, and on the removal of their disability, they will be entitled to a decree [528] against their trustees.(x) Although *the case may be different, where the act of the infants or *femes coverte* amounts to fraud by them on their trustee.(y)

The acquiescence of a *cestui que trust* entitled in remainder after an existing life interest, will not be binding on him during the continuance of the preceding life estate; for until his own title accrues in possession, he has no immediate right to interfere in the administration of the trust property.(z)

The Statutes of Limitation are no bar to the remedy of a *cestui que trust* against his trustee for a breach of trust.(a) Although, as we have already seen, a court of equity adopts to its fullest extent the analogy of those statutes, and refuses relief to a party who lies by for a lengthened period, after notice of the breach of trust.(b)¹

(r) *Randall v. Errington*, 10 Ves. 428; *Cr. 41, 50*; *March v. Russell*, 3 M. & Cr. 31, 42.

(s) *Walker v. Symonds*, 3 Swanst. n.; *Cory v. Gertchken*, 2 Mad. 40; [See *Davis v. Tingle*, 8 B. Monr. 539;

(t) *Lincoln v. Wright*, 4 Beav. 427. *Hall v. Timmons*, 2 Rich. Eq. 120;

(u) *Bowes v. East India Waterworks Company*, 3 Mad. 384; ante, p. 169, &c. *Stoolfoss v. Jenkins*, 12 S. & R. 399; *Wright v. Snowden*, 2 De G. & Sm. 321; ante, p. 144, note.]

(x) See *Ryder v. Bickerton*, 3 Swanst. 82, n.; *Bateman v. Davis*, 3 Mad. 98; *M. & K. 225*; ante, p. 266.

(y) *Kellaway v. Johnson*, 5 Beav. 319; *(a) Milnes v. Cowley*, 4 Price, 103; *Buckeridge v. Glasse*, Cr. & Ph. 136; ante, p. 264.

(z) *Wedderburn v. Wedderburn*, 4 M. & (b) Ante, p. 264, and see *Smith v. Clay*, 3 Bro. C. C. 639, n.

¹ See ante, p. 264, and note; and *Scott v. Haddock*, 11 Geo. 258.

The usual clause in trust deeds, providing for the indemnity of the trustees, does not extend to exonerate them from the consequences of a breach of trust.(c)

The discharge of a trustee under the Insolvent Act is no bar to an equitable demand against him by his *cestui que trusts* in respect of a breach of trust, where the amount for which he is liable *has not been ascertained*.(d) Although it would be different where the debt created by the breach of trust is *ascertained and determined*, either by a decree in a suit, or by an account settled between the parties, and where the debt (being thus specifically in existence) is included by the insolvent in the schedule of debts filed by him under the act.(e)

And the same distinction obtains with regard to the operation of a bankrupt's certificate. If the debt created by the breach of trust *be ascertained in its amount*, so that it may be proved against the bankrupt's estate, it will be discharged by the certificate.(f) But where the extent of the bankrupt's liability, if any, *still remains to be determined*, and the amount consequently cannot be proved as a debt under the fiat, the certificate will be no answer to a suit afterwards instituted by the *cestui que trust*.(g)

Where a trustee had given a bond for the due administration of the trust, and upon the commission of a breach of trust, the *cestui que trust* had sued and recovered upon the bond at law, that is no discharge of the breach of trust, but the *cestui que trust* may still compel a specific performance of the trust, although the relief will be given him only on the terms of repaying to the trustee with interest, the sum recovered on the bond.(h)

In the absence of any express release, the conduct of a *cestui que trust* may also amount to a waiver of his right to relief against a trustee for a breach of trust, so as to preclude him from afterwards asserting that right.

*Thus, where there has been a suit between the trustee and the *cestui que trusts*, in which they might have brought forward any claim against the trustee in respect of his conduct in the trust, and they have suffered the decree to be made without advancing any claim, they will not be permitted to commence any subsequent proceedings against the trustee for a breach of trust.(i)

But if the question of the breach of trust could not have been raised in the first suit, a *cestui que trust*, although a party to that

(c) *Mucklow v. Fuller*, Jac. 198; see *Langston v. Olivant*, Coop. 33.

(d) *Buckeridge v. Glasse*, Cr. & Ph. 126.

(e) *Buckeridge v. Glasse*, Cr. & Ph. 127, 132; *Gibbons v. Hawley*, 2 Hare, 246, 7, n.

(f) *Samuel v. Jones*, 2 Hare, 246; see *Wall v. Atkinson*, 2 Rose, 196.

(g) See *Ex parte Mare*, 8 Ves. 335.

(h) *Morecroft v. Dowling*, 2 P. Wms. 314.

(i) *Guidici v. Kinton*, 6 Beav. 517.

suit, will not be precluded from instituting a subsequent suit of his own, charging the trustee with a breach of trust.^(k) For instance, where there had been a legatee's suit, in which the usual decree was made for taking the accounts and for ascertaining the residue, and A. B. had gone in before the Master under that decree, and claimed the residue, but no final decree had been made in the legatee's suit; it was held, that A. B. was not precluded from instituting a fresh suit against the executor, to charge him with a breach of trust in respect of his accounts.^(l)

[*530]

*CHAPTER II.

OF THE BANKRUPTCY AND INSOLVENCY OF TRUSTEES.

REAL or personal property, which is held upon an *express* trust, is not within the intent of the Bankrupt or Insolvent Acts, and will not pass to the assignees on the bankruptcy or insolvency of the trustee.^(a)¹ However, if the trust be merely *constructive*, and the equity against the bankrupt or insolvent be at all doubtful, the legal estate will vest in assignees; although it will remain liable in their hands to all the same equities that might have been enforced against the bankrupt.^(b)

Where a declaration of the trust has been made by the trustee, the title of the *cestui que trusts* will be complete as against his assignees upon his bankruptcy, although the property consists of *choses in action*, and no notice of the title of the *cestui que trusts* is given to the parties liable to the payment.^(c) And where a trust of land is actually created previously to the bankruptcy of the trustee, but no written declaration of the trust is executed by him until after the commission of an act of bankruptcy, the subsequent declaration is

(k) *Guidici v. Kinton*, 6 Beav. 517.

(l) *Ibid.*

(a) *Copeman v. Gallant*, 1 P. Wms. 314; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Winch v. Keeley*, 1 T. R. 619; *Ex parte Gillett*, 3 Mad. 28; *Garderv. Rowe*, 2 S. & St. 346; 5 Russ. 258; *Pinkett v.*

Wright, 2 Hare, 120; *Ex parte Kensington*, 2 V. & B. 79.

(b) *Taylor v. Wheeler*, 2 Vern. 564; *Bennet v. Davis*, 2 P. Wms. 316; *Carpenter v. Marnell*, 3 B. & P. 40; see *Waring v. Coventry*, 2 M. & K. 406.

(c) *Pinkett v. Wright*, 2 Hare, 120.

¹ *Kip v. Bank of N. Y.*, 10 John. 63; *Blin v. Pierce*, 20 Verm. 25; *Ontario Bank v. Munford*, 2 Barb. Ch. 596; *Hynson v. Burton*, 5 Pike, 496; *Price v. Pollard*, 2 Dallas, 60; *Kennedy v. Strong*, 10 John. 289; *Clarke v. Minot*, 4 Metc. 346; see *Ingraham on Insolvency*, 64.

sufficient evidence of the title of the *cestui que trusts*, and will exclude any claim by the assignees of the trustee.(d)

The distinction between property, belonging beneficially to a bankrupt or insolvent, and that which is vested in him as a trustee, is recognised and acted upon by courts of law. Therefore where a debt or other *chose in action* has been assigned for a valuable consideration, and the assignor afterwards becomes bankrupt, it has been held that the legal title did not pass to his assignees, but remained in the bankrupt as trustee for the person to whom he had assigned it, and that an action might be brought in the bankrupt's name against the debtor to recover the debt.(e)

Where the title of the *cestui que trust* to the property in the bankrupt's possession is not conclusively established, a reference will be directed to the Master to ascertain and report upon the existence of any trust;(f) or in some cases the court will direct an issue to be tried at law with the view of determining that question.(g)

Trust property may be followed into the hands of the bankrupt or insolvent trustee whenever it is of a tangible nature; and this right exists not only with respect to lands or other real estate,(h) but also as to such *personal and movable effects as are capable of being identified.(i) For instance, money or goods that are [*531] ear-marked;(k) or plate, &c. ;(l) or furniture;(m) or a sum of stock standing in the bankrupt's name ;(n) or a policy of insurance ;(o) or shares in a trading or banking company ;(p) may be so followed ; and it is immaterial, that the trust property is blended with other property of the same nature belonging beneficially to the trustee.(q) However, where a sum of stock, or a number of shares, part of which are held in trust, are standing in a person's name, without anything to distinguish the part which belongs to him beneficially, from that which is vested in him as trustee, and the trustee disposes of the *whole* of the property, and afterwards repurchases other stock or shares, and there are no means of identifying the repurchased pro-

(d) *Gardner v. Rowe*, 2 S. & St. 346; 5 Russ. 258. 579. [*Kip v. Bank of N. Y.* 10 John. R. 65; *Kennedy v. Strong*, Id. 289.]

(e) *Winch v. Keeley*, 1 T. R. 619; (k) *Ex parte Smith*, 4 Deac. & Ch. Carpenter *v. Marnell*, 3 B. & P. 40; 579. [*Kip v. Bank of N. Y.*, 10 John. 65.]

(l) *Ex parte Marsh*, 1 Atk. 158.

(m) *Ex parte Martin*, 19 Ves. 491.

(n) *Ex parte Gillett*, 3 Mad. 28; *Pinkett v. Wright*, 2 Hare, 129.

(o) *Bozon v. Bolland*, 1 Mont. & Bl. 67; 11 Sim. 124; *Duncan v. Chamberlaine*, 11 Sim. 121.

(p) *Pinkett v. Wright*, 2 Hare, 120.

(q) *Ibid.*

(f) *Ex parte Gillett*, 3 Mad. 28.

(g) *Gardner v. Rowe*, 2 S. & St. 346.

(h) *Ibid.*

(i) *Copeman v. Gallant*, 1 P. Wms. 314; *Ex parte Smith*, 4 Deac. & Chitt.

perty with that originally held by him as trustee, the court would have great difficulty in fastening the trust specially on the property so repurchased.(r) But in the case suggested above, if a *part* only of the stock or shares, standing generally in the trustee's name, were disposed of by him, the court will presume that the disposition was confined to that part which belonged beneficially to him, and which he had the right to dispose of, and that he had no intention of dealing with the part held by him as trustee. For instance, if one sum of 20,000*l.* consols were standing in the name of A., who was trustee of one moiety and beneficial owner of the other moiety, and A. were to sell and transfer 10,000*l.* of the stock, the court, as against A. and his assignees in bankruptcy or insolvency, would hold, that the 10,000*l.* transferred was the property of the bankrupt, and the remaining 10,000*l.* continued subject to the trust.(s)

Where the trust property does not remain *in specie*, but it has been actually sold or made away with by the trustee, the *cestui que trusts* have no longer any specific remedy against any part of his estate on his bankruptcy or insolvency, but they must come in *pari passu* with the other creditors, and prove against the trustee's estate for the amount due to them.(t)¹ Where the claim of the *cestui que trust* is for an amount already ascertained, or which may be readily ascertained by computation, it will be admitted to proof as a matter of course; as where it is for a sum of money either actually paid over to the trustee upon the trust,(u) or appearing to be due from him on the balance of his accounts,(x) or for which he has been declared liable by a decree of the court,(y) or a legacy,(z) or a sum of stock;(a) for such claims amount to good *equitable [*532] debts.(b)(1) And interest on the amount of the original

(r) 2 Hare, 128. [But see *Kip v. Bank of N. Y.*, 10 John. R. 65.]

(s) 2 Hare, 129.

(t) Ex parte Shakeshaft, 3 Bro. C. C. 196; *Keble v. Thompson*, Ib. 111; Ex parte Watson, 2 Ves. & B. 414; Ex parte Fairfield, 1 Gl. & J. 221.

(u) *Keble v. Thompson*, 3 Bro. C. C. 111; *Bick v. Motley*, 2 M. & K. 312.

(x) Ex parte Watson, 2 Ves. & B. 414; Ex parte Richardson, 3 Mad. 138.

(y) See *Samuel v. Jones*, 2 Hare, 246; *Gibbons v. Hawley*, Ib. n.; *Wall v. Atkinson*, 2 Rose, 196.

(z) Ex parte Heald, 12 Law Jour. N. S., Bankr. 37.

(a) Ex parte Shakeshaft, 3 Bro. C. C. 196; Ex parte Fairfield, 1 Gl. & J. 221.

(b) Archb. Bankrupt Law, 99, 9th ed.

(1) However, it has been decided, that an equitable debt, though provable, could not be made the foundation of a commission, as the petitioning creditor's debt. Ex parte Yonge, 3 V. & B. 40; Ex parte Williamson, 2 Ves. 252.

¹ But where money, the proceeds of trust goods, is kept separate and distinct, as where it is deposited in bank, in the trustee's name, it will not pass to his assignees. *Kip v. Bank of New York*, 10 Johns. R. 65.

claim may also be included in the proof.(c) But where the demand against the trustee is founded on a breach of trust, and the extent of his liability has not been determined by the decree of the court, and *à fortiori* if the commission of *any* breach of trust, and the existence of any liability *at all* be still uncertain, there will then be no existing debt, which can be proved under the bankruptcy or insolvency, or discharged by the certificate, but the *cestui que trusts* may still prosecute and establish their claim against him by any subsequent proceedings, notwithstanding his certificate or discharge.(d)¹

Upon the bankruptcy of a trustee, who is indebted to the trust estate, the debt may be proved by any one or more of the *cestui que trusts*;(e) or upon their petition, the court will make an order for the appointment of a new trustee, who will be at liberty to go in and prove for the amount due from the bankrupt's estate.(f) And in some cases the court, without ordering a new trustee, will appoint a person to prove on behalf of the *cestui que trusts*, the costs of the appearance of the assignees to be paid out of the bankrupt's estate.(g) So the father of infant *cestui que trusts* has been allowed to make the proof upon obtaining an order of the court;(h) and on one occasion the court directed that the son of the *cestui que trust* might prove for the amount, retaining the dividends until further order.(i)

Where a petition is presented by *cestui que trusts*, or by the bankrupt trustee himself, for leave to prove against the estate for the amount of a trust fund, the petitioners will not be liable to pay to the assignees their costs of the petition.(k) And on the other hand, a bankrupt trustee, who has been guilty of a breach of trust, will not be entitled to his costs of appearance on a similar petition by the *cestui que trusts* for leave to prove against his estate.(l)

In some cases the bankrupt himself has been allowed to prove

(c) *Bick v. Motley*, 2 M. & K. 312; N. S., Bank. 16; *Ex parte Vine*, 1 Deac. & Ch. 357.
Moons v. De Barnales, 1 Russ. 301.

(d) *Buckeridge v. Glasse*, Cr. & Ph. 126. (h) *Ex parte Heaton*, Buck. 386.
 (i) *Ex parte Vine*, 1 Deac. & Ch. 357.

(e) *Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Ex parte Fairfield*, 1 Gl. & J. 221; (k) *Ex parte Heald*, 12 Law Journ. N. S., Bankr. 37; *Ex parte Snowlton*, *Ex parte Vine*, 1 Deac. & Ch. 357; *Ex parte Beilby*, 1 Gl. & J. 175. Id.

(f) See *Ex parte Saunders*, 2 Gl. & J. 132; *Ex parte Inkersole*, Id. 230. (l) *Ex parte Harris*, 11 Law Journ. N. S., Bank. 16.

(g) *Ex parte Harris*, 11 Law Journ.

¹ Where an executor improperly pays over to the father of infant legatees, their legacies, who invests them and thereby makes large profits; the *cestui que trusts* having the right to elect between the principal and interest, and the benefit of the investments, are entitled to prove against the father's estate, and the amount of benefit is to be ascertained by the Commissioner: *Ex parte Montefiore*, De Gex. Bank. R. 171.

against his own estate for a debt due to himself as trustee.(m) But an order must be obtained to sanction that course;(n) and the court will guard against the possibility of any misapplication of the dividends, by ordering them to be paid into court,(o) or to the credit of the cause, if any be pending, for the administration of the assets.(p)

[*533] *Where two co-trustees are both implicated in a breach of trust, by having joined in a transfer of the trust fund to one of them, by whom it has been lost, there is a joint and several debt, and the *cestui que trusts* may prove for the whole amount against the estate of the trustee who joined in the transfer, without having recourse first to the estate of the trustee by whom the fund was received and wasted, although his estate was primarily liable;(q) or the proof may be made against both estates.(r) And if one of two trustees misapply the trust fund, and become bankrupt, an order may be obtained by the *cestui que trust* to prove for the amount against his estate, although the other trustee is solvent.(s)

Again, where the trust fund is misapplied by one of several co-trustees, without the concurrence of the rest, and that one becomes bankrupt, the solvent trustees may prove for the amount against the estate of the defaulting trustee.(t) But if the co-trustees have not acted, or accepted the trust, the court, on the petition of the *cestui que trusts*, will appoint some other person to prove.(u) And if one or more of several co-trustees have been compelled to make good to the *cestui que trusts* the amount of the trust fund which had been appropriated or otherwise misapplied by their bankrupt co-trustee, they will be entitled to prove for the amount against the bankrupt's estate.(x)

It may be observed, that where a trustee, who is indebted to the trust estate, is made a defendant in a suit for the administration of the estate, and he afterwards becomes bankrupt or insolvent, he will notwithstanding be entitled to his costs incurred *subsequently* to the bankruptcy or insolvency, to be paid to him out of the trust estate,

(m) Ex parte Snowlton, 12 Law Journ. N. S., Bank. 37; Ex parte Richardson, 3 Mad. 138; Ex parte Watson, 2 V. & B. 414; Ex parte Atkins, Buck. 479; sed vide Ex parte Moody, 2 Rose, 413.

(n) Ex parte Shaw, 1 Gl. & J. 127, see 163; Ex parte Collindon, 1 Mont. & Ch. 156; Ex parte Thring, 1 M. & Cr. 75.

(o) Ex parte Leake, 2 Bro. C. C. 596; Ex parte Brooks, Cook. 163.

(p) Ex parte Colman, 2 Deac. & Ch. 584.

(q) Ex parte Shakeshaft, 3 Bro. C. C. 197.

(r) Keble v. Thompson, 3 Bro. C. C. 111.

(s) Ex parte Beilby, 1 Gl. & J. 175.

(t) Ex parte J. Shakeshaft, 3 Bro. C. C. 198; Ex parte Beaumont, 1 Deac. & Ch. 360; Ex parte Stettel, 1 M. & Cr. 165.

(u) Ex parte Harris, 11 Law Journ. N. S., Bank. 16.

(x) Lincoln v. Wright, 4 Beav. 427.

although the costs incurred *before* he became bankrupt or insolvent will be set off against the debt: for the previous debt is extinguished by the bankruptcy or insolvency, while the right to receive his costs remains.(y)

A trustee, who carries on any trade with the trust assets for the benefit of the *cestui que trusts*, will be responsible to the creditors, not only to the extent of the trust assets, but also with the whole of his own property, and he may be made bankrupt, and proceeded against in the same manner as any other trader.(z) And it is immaterial, that the trade is carried on by him in consequence of an express direction in the trust instrument; although the trust property will doubtless be primarily liable to the creditors, and will be first applied as far as it will go in discharge of the liabilities.(a)¹ Where the amount of the trust funds to be employed in trade is expressly fixed by the author of the trust, it will be a breach of trust in the trustees to employ any further portion of the funds in the business, and neither the trustees nor their creditors, in case of bankruptcy, can enforce any claim upon the trust estate beyond the prescribed amount.(b)

*In the present state of the law on this point, no trustee [*534] could be advised, under any circumstances, to undertake the responsibility of carrying on any trade or business in trust for others. For by so doing, he adopts the same risks and liabilities as persons who trade on their own account, while he can participate in none of the profits; and, as a matter of ordinary prudence, a trust for such a purpose should unhesitatingly be declined.

There has already been occasion to consider the jurisdiction of the court of review to appoint new trustees in the place of those becoming bankrupts, as well as the mode in which that jurisdiction will be exercised.(c)

No power of appointing new trustees has been conferred by the

(y) Samuel v. Jones, 2 Hare, 246; (b) Ex parte Garland, 10 Ves. 110; Gibbons v. Hawley, Id. n. Ex parte Richardson, 3 Mad. 157;

(z) Ex parte Garland, 10 Ves. 119; Thompson v. Andrews, 1 M. & K. 116; Ex parte Richardson, 3 Mad. 157. [See Cutbush v. Cutbush, 1 Beav. 184. Ex parte Butterfield, De Gex, 572.]

(a) Ex parte Garland, 10 Ves. 110, [See Ex parte Congreve, De Gex, 267; 119; Ex parte Richardson, 3 Mad. 138, Ex parte Cousen, Id. 451.] 157.

¹ But in Ex parte Butterfield, De Gex, 572, where a particular sum was authorized by a testator to be employed in his trade, to be carried on after his death by his executrix, who subsequently took in partnership her son, and they then became bankrupt, it was held by the Lord Chancellor, overruling a decision of the Court of Review (Id. 319), that proof for the amount could not be made by the *cestui que trusts*.

legislature on the insolvent debtors' court in case of the insolvency of trustees; but, in such cases, a bill must be filed in the Court of Chancery for the removal of the insolvent, and the appointment of a new trustee in his place; and the insolvency would unquestionably be sufficient foundation for such an application.(d) And in the mean time, wherever the exigencies of the trust require it, a receiver will be appointed, and an injunction granted, prohibiting the receipt of the trust assets by the insolvent trustee.(e) A receiver has also been appointed on the bankruptcy of an executor and trustee, and although the testator, at the time of appointing him, knew that the commission had issued.(f)

Where one of three co-trustees becomes bankrupt after an order of the court for payment of money to them, the proper course is, to apply to the court to vary the order by directing the payment to be made to the two solvent trustees only.(g) And in case of the bankruptcy of a sole trustee, under similar circumstances, the appointment of a new trustee should first be procured, and an application then made to the court to vary the order by directing the payment to the new trustee.

[*535]

*CHAPTER III.

OF THE DISABILITIES OF TRUSTEES.

IT is one of the settled principles of courts of equity, that trustees shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of their *cestui que trusts*.

However, this rule does not extend to prevent a trustee from enjoying any benefit or advantage which is expressly given to him by the creator of the trust. And we shall see in a future chapter, that a trustee may be entitled to charge for professional services, &c., when duly authorized to do so.(a)

And trustees are, of course, entitled to legacies expressly given to them by the testator. Although where the legacy is given to them only *as trustees*, or as a remuneration for their trouble, &c., they cannot claim it, if they do not accept the trust.(b) And it is immaterial that the trustee is prevented from acting by age or infirmity.(c) But if the legacy be given to the trustee *personally*,

(d) 3 Mad. 100.

(e) Mansfield v. Shaw, 3 Mad. 100.

(f) Langley v. Hawk, 5 Mad. 44.

(g) Gage v. Watmough, 10 Law Journ. N. S., Chanc. 234.

(a) Vide post, Ch. [Allowances], p. 575.

(b) Harrison v. Rowley, 4 Ves. 216;

Stackpole v. Howell, 13 Ves. 421; Read

v. Devaynes, 3 Bro. C. C. 95; Dix v.

Reed, 1 S. & St. 239; Barber v. Barber,

3 M. & Cr. 688; Pigot v. Green, 6 Sim.

72; Calvert v. Sebbon, 4 Beav. 222.

(c) Hanbury v. Spooner, 5 Beav. 630.

without regard to the office imposed on him, he will be entitled irrespectively of his acceptance of the office.(d) And where a testator appointed two trustees, and gave them 100*l.* each, "as a mark of his respect for them," and afterwards made a codicil, appointing two other trustees in the place of the first two, and by the codicil he also gave 100*l.* to each of the substituted trustees, "as a mark of his respect for them," the legacies to the first trustees were held not to be revoked by implication by the codicil.(e)

The equitable disability of trustees to become the purchasers of the trust estate, originates in the principle of the court just referred to. And this disability is twofold—1st, Where the trustee attempts to purchase directly from *himself*—and 2dly, Where the purchase is effected by contract or agreement between the trustee and the *cestui que trust*.¹

In the first case, the disability is much more strictly enforced than in the other. Indeed, it was laid down by Lord Erskine, with regard to a trustee selling to himself, that "without any consideration of fraud, or looking beyond the relation of the parties, that contract is void."(f)

However, the authorities scarcely bear out that assertion in its fullest extent;(g) for such sales (though *prima facie* invalid), have frequently *been supported in equity, where it has been [*536] shown, that the fiduciary relation of the purchaser had absolutely ceased previously to the purchase,(h) or that the purchase was made with the full concurrence and consent of the persons beneficially interested (who, in that case must, of course, have been competent to give their assent).(i) Or, where the *cestui que trusts*, by their laches or acquiescence, have debarred themselves from their right of questioning the transaction.(k) A purchase by a trustee, under the sanction of the court, is also necessarily excepted from the operation of the general principle.(l) But wherever one or more of

(d) *Humberston v. Humberston*, 1 P. Wms. 333; *Cockerell v. Barber*, 2 Russ. 585; *Griffith v. Pruen*, 11 Sim. 202; *Christian v. Devereaux*, 12 Sim. 264.

(e) *Burgess v. Burgess*, 1 Coll. N. C. C. 367.

(f) In *Morse v. Royal*, 12 Ves. 372. [See *Chronister v. Bushey*, 7 W. & S. 152; *McConnell v. Gibson*, 12 Illin. 128; *Lewis v. Hillman*, 3 H. L. Cas. 628.]

(g) See *Ex parte Lacey*, 6 Ves. 625; *Downes v. Grazebrook*, 3 Mer. 208. [See ante, 159, note.]

(h) *Ex parte Bennett*, 10 Ves. 393; *Ex parte Lacey*, 6 Ves. 626; *Downes v. Grazebrook*, 3 Mer. 208. [*Ball v. Carrew*, 13 Pick. 28; *De Bevoise v. Sandford*, 1 Hoff. Ch. 192.]

(i) *Downes v. Grazebrook*, 3 Mer. 208; *Randall v. Errington*, 10 Ves. 428. [See *Worthy v. Johnson*, 8 Geo. 236; ante, 169, note.]

(k) *Campbell v. Walker*, 5 Ves. 678. [See ante, 159, note; 168, note.]

(l) See *Campbell v. Walker*, 5 Ves. 681, 2. [See *Michoud v. Girod*, 4 How. U. S. 555.]

¹ See ante, 158, 159, notes.

these corroborative circumstances cannot be established, a purchase of this nature, however fair, open, and honest in itself, will invariably be set aside in equity on a bill filed for that purpose by the *cestui que trusts*.^(m) And it is immaterial that the purchase is made by the trustee at a public sale by auction,⁽ⁿ⁾ or in the name of another person as his agent.^(o)¹ Moreover, it is unnecessary for the *cestui que trust* to show, that the trustee has obtained any profit or advantage by the purchase,^(p) although that would, of course, be an additional reason for the interference of the court against the trustee, who would be decreed to account for the profits thus made.^(q)

It rests with the trustee, who relies upon any corroborative circumstances in support of his purchase, to prove those facts. And even where such circumstances are established in evidence, the court will look into the whole transaction with infinite and the most guarded jealousy, for the law supposes the trustee to have acquired all the knowledge respecting the trust estate, which a trustee may acquire, and which may be very useful to him, but the communication of which to the *cestui que trust*, the court can never be sure he has made.^(r)

On the other hand, a purchase of this nature, though voidable at the option of the *cestui que trusts*, will be enforced against the trustee, if that course be most for the benefit of the trust estate. And accordingly, the decree in these cases usually directs the estate to be put up for sale again, at the price given by the trustee; and if more be bid, the additional price will be for the benefit of the trust

^(m) *Campbell v. Walker*, 5 Ves. 678; *Ex parte Lacey*, 6 Ves. 625; *Lister v. Lister*, *Ib.* 631; *Downes v. Grazebrook*, 3 Mer. 200. [Ante, 158, 159, notes.]

⁽ⁿ⁾ *Campbell v. Walker*, 5 Ves. 678; *Lister v. Lister*, 6 Ves. 631; *Sanderson v. Walker*, 13 Ves. 601; *Downes v. Grazebrook*, 3 Mer. 200; [*Beeson v. Beeson*, 9 Barr, 279; *Bostwick v. Atkins*, 3 Comst. 53; *Campbell v. Penn. Ins. Co.*, 2 Whart. 53; *Michoud v. Girod*, 4 How. U. S. 557.]

^(o) *Whelpdale v. Cookson*, 1 Ves. 9; *Campbell v. Walker*, 5 Ves. 678; 13 Ves. 601; *Downes v. Grazebrook*, 3 Mer. 200; *Randall v. Errington*, 10 Ves. 423.

^(p) *Ex parte James*, 8 Ves. 348; *Ex parte Bennett*, 10 Ves. 393; *Ex parte Lacey*, 6 Ves. 627.

^(q) *Fox v. Mackreth*, 2 Bro. C. C. 400; *Whichcote v. Lawrence*, 3 Ves. 740.

^(r) *Ex parte Lacey*, 6 Ves. 226; *Ex parte Bennett*, 10 Ves. 394; [post, note ^(x).]

¹ *Davoue v. Fanning*, 2 J. C. R. 252; *Hawley v. Cramer*, 7 Cow. 717; *Hunt v. Barr*, 2 Dev. Eq. 292; *Paull v. Squibb*, 12 Penn. St. 296; *Buckler v. Lafferty*, 2 Rob. Va. 394; *Michoud v. Girod*, 4 How. 553; *Lewis v. Hillman*, 3 H. L. Cas. 629. But in *Beeson v. Beeson*, 9 Barr, 280, it was held, that a purchase by the trustee, through a secret agent, does not, of itself, render the sale absolutely void; but that it did so only where there was actual fraud, as where it was used as a means of deceiving or misleading the *cestui que trust*.

estate, but if there be no advance, the trustee will be held to his bargain.^(s)

A person who has been named a trustee for sale in an instrument, but who has never accepted or acted in the trust, is not a trustee; and consequently he will not be disabled from purchasing the trust property.^(t)

*The same principles apply, although not with quite the same stringency, to contracts between the trustee and his *cestui que trust* for the purchase of the trust estate.¹ [^{*537}]

In *Coles v. Trecothick*,^(u) Lord Eldon said: "I agree the *cestui que trust* may deal with his trustee, so that the trustee may become the purchaser of the estate. But though permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence: so much, that it is very hazardous for a trustee to engage in such a transaction." And Again, "a trustee may purchase from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee." But "it is a difficult case to make out, whenever it is contended that the exception prevails."^(x)

Therefore, in all cases of purchases by trustees from their *cestui que trusts*, where the equity is not barred by acquiescence or confirmation, the court will carefully inquire into and sift all the circumstances, in order to ascertain the perfect fairness and propriety of the transaction; and it will rest with the trustee to establish in evidence, that there was such a *bona fide* contract between them, as according to the rule just referred to, will sustain the purchase in a court of equity.^(y) The court, if satisfied as to this evidence, will support the transaction.^(z) But it is almost needless to add, that if any unfair advantage has been taken by the trustee, by withholding

(s) Ex parte Reynoler, 5 Ves. 707; Ex parte Hughes, 6 Ves. 617; Ex parte Lacey, Ib. 630; Lister v. Lister, Ib. 631; Sanderson v. Walker, 13 Ves. 601. [McClure v. Miller, 1 Barb. Ch. 107; Thorp v. McCullum, 1 Gilm. 624; Ex parte Wiggin, 1 Hill's Eq. 354; Pitt v. Petway, 12 Ired. R. 69.]

(t) Chambers v. Waters, 3 Sim. 42; Stacey v. Elph, 1 M. & K. 195.

(u) 9 Ves. 244.

(x) 9 Ves. 246, 7; and see Morse v.

Royal, 12 Ves. 373; Ayliff v. Murray, 2 Atk. 59. [Boyd v. Hawkins, 2 Dev. Eq. 195, 329; Schwartz v. Wendell, Walker, Ch. 267; Farr v. Farr, 1 Hill's Eq. 390; Stuart v. Kissam, 2 Barb. S. C. 494; but see S. C. 11 Barb. S. C. 271; Allen v. Bryant, 7 Ired. Eq. 276.]

(y) See Hunter v. Atkins, 3 M. & K. 135.

(z) Coles v. Trecothick, 9 Ves. 234; Clarke v. Smith, 2 Ed. 134; Morse v. Royal, 12 Ves. 355.

¹ See ante, 156, 159, and notes.

information, or other fraudulent dealing, the purchase will be at once set aside.(a) And mere inadequacy of price will go a vast way in the mind of the court, to constitute such fraud,(b) though the purchase will not necessarily be set aside on that account alone.(c) And it is essential to the validity of such a purchase, that the *cestui que trust* should be made aware, that he is dealing with his trustee, as the knowledge of that fact might put him more on his guard; and on this ground, where the trustee purchased and took the conveyance *in the name of a third person*, without the knowledge of the *cestui que trust*, the conveyance was set aside after a lapse of several years.(d)

For the same reason, a purchase by a trustee of an estate put up to *public sale* by the *cestui que trust*, might not be so easily supported, as a sale by *private contract* between them, where the *cestui que trust* is not distinctly informed of the intention of his trustee to become a bidder at the sale.(e)

The incapacity of trustees to purchase proceeds on the facilities which their situation gives them, of acquiring exclusive advantages and information; consequently the same principle does not apply to [*538] mere dry trustees—*such as those for preserving contingent remainders—who have practically no interest or power with regard to the trust estate.(f)¹

On this ground also, where the *cestui que trust* has taken upon himself the conduct of all the preliminary proceedings requisite for the sale, such as the surveys, the mode and conditions of sale, the plans, the choice of the auctioneer, &c.; and the trustee has not been in a situation to acquire any exclusive information respecting the property, the court will deal with the contract, as if made between two indifferent persons putting each other at arms' length, and will give effect to the sale, though made for an inadequate price.(g)

It is almost superfluous to add, that the rule of equity, interdicting

(a) *Herne v. Meeres*, 1 Vern. 465; (d) *Randall v. Errington*, 10 Ves. 423.
Fox v. Mackreth, 2 Bro. C. C. 400; (e) See *Att-Gen. v. Lord Dudley*,
Scott v. Davis, M. & Cr. 87. Coop. 146.

(b) *Morse v. Royal*, 12 Ves. 373. (f) *Parkes v. White*, 11 Ves. 226;
 [Pugh v. Bell, 1 J. J. Marsh. 406.] and see *Naylor v. Winch*, 1 S. & St. 567.

(c) *Coles v. Trecothick*, 9 Ves. 234. (g) *Coles v. Trecothick*, 9 Ves. 248.

¹ So of a purchase by a mortgagee: *Iddings v. Bruen*, 4 Sandf. Ch. 223; *Knight v. Majoribanks*, 2 Mac. & G. 10; 2 Hall & Twells, 308; *Murdock's Case*, 2 Bland, 461; otherwise if there be a power of sale. *Waters v. Givens*, 11 Cl. & F. 684. So a devisee of land subject to a legacy, is not a trustee, to prevent him from purchasing it in, at a profit: *Powell v. Murray*, 2 Edw. Ch. 636. And in general, where several heirs or devisees are turned into trustees, by implication, but without any notice, constructive or actual, of the trust, any one of them may become a *bona fide* purchaser of the shares of his co-heirs or co-devisees so as to hold the same discharged of the trust. *Giddings v. Eastman*, 5 Paige, 561.

the purchase of the trust estate by trustees, applies as much to *one* of several trustees as to a *sole* trustee.^(h)

In all cases of this description, whether the purchase be made by the trustee from himself, or by contract with his *cestui que trust*, the right to relief may be barred by the confirmation or acquiescence of the *cestui que trust*.

Where the person, beneficially entitled, is *sui juris*, and has knowledge of the fraud committed against him, a purchase by the trustee may unquestionably be supported by a subsequent confirmation.⁽ⁱ⁾ But, it has been said by Lord Eldon, that where the original fraud is clearly established, the defence of a confirmation will be watched with the utmost strictness, and will be allowed to stand only upon the clearest evidence, as an act done with all the deliberation, that ought to attend a transaction, the effect of which is to ratify that, which in justice ought never to have taken place.^(k)¹

Again, the application for relief must be made within a reasonable time; and the court will refuse to set aside a purchase by a trustee, in which the *cestui que trusts* have acquiesced for any considerable period.^(l) *However, the nature and effect of acquiescence and laches as a bar to relief in equity have already been con- [*539] sidered, and need not again be discussed.^(m)²

Where it is determined that a purchase by a trustee cannot stand, the *cestui que trusts* will be entitled to have the property reconveyed to them by the trustee, or by any purchaser from him with notice of the trust.⁽ⁿ⁾ This relief will be granted on the terms of the *cestui que trusts* repaying to the trustee the amount of the purchase-money paid by him, together with interest at four per cent.,^(o) while the trustee, or the purchaser with notice, will have to account to the *cestui que trusts* for the rents and profits of the estate:^(p) and if he has

(h) Whichcote v. Lawrence, 3 Ves. 740.

(i) Clarke v. Swaile, 2 Ed. 134; Morse v. Royal, 12 Ves. 373, 4; Roche v. O'Brien, 1 Ball & B. 353.

(k) Morse v. Royal, 12 Ves. 373, 4; see Carpenter v. Heriot, 1 Ed. 338.

(l) Campbell v. Walker, 5 Ves. 680; Parkes v. White, 11 Ves. 221; Gregory v. Gregory, Coop. 201; Chalmer v. Bradley, 1 J. & W. 59; Morse v. Royal, 12 Ves. 374.

(m) Ante, p. 168, n:

(n) York Buildings Company v. Mac-

kenzie, 8 Bro. P. C. 42; Lord Hardwicke v. Vernon, 4 Ves. 411; Ex parte James, 8 Ves. 351; Ex parte Bennett, 10 Ves. 400; Att.-Gen. v. Dudley, Coop. 146; Punbar v. Tredennick, 2 Ball & B. 304. [See ante, 164, notes.]

(o) Whelpdale v. Cookson, 5 Ves. 682, stated; Hall v. Hallett, 1 Cox, 134, 139; Ex parte James, 8 Ves. 351; Watson v. Toone, 6 Mad. 153.

(p) Ex parte Lacey, 6 Ves. 630; Ex parte James, 9 Ves. 351; Watson v. Toone, 6 Mad. 153.

¹ See ante, 159, notes.

² See ante, 159, note; 168, 169, notes.

been in actual occupation of the property, he will be also charged with an occupation rent.(g)

If the trustee have expended money in substantial repairs, and improvements of the property, he will be allowed the amount, which will be added to the purchase-money.(r)¹ And if, on the contrary, the property has been deteriorated in value through the act of the trustee, he will be charged with the loss, which will be deducted from the purchase-money.(s) It seems, that if there has been *actual fraud* on the part of the trustee in the acquisition of the estate, he will be allowed any sums expended for *repairs*, but not for mere *improvements*.(t)

Although the decree is against the trustee, he will not necessarily be fixed with the costs of the suit, where he has been guilty of no improper conduct.(u) Although, if the *cestui que trusts* be *infants*, the trustee will invariably be charged with the costs, for the purchase by him, under such circumstances, will be regarded as an improper dereliction of duty.(x) The delay in filing the bill may also be material in considering the question of costs.(y)

A lease of the trust estate, taken or renewed by a trustee, comes within the same rules as a purchase by him, more especially if the lease be a beneficial one, for that is equivalent to a purchase.(z)²

(g) Ex parte James, 8 Ves. 351.

(r) York Buildings Company v. Mackenzie, 8 Bro. P. C. 42; Campbell v. Walker, 5 Ves. 682; Ex parte Hughes, 6 Ves. 624; Ex parte James, 8 Ves. 352; Ex parte Bennett, 15 Ves. 400; Robinson v. Ridley, 6 Mad. 2; [Pratt v. Thornton, 28 Maine, 355; Beck v. Uhricks, 16 Penn. St. R. 499.]

(s) Ex parte Bennett, 10 Ves. 401.

(t) Baugh v. Price, 1 Wils. 320; see Kenney v. Browne, 3 Ridg. 518. [McKenna v. Pry, 6 Watts, 138.]

(u) Downes v. Grazebrook, 3 Mer. 209, where the trustee received his costs.

(x) Saunders v. Walker, 13 Ves. 601.

(y) Att.-Gen. v. Dudley, Coop. 148; ante, p. 169; post, p. 564, [Costs.]

(z) Ker v. Lord Dungannon, 1 Dr. & W. 509, 541; Killick v. Flexney, 4 Bro. C. C. 161; Parker v. Brooke, 9 Ves. 583; James v. Dean, 11 Ves. 392; 15 Ves. 236; Griffin v. Griffin, 1 Sch. & Lef. 352; Ex parte Hughes, 6 Ves. 617; Att.-Gen. v. Clarendon, 17 Ves. 500; [Davoue v. Fanning, 2 J. C. R. 258; Holridge v. Gillespie, Id. 30; Re Heager's Executors, 15 S. & R. 65; Galbraith v. Elder, 8 Watts, 94; Fisk v. Surbet, 6 Watts & S. 31; Wallington's Est., 1 Ashm. 310; Huson v. Wallace, 1 Rich. Eq. 7; McLanachan v. Henderson, 2 A. K. Marsh. 388;] vide supra, p. 438.

¹ That the trustee is entitled to reimbursement of the purchase-money, &c., paid by him, see Davoue v. Fanning, 2 J. C. R. 252; Ward v. Smith, 3 Sandf. Ch. 592; Quackenbush v. Leonard, 9 Paige, 344; McLanachan v. Henderson, 2 A. K. Marsh. 388; Matthews v. Dragaud, 3 Desaus. 25; Buckler v. Lafferty, 2 Rob. Va. 294; Scott v. Freeland, 7 Sm. & M. 410; note to 1 Lead. Cas. Eq. 145, 1 Am. Ed. But if there be actual fraud, it is otherwise: McKenna v. Pry, 6 Watts, 138.

² On analogous grounds, it is held in equity, that *whatever* acts are done by trustees in regard to the trust property, shall be deemed to have been done for the benefit of the *cestui que trust*, and not for the benefit of the trustee. Davoue

As a general rule, a trustee cannot act as the receiver or consignee of the trust estate with a salary. And there are two principal reasons for this rule: 1st, That his holding that situation would be inconsistent with the duty of a trustee, who ought to check and control the receiver in his management of the estate, and 2d, That a trustee is bound to give his *services for the benefit of the trust estate without any emolument.(a) And the same rule [*540] applies to one of several trustees.(b)

However where there are any special circumstances recommending the appointment of the trustee as receiver, as where from his knowledge and experience it is for the benefit of the trust to secure his

(a) Anon. 3 Ves. 515; — *v. Jolland*, *Morison v. Morison*, 4 M. & Cr. 216. 8 Ves. 72; *Sykes v. Hastings*, 11 Ves. [But see post, p. 574, note.] 363; *Sutton v. Jones*, 15 Ves. 584; see (b) — *v. Jolland*, 8 Ves. 72.

v. Fanning, 2 Johns. Ch. R. 252; 4 Kent's Com. 306, 307, 3d edit.; [*Sparhawk v. Allen*, 1 Foster, N. H. 9; *Huson v. Wallace*, 1 Rich. Eq. 1; *Beck v. Uhrick*, 16 Penn. St. 503; *Paff v. Kinney*, 1 Bradf. N. Y. 9; *Myers v. Myers*, 2 McCord's Ch. 214; *Arnold v. Brown*, 24 Pick. 89; *Hallet v. Collins*, 10 How. U. S. 182; *Napier v. Napier*, 6 Geo. 409; *Bethea v. McColl*, 5 Alab. 314; *Butler v. Hicks*, 11 Sm. & M. 73; *Davis v. Wright*, 2 Hill, S. C. 560; *Voorhees v. Stoothoft*, 6 Halst. 145; *Seager v. Wilson*, 4 Watts & S. 501; *Heager's Exrs.*, 15 S. & R. 65; *Leisenring v. Black*, 5 Watts, 303; *Oeslager v. Fisher*, 2 Barr, 407; *Conger v. Ring*, 11 Barb. S. C. 356. See *Stuart v. Kissam*, Id. 271; notes to *Keach v. Sandford*, 1 Lead. Cas. Eq. 55, 1st Am. ed.] If, therefore, the trustee makes any contract, or does any act connected with the trust estate for his own benefit, he will, nevertheless, be decreed responsible for all advantages to his *cestui que trust*, as upon an implied trust. Thus, if a trustee should purchase a lien or mortgage on the trust estate at a discount, he would not be allowed to avail himself of the difference; but the purchase would be held a trust for the benefit of the *cestui que trust*: *Green v. Winter*, 1 Johns. Ch. R. 26; *Van Horn v. Fonda*, 5 Johns. Ch. R. 409; *Evertson v. Toppan*, Id. 514; [*Mathews v. Dragaud*, 3 Desaus. 25; *McLanachan v. Henderson*, 2 A. K. Marsh. 388; *Butler v. Hicks*, 11 Sm. & M. 75; *Giddings v. Eastman*, 5 Paige, 561; *Matter of Oakley*, 2 Edw. Ch. 478; *Irwin v. Harris*, 6 Ired. Eq. 221; *Strong v. Willis*, 3 Florid. 124. A creditor, who afterwards becomes trustee, may, however, bring in an outstanding lien: *Prevost v. Gratz*, Pet. C. C. R. 373; though, see *Irwin v. Harris*, 6 Ired. Eq. 221; and the trustee is not incapacitated from lending money on mortgage for the benefit of the trust; in which he may set up the mortgage in an adverse proceeding by the *cestui que trust* against himself: *Att.-Gen. v. Hardy*, 4 Eng. L. & Eq. 57.] So, if a trustee should renew a lease of the trust estate, he would be accountable to his *cestui que trust* for all profits derived therefrom. *Holdridge v. Gillespie*, 2 Johns. Ch. R. 30; *Wilson v. Troup*, 2 Cowen's Rep. 195. The same principle will apply to persons standing in other fiduciary relations to each other, such as agents and sureties. See *Story's Eq. Jur.* § 324, &c. The doctrine stated in this note, is very thoroughly and learnedly asserted and maintained by Chancellor Kent in *Davoue v. Fanning*, above cited, and his judgment in that case may be pronounced to be one of the ablest and most important ever delivered by any tribunal of Justice. See, also, the case of *Delamater's Estate*, 1 Wharton's Rep. 362.—T.

services, the court has allowed the trustee to propose himself as the receiver; but even then this will only be allowed on the terms of his consenting to act without emolument.(c) In a very recent case, however, Sir K. Bruce, V. C., ordered a receiver of an infant's estate, with liberty for either of the two trustees to offer himself, although it does not appear, that there were any special circumstances requiring the appointment of either of the trustees. According to the report of the case, however, the attention of the court does not seem to have been drawn to the objection against the appointment of a trustee to such an office.(d) This rule does not apply to a mere dry trustee, such as one to preserve contingent remainders.(e)

According to the general rules of evidence, a trustee, being a *plaintiff* in a suit, cannot be examined as a witness for a *co-plaintiff*.(f)¹ But he may with his own consent be examined by a *defendant*, on an order being obtained for that purpose.(g) But a *defendant* trustee, who has no personal interest in the event of the suit, is a competent witness, and it is a motion of course to examine him as such.(h) And in this respect there is a difference between trustees and executors, who cannot be examined as witnesses in a cause relating to their testator's estate.(i)²

And where the trustee has any interest in the event of the suit,—as where there is some charge which he is interested in rebutting, or any liability (however trivial), which depends on the nature of the decree in the suit,—his evidence will not be received.(k)³ And for

(c) *Hibbert v. Jenkins*, 11 Ves. 363, cited.

(d) *Tait v. Jenkins*, 1 N. C. C. 492.

(e) *Sutton v. Jones*, 15 Ves. 587.

(f) *Phillips v. Duke of Buckingham*, 1 Vern. 230; — *v. Fitzgerald*, 9 Mod. 330.

(g) *Armiter v. Swanton*, Ambl. 393.

(h) *Man v. Ward*, 2 Atk. 228; *Goss v. Tracey*, 1 P. Wms. 290; *Goodtitle v. Welford*, 1 Dougl. 140; *Bettison v.*

Bromley, 12 East, 250; *Phipps v. Pitcher*, 6 Taunt. 220; see 1 Ball & B. 100, 414. [*Hawkins v. Hawkins*, 2 Car. L. Rep. 627; *Hodger v. Mulliken*, 1 Bland. 503; *Neville v. Demarest*, 1 Green Ch. 82.]

(i) *Croft v. Pike*, 3 P. Wms. 182; *Fotherby v. Pate*, 3 Atk. 604.

(k) *Frank v. Mainwaring*, 2 Beav. 126; see *Smith v. Duke of Chandos*, Barn. 416.

¹ See ante, 277, and note; and *Hardwick v. Hook*, 8 Georgia, 354; *Southard v. Cushing*, 11 B. Monr. 344.

² See *Cochran v. Cochran*, 1 Yeates, 134; *Dehuff v. Turbitt*, 3 Id. 157; *Vansant v. Barleau*, 1 Binn. 444; *Hunt v. Moore*, 2 Barr, 105; *Osborne v. Black*, Spear's Eq. 431; *McIntyre v. Middleton*, 1 Sm. & M. Ch. 91; *Abbott v. Clark*, 19 Verm. 444; *Fort v. Gooding*, 9 Barb. S. C. 371. But where an administrator plaintiff releases his commissions, and is released from costs, and there is no suggestion of the possibility of a *devastavit*, he is a competent witness, in Pennsylvania. *Anderson v. Neff*, 7 S. & R. 123; *King v. Cloud*, 7 Barr, 469.

³ *Donalds v. Plum*, 8 Conn. 447. As to the necessity of a release of commissions, where such are allowed by law, see *King v. Cloud*, 7 Barr, 467.

the same reason the testimony of a trustee's wife will be equally inadmissible under similar circumstances.(l)

The disability of trustees to delegate the office to another comes also within the subject now under consideration. The administration of the trust is a matter of personal confidence, which it is a breach of trust in the trustee to make over to a stranger, and the original trustee will continue responsible for all the acts of the person so substituted.(m) And although trustees will be allowed to employ a solicitor or agent, and to govern themselves by his advice as to their conduct in the trust, yet they will not be justified in committing the entire management of the trust to *him.(n) And [*541] we have already seen, that even as between co-trustees the sole and absolute administration of the trust must not be delegated to one or more of the number to the exclusion of the others.(o) However, the employment of an agent for carrying out mere ministerial acts—such as the sale of the property, and purposes of that nature—is not within this rule, for such acts are necessary to the discharge of the trust; and it will be sufficient, that the trustee retains the supervision and control over the person so employed.(p) Although, if the trustees suffer the attorney or agent to obtain and keep possession of the trust property, or any part of it, and it is thus lost, they will in general be responsible to the *cestui que trusts* for the loss.(q)

From the observations of Sir L. Shadwell, V. C. E., in a recent case,(r) it seems, that a *devise* by a trustee of his estate is equally a delegation of trust, and as much a breach of trust, as a conveyance or assignment *inter vivos*.¹ In the course of his judgment his Honor said, “And here I must enter my protest against the proposition, which was stated in the course of the argument, that it is a beneficial thing to devise an estate, which is vested in him in that character. My opinion is, that it is not beneficial to the testator's estate, that he should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for in so doing he acts in accordance with the devise made to him. If he devises the estate, I am

(l) *Frank v. Mainwaring*, 2 Beav. 126.

(m) *Chalmers v. Bradley*, 1 J. & W. 68; *Adams v. Clifton*, 1 Russ. 297; *Wilkinson v. Parry*, 4 Russ. 272; *Hulme v. Hulme*, 2 M. & K. 682. [See ante, 175.]

(n) *Chambers v. Minchin*, 7 Ves.

196; *Ex parte Townsend*, 1 Moll. 139; *Turner v. Corney*, 5 Beav. 515.

(o) Ante, p. 309, [but see in note.]

(p) *Ex parte Belchier*, Amb. 219; *Bacon v. Bacon*, 5 Ves. 335; *Clough v. Bond*, 3 M. & Cr. 497. [See ante, p. 474, and note.]

(q) *Ex parte Townsend*, 1 Moll. 139.

(r) *Cooke v. Crawford*, 13 Sim. 97.

¹ But see ante, p. 283, note (1).

inclined to think, that the court, if it were urged to do so, would order the costs of getting the legal estate out of the devisee, to be borne by the assets of the trustee. I see no substantial distinction between a conveyance by act *inter vivos* and a devise, for the latter is nothing but a *post-mortem* conveyance: and if the one is unlawful, the other must be unlawful." In the case in which these observations were made an estate was devised to three trustees, in trust that they or the survivors or survivor of the "*heirs*" (without adding "*assigns*") of such survivor should sell. The sole acting trustee *devised* the estate to M. and N. upon the trusts affecting the same, and the Vice-Chancellor held, that M. and N. could not execute the trust for sale, as it was not limited to the *assigns* of the original trustees. It will be observed, that his Honor's observations, which have been stated above, as to the general incapacity of trustees to devise the trust estate, were not required for the decision of the case, and are therefore clearly extrajudicial. It is singular that the power of trustees to devise an estate held upon subsisting trusts should never have been determined by a distinct judicial decision. But in the absence of such an authority, the cases which have settled that a general devise will pass a trust estate(s) would seem to be strongly in favor of the existence of this power: unless indeed they should be held to apply only to the devise of a mere dry legal estate, and not to active and discretionary duties and powers. Moreover, with great deference to his Honor's opinion, which within the writer's knowledge is supported by *that of some most eminent mem- [*542] bers of the profession, it is conceived, that a distinction might fairly be drawn between a delegation of a trust to take effect in the trustee's lifetime, and one to take effect only after his death: for by the trustee's death the trust must necessarily be transferred to some one else; and the *argumentum ab inconvenienti*, in case of the infancy of the heir, might also be urged in favor of the power of the trustee to devise, at all events where the trust is limited to the assigns of the original trustee. A final decision on the point is unquestionably most desirable, but in the mean time no trustee could be advised to devise a still subsisting trust, nor could the devisee safely act in its performance.

(s) Ante, p. 283.

*CHAPTER IV.

[*543]

OF SUITS BY AND AGAINST TRUSTEES.

I. OF SUITS AND ACTIONS BY TRUSTEES [543].	III. OF THE EFFECT OF SUITS INSTITUTED BY OR AGAINST TRUSTEES [548].
II. OF SUITS AND ACTIONS AGAINST TRUSTEES [545].	IV. OF COSTS [551].

I. OF SUITS AND ACTIONS BY TRUSTEES.

TRUSTEES have an undoubted right to come to the court for its assistance and protection in all cases of doubt or difficulty in the administration of the trust; (a)¹ and the personal representatives of a deceased trustee are entitled to the same privilege. (b) And so where any legal proceedings have been commenced against trustees, they are entitled to come to the court for its protection, and to obtain directions as to the mode of defence, if any, to be adopted, and to stay the proceedings against them in the mean time. (c) And if a suit be pending between the parties at the time, the application may be made by a petition in that suit. (d)²

- (a) See *Curteis v. Candler*, 6 Mad. 123; *Coventry v. Coventry*, 1 Keen, 576. 758; *Talbot v. Earl of Radnor*, 3 M. & K. 252; *Hearn v. Wells*, 1 Coll. N. C. C. 173. 323.
- (b) *Greenwood v. Wakeford*, 1 Beav. 576.
- (c) *Edgecombe v. Carpenter*, 1 Beav. 173.
- (d) 1 Beav. 171.

¹ *Bowers v. Smith*, 10 Paige, 193; *Lorillard v. Coster*, 5 Paige, 172; *Hawley v. James*, Id. 318; *Jones v. Stockett*, 2 Bland, 409; *Trotter v. Blocker*, 6 Porter, 269; *Dimmock v. Bixby*, 20 Pick. 374; see *Harrison v. Rowan*, 4 Wash. C. C. 202. The trustee, under such circumstances, is bound to give the court all the information in his power: *Trotter v. Blocker*, *ut supra*. The court in such a suit cannot merely declare the rights of the parties, but must direct an account and inquiries: *Brown v. Martyn*, 2 J. & Lat. 333. The costs of the trustees in these cases come out of the estate: *Trotter v. Blocker*, *ut supra*; *Chase v. Lockerman*, 11 Gill & J. 185; *Rogers v. Ross*, 4 J. C. R. 608. But in *Rowland v. Morgan*, 13 Jur. 23, it was said by Lord Cottenham, that this rule did not apply on appeal. In a suit for the construction of a will, the executors and trustees are the representatives of parties not *in esse*: *Lorillard v. Coster*, 5 Paige, 172.

² See as to the mode of proceeding at present in England, the Trustees Relief Acts, 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74 (11 Jurist, pt. ii. 355; 13 Id. 346), by which it is provided that trustees (or a majority of them, on application to the court), may pay trust-moneys, or transfer stocks and securities, into the Court of Chancery; and that the court may then make orders on petition without bill, for the application of the trust-moneys, and the administration of the trust. Under a provision in this act, general orders were issued by the Lord Chancellor, June 10th, 1848, which may be found in 2 Phillips, xvii. See on these acts,

In order to sustain a suit by a trustee, it must be shown that he has accepted the trust; and the mere fact of a person's being named as a trustee in articles for a settlement, will not give him a sufficient interest to file a bill. However, it is not necessary that he should have actually executed the trust deed; and it will be sufficient to show, either by letters, or by the acts of the parties, that the plaintiff has been recognised as trustee, and has accepted the trust.(e)

As a general rule, a trustee cannot institute proceedings in equity relating to the trust property, without making the whole of the *cestui que trusts* parties.(f)¹ And where the existence of a doubtful claim occasions the necessity of the suit, the person who is interested under that claim must also be joined as a party.(g)

However, there are exceptions to this rule,—as where trustees under a *deed* upon trust to sell and to apply the produce amongst creditors or others, are empowered to give discharges to the purchasers;—for such a provision will be treated as a declaration [*544] by the author of the trust, that *the presence of the parties

(e) Cook v. Fryer, 1 Hare, 498, 504.

Ch. Pr. 311; Morse v. Sadler, 1 Cox, 352; Bifield v. Taylor, 1 Beatt. 93.

(f) Kirk v. Clark, Prec. Ch. 275; Calverley v. Phelps, 6 Mad. 232; Douglas v. Horsfal, 2 S. & St. 184; 1 Dan.

(g) Talbot v. Earl of Radnor, 3 M. & K. 252. [But see Whelan v. Whelan, 3 Cowen, 587.]

articles in the Jurist, vol. 11, pt. ii. 302; vol. 12, pt. ii. 249; vol. 14, pt. ii. 250; and on their construction the following cases: Re Biggs, 11 Beav. 27; Re Joseph's Will, 11 Beav. 56; Re Everett, 12 Beav. 485; Re Lorimer, Id. 251; Re Cawthorne, Id. 56; Re Money, 13 Beav. 109; Re Bloye's Trust, 1 Mac & G. 488; 3 H. L. Cas. 606; Re Upfull's Trust, 3 Mac & Gord. 281; 9 Eng. L. & Eq. 10; Re Wood's Settlement, 15 Sim. 469; Re Sharp's Trustees, Id. 470; Re Parry, 6 Hare, 306; Re Staples' Settlement, 13 Jur. 380; Re Bartholomew's Will, Id. 380; Ex parte Fletcher, 12 Jur. 619; Ex parte Peart, Id. 610; Re Croyden's Trust, 14 Jur. 54; Re Ross's Trust, 1 Sim. N. S. 196; 2 Engl. L. & Eq. 151; Goode v. West, 7 L. & Eq. 285; Re Magawley's Trust, Id. 268; Re Masselin's Will, 8 Id. 641; Re Knowles, 9 Id. 98; Re Spence, Id. 219; Re Dalton's Settlement, 10 Id. 101; Re Hey's Will, 12 Id. 205; 9 Hare, 221; Re Waring, 12 Engl. L. & Eq. 351; Re Fields' Settlement, 13 Id. 11; Re Bayley's Trust, Id. 28; Ex parte Bradshaw, 15 Id. 421. As to the mode of proceeding by claim, recently introduced into England, see the General Orders of April 22d, 1850, 14 Jurist, pt. ii. 143.

Trustees invested by an Act of the Legislature with a public duty, are competent to proceed in equity by bill to protect the franchise committed to them from violation: Lucas v. McBlair, 12 G. & J. 1.

¹Malin v. Malin, 2 J. C. R. 238; Fish v. Howland, 1 Paige, 20; Schenck v. Ellingwood, 3 Edw. Ch. 175; Helm v. Hardin, 2 B. Monr. 232; Stilwell v. McNeely, 1 Green's Ch. 305; Willink v. Morris Canal, 3 Id. 377; Whelan v. Whelan, 3 Cow. 531. It is, however, in the discretion the court to dispense with the strict rule on this subject, where it would occasion great inconvenience and expense: Willink v. Morris Canal Co., 3 Green. Ch. 377; and see Rule xlvi. in Equity of the United States Courts, and Rule xlv., in Pennsylvania.

beneficially interested shall not be necessary in a suit by the trustees to enforce a sale. *(h)* (1)

And an important alteration has recently been made in the practice of the court on this point, where real estate is *devised by will* to trustees for sale. For the 30th of the general orders of August, 1841, declares, that in all suits concerning real estate, which is vested in trustees by *devise*, and such trustees are competent to sell, and give discharges for the proceeds of the sale, and for the rents and profits, such trustees shall represent the persons beneficially interested in the same manner as executors or administrators represent the persons beneficially interested in personal estate; and in such cases it shall not be necessary to make the persons beneficially interested parties to the suit, although the court on the hearing may order them to be made parties. *(2)*¹

Previously to this order, all legatees, whose legacies were charged on the land, and other persons taking a beneficial interest in the real estate under a will, however numerous, must have been brought before the court, as well as the devisees in trust; *(i)* although a contrary doctrine has been countenanced by Lord Redesdale in his *Treatise on Pleading*. *(k)*

(h) Calverley *v.* Phelps, 6 Mad. 232; *(i)* Morse *v.* Sadler, 1 Cox, 352; 1 see Wakeman *v.* Rutland, 8 Bro. P. C. Dan. Ch. Pr. 314.
145. [Van Vechten *v.* Terry, 2 J. C. R. *(k)* Mitf. Pl. 174, 4th edit.
197; Swift *v.* Stebbins, 4 Stew. & Port.
447; see ante, 338, and note.]

(1) It may be observed, however, that this exception does not hold good where the suit is for *foreclosure*, and not for a *sale*: and in that case the *cestui que trusts* must be made parties. See Calverley *v.* Phelps, 6 Mad. 229; Osbourn *v.* Fallows, 1 R. & M. 741.

(2) It has been decided, that this order applies only in those cases where the *legal estate* is vested in the devisees in trust. And wherever the legal estate is outstanding, the old practice will still prevail, and the *cestui que trusts*, as well as the persons who have legal interests, must be joined with the trustees as parties to the suit respecting the estate. Turner *v.* Hind, 12 Sim. 414.

And the order only applies where the trustees have an *immediate* and absolute power of selling. Therefore, where the power was to sell *with the consent of the tenant for life*, and that consent was not proved, the case was held not to be within the order. Lloyd *v.* Smith, 12 Law Journ. N. S. Chanc. 457.

Where the persons beneficially interested had been joined with the trustees as parties to a suit, instituted *before the making of the 30th order of August, 1841*, they may properly be dismissed at the hearing. Tarbuck *v.* Greenall, 6 Beav. 358.

[Where the suit involves the administration of the estate and distribution of the residue, the devisees in trust do not, under the order, sufficiently represent the persons beneficially interested. Jones *v.* How, 7 Hare, 270. See Chamberlain *v.* Thacker, 13 Jur. 785.]

¹The 47th Rule in Equity of the Supreme Court of Pennsylvania, and the 49th Rule in Equity of the Supreme Court of the United States, are to the same effect.

Where the interest of the *cestui que trusts* is *collateral* to the rights of the plaintiff trustee, and the defendant to the suit, it has been decided, that the suit may be maintained without making them parties,—as, where a bill is filed by one trustee against his co-trustee, to compel him to replace the trust fund, which had been misapplied or appropriated by him, the *cestui que trusts* are unnecessary parties.^(l) And so where a suit was instituted by a trustee against the *cestui que trust* for life, to compel the restitution of the trust property, of which he had acquired possession, it was held that the other *cestui que trusts* need not be joined as parties.^(m)¹

The trustees and *cestui que trusts*, having no conflicting interests, may be joined together as co-plaintiffs in a suit. But this cannot be done where the *cestui que trusts* have any adverse claim against the [545] trustees; *and in that case, a bill so framed will be dismissed with costs.⁽ⁿ⁾ On one occasion, however, where in the course of the suit it turned out that a question of this description was likely to arise between the trustee and *cestui que trusts*, who were co-plaintiffs in the suit, the court, on the motion of the *cestui que trust*, allowed the frame of the suit to be altered by striking out the name of the trustee as plaintiff, and making him a defendant, in order to prevent any injury to the *cestui que trusts*.^(o)

It has been already stated, that the trustee in whom the legal interest in property is vested, is the proper person to bring any action at law for asserting or defending the legal title. And we have seen to what extent the interest of the *cestui que trust* will be taken notice of by a court of law.^(p) Where trustees sue at law for a breach of covenant on behalf of their *cestui que trusts*, without any damage to themselves, they will not be restricted to the recovery of mere nominal damages.^(q)

- (l) *Franco v. Franco*, 3 Ves. 75; *May v. Selby*, 1 N. C. C. 235; 1 Dan. Ch. Pr. 312. [See *Hallett v. Hallett*, 2 Paige, 15; *Howland v. Fish*, 1 Paige, 20; *Todd v. Sterrett*, 6 J. J. Marsh. 432; *Brown v. Ricketts*, 3 J. C. R. 553.]
- (m) *Bridget v. Hames*, 1 Coll. 72; see *Robinson v. Evans*, 7 Jur. 738.
- (n) *Jacob v. Lucas*, 1 Beav. 426. [*Griffith v. Van Haythusan*, 4 Engl. L. & Eq. 27.]
- (o) *Hall v. Lack*, 2 N. C. C. 631.
- (p) Ante, pp. 274, 316, and notes.
- (q) *Lethbridge v. Mytton*, 2 B. & Ad. 772.

¹ Where a suit is instituted merely for the recovery of the trust fund, the *cestui que trusts* are not necessary parties: *Ferguson v. Applenhite*, 10 Sm. & M. 301; *Sill v. Ketchum*, Harr. Ch. 423; *Morey v. Forsyth*, Walk. Ch. 465; *Horsley v. Fawcett*, 11 Beav. 565; *Sherman v. Burnham*, 6 Barb. S. C. 414; *Alexander v. Cana*, 1 De G. & Sm. 415; but their joinder is not, it seems, objectionable: *Jennings v. Davis*, 6 Dana, 127. In a suit for partition, where the whole legal estate of a share is in a trustee, it is not necessary to join the *cestui que trusts*.

II.—OF SUITS AND ACTIONS AGAINST TRUSTEES.

A suit in equity may be brought against trustees either by strangers or by the *cestui que trusts*. In suits by strangers, it will not be sufficient, as a general rule, to make the trustees the only defendants, but the *cestui que trusts* must also be brought before the court; ^(r) more especially where they are infants. ^(s) But the exceptions to this rule in the case of suits by trustees as *plaintiffs*, ^(t) will also hold good in the case of suits against them as *defendants*. And the 30th order of August, 1841, which has already been stated and considered, ^(u) applies equally to suits by or against trustees. ^(x) ⁽¹⁾

Although the trustees have no active duties to discharge in the management of the trust estate, and although the question at issue in the cause is to be fought principally by the *cestui que trusts*, the trustees must, notwithstanding, be brought before the court as co-defendants, in respect of the legal estate vested in them, and a suit against the *cestui que trusts only* will be defective. ^(y) ¹ And this rule applies to new trustees, who have been duly appointed under a power upon the death of the old trustees, pending a suit to which the old trustees were parties; and in such a case *the new trustees must be brought before the court by a supplemental bill. ^(z) [*546] And so where there are two sets of trustees (one in this country, and the other abroad), the foreign trustees must be made parties to a suit

(r) *Whistler v. Webb*, Bunb. 53; *Calverley v. Phelps*, 6 Mad. 231; *Osbourn v. Fallows*, 1 R. & M. 741; *Holland v. Baker*, 3 Hare, 68; 1 Dan. Ch. Pr. 348; *Calvert, Parties*, 207; *Faithfull v. Hunt*, 3 Anst. 751; *Pinkus v. Peters*, 5 Beav. 253. [*Caldwell v. Taggart*, 4 Peters, 202; *Whelan v. Whelan*, 3 Cowen, 538; *Houghton v. Davis*, 23 Maine, 27; *Philipson v. Gatty*, 6 Hare, 26; *Story's Eq. Plead.*, § 207, &c.; see *Mann v. Butler*, 2 Barb. Ch. 362.]

(s) *Orrok v. Binney*, Jac. 523.

(t) Preceding section, p. 544. [See *Piatt v. Oliver*, 2 McLean, 307.]

(u) *Ibid.*

(x) *Osborne v. Foreman*, 2 Hare, 656; 13 Law Journ. N. S. Chanc. 123.

(y) *Hobson v. Staneer*, 9 Mod. 80; *Jones v. Jones*, 3 Atk. 110; *Dormer v. Fortescue*, Ib. 133; *Bagg v. Forster*, 1 Ch. Ca. 188; *Att.-Gen. v. Green*, 2 Bro. C. C. 493; *Gifford v. Hart*, 1 Sch. & L. 386; *Bromley v. Holland*, 7 Ves. 14; *Wood v. Williams*, 4 Mad. 186.

(z) *Att.-Gen. v. Forster*, 2 Hare, 81.

(1) Under the 30th order of August, 1841, trustees, by devise for the sale of real estate, with the power of giving discharges, will represent all the persons beneficially interested, not only in a suit brought by a claimant paramount to the devise, but also in a suit by one of the parties claiming under the will: and that even though the conduct of the trustees be impeached by the bill. *Osborn v. Foreman*, 2 Hare, 656; S. C. Law Journ., N. S. Chanc. 123.

¹ See *Malin v. Malin*, 2 J. C. R. 238; *Cassidy v. McDaniel*, 8 B. Monr. 519; *Fish v. Howland*, 1 Paige, 20; *Carter v. Jones*, 5 Ired. Eq. 196; *Bank N. A. v. Pollock*, 4 Edw. Ch. 315; *Everett v. Winn*, 1 Sm. & M. Ch. 67; *McKinley v. Irvine*, 13 Alab. 681; see *Story's Eq. Plead.*, § 207, &c.; *Allison v. Cookson*, 2 Coll. C. C. 52; *Peppard v. Kelley*, 2 J. & Lat. 558.

respecting the trust, unless there is some sufficient reason to the contrary.(a) But where a mere trustee, having no other interest, cannot be discovered, the 24th section of Sir Edward Sugden's Act (1 Will. IV. c. 60), empowers the court, on proof by affidavit that diligent search and inquiry has been made after him, to hear the cause and make a decree against the absent trustee, as if he had regularly appeared.¹

The onerous character of this rule of pleading, which required the presence of the trustees in every case, has also been much alleviated by the recent general orders of the court.(b) The 23d order of August, 1841, enables a plaintiff to proceed against a trustee or other formal party, against whom no direct relief is required, by serving him with a copy of the bill, omitting the interrogating part, and by praying (instead of the usual *subpœna* to appear and answer), that the defendant, being served with a copy of the bill, may be bound by the proceedings in the suit. By the 26th of the same orders, the formal party may appear and answer in the usual course, if he so please, but it will be on the penalty of paying the costs, unless the court order otherwise. However, these orders do not apply where any account, payment, conveyance, or other direct relief, is sought against a defendant; and it must frequently be a matter of very nice discrimination, to determine who is such a formal party as to come within the scope of the orders.(c)²

(a) *Weatherby v. St. Giorgio*, 2 Hare, 624.

(c) See *Lloyd v. Lloyd*, 1 N. C. C. 181.

(b) Ord. Gen. August, 1841, XXIII., XXIV., XXV.

¹ See ante, p. 192.

² See on these orders, generally, *Salmon v. Green*, 8 Beav. 457; *Thomas v. Selby*, 9 Id. 194; *Boreham v. Bignall*, 4 Hare, 633; *Duncombe v. Levy*, Id. 232; *Boyd v. Moyle*, 2 Coll. C. C. 316; *Anon.*, 1 De G. & Sm. 321; *Lay v. Prinsep*, Id. 630; *Knight v. Cawthorn*, Id. 714; *Smith v. Groves*, 14 Sim. 603; *Johnson v. Tucker*, 15 Id. 485; *Mason v. Best*, 16 Id. 429; *Lerton v. Kingston*, 2 Mac. & Gord. 139; *Vincent v. Watts*, 3 Id. 240. Where all the parties named in a will had died, and a bill was filed by one of the *cestui que trusts* against the others, the heir of the last trustee, and certain persons who had been in possession of the estate, praying for an account of the rent received by these persons, for the appointment of new trustees, and that the estates might be conveyed to them by the heir of the last trustee, it was held, that the defendant *cestui que trusts* had been rightly served with a copy of the bill under the above order, there being nothing asked adversely to them. *Johnson v. Tucker*, 15 Sim. 485.

The corresponding rule in the United States Courts in Equity (liv.), and in Pennsylvania (lii.), is as follows: "Where no account, payment, conveyance, or other direct relief, is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer,

On the other hand, in suits by *cestui que trusts* against strangers respecting the trust estate, the rule of practice, requiring the presence of the trustees as parties, is equally imperative.(d)(1) And where all the *cestui que trusts* do not join as co-plaintiffs in a suit, those, who are not plaintiffs, must be brought before the court as defendants. Although it has been decided, that in the case of several *cestui que trusts*, who are entitled to certain *aliquot* parts of an ascertained trust fund, one of them may sue the trustees for his share without joining the other *cestui que trusts* as parties to the suit.(e)

There has already been occasion to consider, how far a suit may be brought by *cestui que trusts* against one or more of several co-trustees for a breach of trust, *without joining the others as parties*.(f)

The husband of a *feme* trustee is liable for his wife's conduct in the administration of the trust, and may be sued in respect of that liability.(g) And so the personal representatives of a deceased trustee are accountable *and may be sued for any breach of trust [*547] committed by their testator in his lifetime.(h)

A trustee who has never acted or otherwise accepted the trust, and *who has disclaimed*, ought not to be made a party to a suit respecting the trust property.(i)¹

But if a person named trustee in an instrument, have *not disclaimed*, he must be joined as a party, and on putting in his disclaimer, the bill may be dismissed against him. But in such a case, he will have his costs only as between party and party, even though he be continued a party till the hearing.(k)

However, there will be an exception to this rule, where the object

(d) *Harrison v. Pryse*, Barn. 325; *Vandebende v. Livingston*, 3 Swanst. 625; *Cooke v. Cooke*, 2 Vern. 36; *Att-Gen. v. Green*, 2 Bro. C. C. 493; *Cope v. Parry*, 2 J. & W. 538. [*Neilson v. Churchill*, 5 Dana, 341.]

(e) *Smith v. Snow*, 3 Mad. 10; *Hutchinson v. Townsend*, 2 Keen, 675; *Perry v. Knott*, 5 Beav. 293; ante, 519, n. (h).

(f) Ante, Ch. I. [Remedies for Breach of Trust], p. 518.

(g) *Palmer v. Wakefield*, 3 Beav. 227. [See ante, 520, note (s).]

(h) *Thayer v. Gould*, 1 Atk. 615; see *Greenwood v. Wakeford*, 1 Beav. 576; *Wilkinson v. Parry*, 4 Russ. 272, 275. [Ante, 520, note.]

(i) *Richardson v. Hulbert*, 1 Anst. 65.

(k) *Norway v. Norway*, 2 M. & K. 278; *Bray v. West*, 9 Sim. 429.

(1) But where *all* the *cestui que trusts* are before the court in a suit for the administration of the trust, the trustees will not, in general, be allowed to interfere actively in the suit. *Davis v. Combermere*, V. C. E., 9 Jurist, 76.

he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to all the costs of all the proceedings against him, unless the court shall otherwise direct."

¹ So where the trustee has fully executed the trust, and delivered up the trust property, he need not be made a party: *Swan v. Ligan*, 1 McCord, Ch. 231.

of the suit is merely to obtain the accounts of the trust: for in that case, if a trustee have never accepted or acted in the trust, and the bill state that fact, it will not be essential to bring the non-acting trustee before the court.(l)

Where an estate is subject to several distinct trusts, created by the same instrument, and the execution of each trust rests with distinct sets of trustees, each set of trustees may be sued separately, in respect of their separate trust. For instance, where a term is created out of the inheritance for particular purposes, and a suit is brought to carry into execution the particular trusts of the term, it will be sufficient to bring before the court the trustees of the term and the *cestui que trusts*, without making an *intermediate trustee* of the equitable interest a party to the proceedings.(m)

Where trustees enter into any personal covenants with strangers, respecting the trust property, such as covenants for title or quiet enjoyment, in a conveyance or lease of the estate—they will be liable to an action at law, in case of the breach of those covenants.(n) But where the conveyance or lease containing the covenants is set aside in equity as improper, the instrument will be annulled *in toto*, and the court will not leave the personal covenants of the trustees in force for the benefit of the party taking under the deed.(o)

The allegations in an information or bill against trustees, seeking to charge them with a breach of trust, must be such as amount to a certain breach of trust: and if the facts alleged, as a mispayment or application of the trust funds, might be justifiable under certain circumstances (not negatived by the bill), a demurrer for want of equity will be allowed.(p)

We have seen that courts of law cannot take cognizance of a trust, and an action at law against a trustee, for money had and received, cannot be maintained, as long as the trust is open; although where a final account has been settled, and the trust closed, such an action may lie.(q)²

(l) See *Selyard v. Harris*, 1 Eq. Ca. Abr. 74; *Ex parte Angell*, 2 Atk. 162; *Walker v. Symonds*, 3 Sw. 1, 75; *Routh v. Kinder*, lb. 144, n.

(m) *Head v. Teynham*, 1 Cox, 57.

(n) *Att.-Gen. v. Morgan*, 2 Russ. 306.

(o) *Ibid*.

(p) *Att.-Gen. v. Mayor of Norwich*, 2 M. & Cr. 406, 422.

(q) *Case v. Roberts*, Holt, N. P. C. 501; *Edwards v. Bates*, C. P. June, 1844; S. C. 13 Law Journ. N. S. 156; [7 Mann. & Gr. 590.]

¹ See *McGachen v. Dew*, 15 Beav. 84; 15 Engl. L. & Eq. 17.

² See ante, 518, note (1).

*III.—OF THE EFFECT OF SUITS INSTITUTED BY OR [*548]
AGAINST TRUSTEES.

When a bill is filed in the Court of Chancery for the execution of a trust, and the trustees have appeared and put in their answers, and thereby submitted to the jurisdiction, the management of the trust is taken out of their hands, and they cannot in general take any further step, except under the direction, or with the sanction of the court.(r) Thus where real estate was devised to a trustee for the payment of debts, and after the testator's death a bill was filed by his creditors for the administration of his estate, a sale by the trustee pending the suit was held to be void.(s) And so a trustee of a will with a discretionary power of investment cannot lay out money on mortgage after a decree for an account in an administration suit without an application to the court.(t) And after a decree in a creditor's suit, a trustee for the payment of debts cannot pay any debt,(u) or bring an action for recovery of a claim(x) of his own authority. So it has been already stated, that trustees of equitable interests belonging to a married woman, are not at liberty to make them over to the husband, after a bill has been filed on her behalf claiming a settlement out of the property, although they would be fully justified in so doing previously to the institution of the suit.(y) Again, a trustee having the most ample discretionary power to appoint new trustees, will not be suffered to exercise that power, after the institution of a suit for the execution of the trust, except with the approbation of the court; and he will be restrained by injunction from conveying over the trust estate to any new trustee appointed by him, without that approbation.(z) However, if the appointment and conveyances to the new trustees under such circumstances, be actually made and completed, it will not necessarily be void, nor will it be declared at once a contempt of court; but the trustee must prove by the strictest evidence, that what has been done was perfectly right and proper, and he must also pay the costs of such proof. And if he fail in establishing a sufficient case, the appointment of the new trustees will be set aside with costs.(a) Thus in the case of *Attorney-General v. Clack*,(b) the

- (r) *Walker v. Smallwood*, Ambl. 676; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Att.-Gen. v. Clack*, 1 Beav. 467; *Underwood v. Hutton*, 5 Beav. 36; *Widdowson v. Duck*, 2 Mer. 498, 494; see *Shewen v. Vanderhost*, 2 R. & M. 75.
- (s) *Walker v. Smallwood*, Amb. 676; and see *Drayson v. Pocock*, 4 Sim. 283.
- (t) *Widdowson v. Duck*, 2 Mer. 494.
- (u) *Mitchelson v. Piper*, 8 Sim. 64.
- (x) *Oldfield v. Cobbett*, 6 Beav. 515.
- (y) *Macauley v. Phillips*, 4 Ves. 18; *Murray v. Lord Elibank*, 19 Ves. 90; *De la Garde v. Lempriere*, 6 Beav. 344, 347; vide supra, [Trustees for Married Women, p. 413.]
- (z) *Webb v. Earl of Shaftesbury*, 7 Ves. 480.
- (a) *Att.-Gen. v. Clack*, 1 Beav. 472, 3.
- (b) 1 Beav. 467.

surviving trustees of a charity, with a power of appointing new trustees, exercised that power and appointed new trustees, pending an information, which had been filed for the appointment of new trustees; Lord Langdale, M. R., held, that the defendants had not shown, that the appointment was perfectly right and proper, and set it aside with costs, to be paid personally by the defendants.(b)

However, *the mere filing of a bill* against the trustees, to which they have put in no answer, will not have the effect of suspending powers given to the trustees, or of preventing them from doing acts, [*549] which are *necessary to the due execution of the trust; for *non constat*, that the suit will ever be prosecuted further. Thus in the recent case of *Cafe v. Bent*,(c) a sole surviving trustee in exercise of a power created by the will, appointed two other persons as new trustees, *after the institution of a suit against him for the appointment of new trustees*. However, the court held the appointment valid, and refused an injunction to restrain the transfer of the trust stock into the names of the new trustees.(c) It does not appear from the report of this case, whether the defendant had actually put in his answer previously to making the new appointment; and although the Vice-Chancellor (Sir J. Wigram) adverted to, and expressly recognised, the cases of *Webb v. Earl of Shaftesbury*, and *Attorney-General v. Clack*, his judgment in *Cafe v. Bent* seems to be somewhat at variance with the principle of those cases, as well as with that of *Walker v. Smallwood*. Indeed, it seems to have been his Honor's opinion, that the discretion of the trustees ceases only, *where the court has assumed the execution of the trusts*. It was also stated by the same learned Judge, that the court in these cases does not deprive the trustees of the exercise of their discretion, but only requires them to act under the control of the court.(d) However, this is a distinction to which it appears somewhat difficult to give any practical effect.

It has been already stated, that new trustees, when actually appointed *pendente lite*, must be brought before the court by supplemental bill. This was so decided in the late case of *Attorney-General v. Foster*,(e) and it is remarkable that no question as to *the propriety of the appointment* was there raised against the old trustees, although the circumstances were very similar to those of *Attorney-General v. Clack*, which last case was referred to by counsel in the course of the argument.

Again, where a suit has been instituted for the administration of a trust estate, and the party beneficially entitled has been let into pos-

(b) 1 Beav. 467.

(c) 3 Hare, 245.

(d) 3 Hare, 249.

(e) Att. Gen. v. Foster, 2 Hare, 81.

[Greenleaf v. Queen, 1 Pet. S. C. 143.]

session by the order of the court, the trustees will not be justified in taking possession of the estate of their own authority for the purpose of satisfying a claim, which may have subsequently arisen against the testator's estate. In such a case the trustees, if they act at all, must apply to the court for directions how to proceed.(f)

However, the suit must be actually pending and in course of prosecution, or it will have no effect in controlling the trustees in the exercise of their ordinary powers. Thus where a suit was commenced in 1802, and the decree on further directions made in 1813, which did not affect the real estate, and the suit afterwards became abated, and was not revived, it was held that there was no such *lis pendens* as to prevent the trustees from making a valid sale of the real estate of their own authority in the year 1818.(g)

Where the answer of a trustee to a bill alleging a breach of trust contains a clear admission that there is trust-money in his hands, it is the constant practice to order the payment of the amount into court upon an interlocutory application by motion.(h)¹ And a similar order will be *made, where a defendant trustee makes the same admission in his examination upon interrogatories [*550] before the Master.(i) And an admission by the trustee that the trust-money is in the hands of his banker,(k) or his partner in trade,(l) will be treated as an admission of its being in his own hands for the purpose of such a motion.² And a trustee cannot protect himself from the payment into court of trust-money, which he admits to have come into his possession, by alleging any investment or application of it, which amounts to a breach of trust. Therefore where an executor or trustee acknowledges by his answer the receipt of a sum of trust-money, but states that it has been lent on a promissory note or bond, or on any other unusual security, and he has no ex-

(f) *Underwood v. Halton*, 5 Beav. 4 M. & Cr. 184; *Meyer v. Montrieu*, 4 Beav. 343.

(g) *Drayson v. Pocock*, 4 Sim. 283. (i) *Hinde v. Blake*, 4 Beav. 597.

(h) *Rothwell v. Rothwell*, 2 S. & St. 217; *Richardson v. Bank of England*, (k) *Johnson v. Aston*, 1 S. & St. 73. (l) *Ibid.*; see *Freeman v. Fairlie*, 3 Mer. 39.

¹ See *Contee v. Dawson*, 2 Bland. 293; *Hosack v. Rogers*, 9 Paige, 468; *Claggett v. Hall*, 9 Gill & J. 81; *Nokes v. Steppings*, 2 Phillips, 19; *Brown v. Mole*, 8 Beav. 177. A contingent interest is sufficient in a proper case to entitle the party to move. *Bartlett v. Bartlett*, 4 Hare, 631; *Ross v. Ross*, 12 Beav. 89. There must be some allegation of danger, however: *Ross v. Ross*, ut supr. On the motion for payment into court, items in an account furnished in the trustee's answer, objected to, but not specified in the notice of motion, can not be taken into the account, though they may be equally inadmissible with others specified. *Nokes v. Steppings*, 2 Phillips, 19.

² But the amount must be specified, or the motion will not be allowed, and the admission must be that of all the trustees. *Boschetti v. Power*, 8 Beav. 98.

press authority for making such an investment, he will be ordered on motion to pay the amount into court.(m) And again, where a trustee had admitted the possession of a sum of stock, but stated that he had disposed of it, and invested the money *on other securities*, without saying what securities, he was ordered to pay the whole fund into court.(n)¹

But a trustee will not be ordered to pay money into court on an interlocutory application, unless the title of the *cestui que trusts* be clearly admitted, so that they must necessarily have a decree on the hearing.(o) And if the trustee by his answer state his ignorance whether the plaintiff fills the character he claims or not, no order will be made for the payment of the money into court.(p) Moreover, the foundation of such an application wholly fails, where the receipt of the trust-money is not also distinctly admitted. Therefore, where one of three co-trustees, in whose joint names a sum of trust stock was standing, admitted the execution of a power of attorney enabling one of his co-trustees to dispose of the stock and receive the proceeds, *but denied having received any of the money*, or having joined in any misapplication of it, Lord Langdale, M. R., refused to make an interlocutory order for the payment of the money into court by that trustee.(q)

And the relief upon an interlocutory application of this nature will be confined strictly to the *payment of money into court*, and the court will not direct any permanent relief, such as the repurchase of stock, which had been sold by the trustee, for that can be done only at the hearing of the cause. Thus in a very recent case, where a trustee by his answer admitted that he had sold out a sum of trust stock, but added a statement that "*he had temporarily invested the produce in other securities*," Lord Langdale, M. R., refused to order the defendant the trustee *on motion* to repurchase other stock, and transfer into court.(r)

There is no general rule of practice fixing the time for the trustee to bring the fund into court, but regard will be had to the circum-

(m) *Vigrass v. Binfield*, 3 Mad. 62; *Collis v. Collis*, 2 Sim. 366; *Wyatt v. Sharratt*, 3 Beav. 498; see *Widdowson v. Duck*, 2 Mer. 494. (o) *Beaumont v. Meredith*, 3 V. & B. 180; *Freeman v. Fairlie*, 3 Mer. 24, 39. [See *Boschetti v. Power*, 8 Beav. 98.]

(n) *Hinde v. Blake*, 4 Beav. 597; see *Meyer v. Montriou*, *Ib.* 348; *Futter v. Jackson*, 6 Beav. 424. (p) *Dubless v. Flint*, 4 M. & Cr. 302. (q) *Meyer v. Montriou*, 4 Beav. 343. (r) *Futter v. Jackson*, 6 Beav. 424.

¹ The order in such cases proceeds on the admissions of the defendant, and evidence cannot be resorted to. *Boschetti v. Power*, 8 Beav. 98. The order cannot be made on motion after decree, and before hearing on further directions, merely on the admissions in the answer. *Binns v. Parr*, 7 Hare, 288; *Wright v. Lukes*, 13 Beav. 107.

stances of each particular case. Thus where there is any danger of the property being lost, from the trustees being insolvent or in embarrassed circumstances *or otherwise, immediate payment will be required.^(s) If no such danger be apprehended, any [*551] reasonable time will be allowed for making the payment.^(t) And in fixing the day of payment, sufficient time will be allowed for the trustee, if he desire it, to show that there is no reason for calling the money into court.^(u) And if the money be invested on improper securities, time will be given for calling them in ;^(x) and a longer period will be allowed where the money is abroad.^{(y)¹}

A plaintiff trustee may also relieve himself from responsibility by paying the trust funds into court, in order that they may abide the result of the suit; and he may obtain an interlocutory order for making that payment.^(z)

There has already been occasion to consider the cases, in which a receiver of the trust estate will be appointed by the court as against the trustees.^(a)

The effect of a decree of the court in discharging trustees from past and future liability, will more conveniently form the subject of consideration in a future Chapter.^(b)

IV.—OF COSTS.

In suits between trustees and strangers to the trust, the liability to costs will ordinarily be governed by the general rule, which throws the costs of a suit upon the unsuccessful party. Therefore, as a trustee who succeeds in a suit will be entitled to the costs from his adversary, so, if he fail, he must pay those costs. Thus, an executor, or trustee, who sues a debtor to the estate for the recovery of a debt, or a trustee for sale, who files a bill against a purchaser for a specific performance; will have to pay or receive the costs of the suit, in the same manner as a person instituting or defending such a suit

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| (s) <i>Vigrass v. Binfield</i> , 3 Mad. 63 ; | (y) <i>Johnston v. Aston</i> , 1 S. & St. 73. |
| see <i>Payne v. Collier</i> , 1 Ves. jun. 170. | (z) <i>Francis v. Collier</i> , 5 Mad. 75. |
| (t) See <i>Vigrass v. Binfield</i> , 3 Mad. | [See <i>Hosack v. Rogers</i> , 9 Paige, 468.] |
| 63 ; <i>Collis v. Collis</i> , 2 Sim. 368. | (a) Ante, Pt. I., Div. III., Ch. II., |
| (u) <i>Hinde v. Blake</i> , 4 Beav. 599. | Sect. 3 ; p. 212. |
| (x) <i>Wyatt v. Sharratt</i> , 3 Beav. 498 ; | (b) Post [Discharge of Trustees]. |
| <i>Hinde v. Blake</i> , 4 Beav. 599. | |

¹ Where under an order of court, money admitted to be due by a trustee was paid into court, to the credit of the cause generally, and the money was invested in public stocks, on which a loss occurred, it was held that the loss must be borne by the defendant. *De Peyster v. Clarkson*, 2 Wend. 78.

in his own right.^(c)¹ And where a trustee for a mortgagee makes an unsuccessful opposition to a suit by the mortgagor for the recovery of the estate, and the delivery of the title deeds, the decree against him will be with costs.^(d)

And in such suits the costs, whether paid or received by the trustee, will in general be taxed as between party and party, and not as between solicitor and client.^(e)

However, in these cases, the trustee is, doubtless, entitled to be reimbursed out of the trust estate the amount of what he may be out of pocket for costs, subject to the general rules, which will presently be considered, respecting the right of trustees to their costs out of the trust fund.^(f)²

(c) *Westley v. Williamson*, 2 Moll. 458; *Edwards v. Harvey*, Coop. 40, 3 Dan. Ch. Pr. 7, 57; see *Brodie v. St. Paul*, 1 Ves. jun. 326.

(d) *Earl of Scarborough v. Parker*, 1 Ves. jun. 267.

(e) *Mohun v. Mohun*, 1 Sw. 201; *Norway v. Norway*, 2 M. & K. 278; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 112.

(f) See 3 Dan. Ch. Pr. 58; *Hill v. Magan*, 2 Moll. 460; vide post.

¹ The proposition in the text is stated somewhat too broadly. In England, at law, an executor, suing on a cause of action accrued during the lifetime of his testator, is not liable for costs if he fails; though the court has the power of punishing him by their imposition, on account of his conduct in the action. See 2 Williams' Exrs. 1165. When defendant, however, the costs follow the ordinary rule, and he will be personally liable if there are no assets. *Id.* 1219. This has been followed in several of the States. *Jamison v. Lindsay*, 1 Bail. R. (S. C.) 79; *Farrier v. Cairns*, 5 Ohio, 45; *Caperton v. Callison*, 1 J. J. Marsh. (Ky.) 499; *Harrison v. Warner*, 1 Blackf. (Ind.) 385; *Ketchum v. Ketchum*, 4 Cow. 87; and in this last State (New York), the Revised Statutes have adopted and extended the common rule; 2 R. S., 615, § 17; see *Finley v. Jones*, 6 Barb. S. C. 229. So formerly in Virginia; though by statute the rule has been changed, and executors are made liable for costs. 2 Lomax Exrs. 38. But in Pennsylvania, the rule is now the other way, and no distinction is made between executors and other plaintiffs. *Muntorff v. Muntorff*, 2 Rawle, 180; *Show v. Conway*, 7 Barr, 136; *Ewing v. Furness*, 13 Penn. St. R. 532. So in Massachusetts, by statute. See *Hardy v. Call*, 16 Mass. 530.

In New York, the rule in equity, also, is to allow executors and trustees their costs in actions with strangers, where their conduct has been in good faith. *Moses v. Murgatroyd*, 1 J. C. R. 473; *Armoux v. Steinbrenner*, 1 Paige, 82; *Roosevelt v. Ellithorp*, 10 Paige, 415; *Dyer v. Potter*, 2 J. C. R. 152; though it is otherwise where the suit (if by the executors), is groundless and vexatious. *Roosevelt v. Ellithorp*, 10 Paige, 415; *Getman v. Beardsley*, 2 J. C. R. 274. The law was so laid down, also, in *Williams v. Matlock*, 3 Verm. 189; *Beauchamp v. Davis*, 3 Bibb, 311; *Long v. Israel*, 9 Leigh, 556; *Garner v. Strode*, 5 Litt. 314. But where the executor comes into equity to aid a defence at law, it is otherwise; *Manning v. Phillips*, 1 Paige, 472.

² *Ex parte Croxton*, 13 Engl. L. & Eq. 402; 5 De G. & Sm. 432; *Mumper's App.*, 3 W. & S. 443; *Gage v. Rogers*, 1 Strobh. Eq. 370; *Capehart v. Huey*, 1 Hill's Eq. 405; *Gouverneur v. Titus*, 1 Edw. Ch. 477; *Knox v. Pickett*, 4 Desaus.

*The case of a mortgagee is an exception to the general rule, that the costs of a suit follow its result; for a mortgagee is entitled to his costs of a suit either for redemption or foreclosure. And a trustee for a mortgagee has also the same privilege, whether his interest be created at the time and as part of the mortgage security, or whether it be vested in him subsequently by the act of the mortgagee. Thus, where on the creation of a mortgage, a term had been assigned to a trustee to attend for the benefit of the mortgagee, and the trustee of the term was made a defendant by the mortgagee in a suit for foreclosure, he was held entitled to his costs.^(g) And where a mortgaged estate is conveyed by the mortgagee to trustees on certain trusts, and those trustees are made defendants in a suit either for redemption or foreclosure, they will have their costs of the suit.^(h) And the decree in such cases will be for the trustees' costs, to be paid by the mortgagee and added to the mortgage debt.⁽ⁱ⁾ [*552]

We have seen that the trustees must, in general, be made parties to suits instituted by their *cestui que trusts* against third persons,¹ and in such cases, although the plaintiffs obtained a decree in their favor, they will usually be bound to pay the trustees their costs.^(k) It has been laid down, indeed, in an Irish case, that if the trustee *refuse to join as co-plaintiff* in the suit upon being indemnified against the costs, and he is consequently made a defendant, he must

(g) *Brown v. Lockhart*, 10 Sim. 426. (i) *Bartle v. Wilkin*, 8 Sim. 238;

(h) *Wetherell v. Collins*, 3 Mad. 255; *Browne v. Lockhart*, 10 Sim. 426.
Bartle v. Wilkin, 8 Sim. 238. (k) *Ibid.*

92; *Delafield v. Colden*, 1 Paige, 139; *Collins v. Hoxie*, 9 Paige, 81; *Day v. Day*, 2 Green's Ch. 549; *Miles v. Bacon*, 4 J. J. Marsh, 468; *Peyton v. McDowell*, 3 Dana, 314; *Morton v. Barrett*, 22 Maine, 257; see *Carow v. Mowatt*, 2 Edw. Ch. 57, where the costs of a suit, commenced against an executor, who was afterwards removed, were allowed him. But where the executor, or trustee, has unreasonably resisted payment of a just debt, when the assets were sufficient, he cannot charge the costs of the contest on the fund. *Armstrong's Estate*, 6 Watts, 236; *Callaghan v. Hall*, 1 Serg. & Rawle, 241; *Getman v. Beardsley*, 2 J. C. R. 274; *Davis v. Davis*, 2 Hill's Eq. 377. So in Pennsylvania, counsel fees will not be allowed to an executor who takes part in an issue of *devisavit vel non*, to sustain the validity of the testator's will, as that is a question in which the estate, as such, is not necessarily interested. *Mumper's App.*, 3 Watts & S. 443; *Royer's App.*, 13 Penn. St. R. 569; *contra*, in New Jersey, *Day v. Day*, 2 Green's Ch. 549; see *Townshend v. Brooke*, 9 Gill, 90. So where he takes part in a contest between several claimants to a specific legacy, in which the residuary legatees are not interested. *Verner's Est.*, 6 Watts, 236. But where the only parties in interest are legatees, for whose benefit the will is established, it is otherwise. *Scott's Est.*, 9 Watts & Serg. 98.

¹ Ante, p. 545, note.

abide his own costs as defendant.^(l) But according to the present practice, the refusal of a trustee to join with his *cestui que trusts* as co-plaintiff in a suit, without any other circumstances of misconduct or caprice, would scarcely be sufficient to deprive him of his right to his costs; for by joining as a plaintiff he would become personally liable for the costs of the suit, and the indemnity offered by the *cestui que trusts* might not be a sufficient protection against that liability. And in the recent case of *Browne v. Lockhart*,^(m) where a suit for foreclosure was brought by a mortgagee against the mortgagor, and a trustee of a term, which had been assigned in trust for the plaintiff, was also made a defendant, the Vice-Chancellor (Sir L. Shadwell), expressly recognised the right of the trustee to object to being made a co-plaintiff.

In suits between trustees and *cestui que trusts*, where there is a fund under the control of the court, it is a general rule that the trustees shall have their costs, as a matter of course, out of that fund as between solicitor and client, unless they have forfeited that right by any misconduct.⁽ⁿ⁾ And this rule applies equally, whether the trustee comes before the court as defendant or as plaintiff, as long as the suit is properly instituted.^(o) And a trustee, by whom a suit is fairly instituted, will not only be entitled to *his own* costs, but any person who is made a party to the suit for his protection, will also be ordered his costs out of the fund. Thus, where a bill was filed by trustees to obtain the direction of the court as to the [*553] *application of a trust fund, and the question was as to the legitimacy of one of the two claimants, who were both made defendants, and the Master found that he was legitimate, the other was allowed his costs out of the fund, for he was necessarily made a party for the protection of the trustees.^(p)

However, the court will not suffer this rule to be abused by burdening the trust fund with any costs which are unnecessary, or might be avoided.²

(l) *Reade v. Sparkes*, 1 Moll. 8. And in a case where a *co-executor* had refused to join as plaintiff in a suit by the other executors, and he had been made a defendant, Sir William Grant refused to give him his costs. *Collyer v. Dudley*, T. & C. 422; see *Blount v. Burrow*, 3 Bro. C. C. 90.

(m) 10 Sim., 426.

(n) *Att.-Gen. v. City of London*, 1 Ves. jun. 246; *Taylor v. Glanville*, 3 Mad. 176. [Post, 565, note.]

(o) *Curteis v. Candler*, 6 Mad. 123; see *Coventry v. Coventry*, 1 Keen, 758.

(p) *Hicks v. Wrench*, 6 Mad. 93.

¹ In *Guyton v. Shane*, 7 Dana, 498, a trustee refusing to join in a suit, and resisting the equity of his *cestui que trusts*, was struck from the bill as complainant, made a defendant, and subjected to costs.

² The trustees of a fund, who appeared without necessity, and without being served, were refused their costs: *Bennett v. Biddles*, 10 Jurist, 534.

Thus where a trustee, to whom a legacy had been assigned, filed a bill against the executors to recover the legacy, notwithstanding he had notice of a subsisting suit and decree for the administration of the assets, under which he might have had the same benefit as that sought by his own bill, the court refused to give him his costs of the suit.(q)

And on the same principle, where several co-trustees are made defendants in respect of their joint fiduciary character only, they ought to appear by the same solicitor, and answer and defend together; and if they appear separately, and sever in their defence, without any special circumstances to warrant that step, they will only be allowed one set of costs.(r)¹

But distinct sets of costs will be allowed where there is sufficient reason for the severance.(s) And it has been considered a sufficient reason for the trustees to sever, where one of them has a personal interest, which conflicts with his duty as trustee;(t) or where one of them can admit facts which the others believe not to be true, for it then becomes impossible for them with prudence to answer together;(u) or if the trustees have never admitted a common interest in themselves, by accepting the joint trust, or acting in common in its performance;(x) or where they reside at a distance from each other.(y)

And where previous orders, allowing two sets of costs, have been made and submitted to in the same cause, that will have considerable weight with the court, in case an objection is raised on the hearing, on further directions as to the allowance of costs on the same principle.(z)

(q) *Packwood v. Maddison*, 2 S. & St. 232.

(u) *Gaunt v. Taylor*, 2 Beav. 347.

(x) *Aldridge v. Westbrook*, 4 Beav.

(r) *Nicholson v. Faulkner*, 1 Moll. 213.

559; *Gaunt v. Taylor*, 2 Beav. 347;

Aldridge v. Westbrook, 4 Beav. 214;

Att.-Gen. v. Cuming, 2 N. C. C. 156;

Allen v. Thorp, 13 Law Journ. N. S., Chanc. 5.

(y) *Aldridge v. Westbrook*, *ubi supra*; *Slaughter v. Perry*, Id. cited. [But see note 1, below.]

(z) *Gaunt v. Taylor*, 2 Beav. 347; *Greenhow v. Etheridge*, Rolls, 4th July, 1843, MS.

(s) *Reade v. Sparkes*, 1 Moll. 10.

(t) *Gaunt v. Taylor*, 2 Beav. 346.

¹ Executors who severed in defence, were allowed but one counsel fee, in *Davis v. McNeil*, 1 Ired. Eq. 344. In *Farr v. Sheriff*, 4 Hare, 328, trustees severing were held entitled only to one set of costs, though it was stated at the bar, though not in the answers, that they resided in different parts of the country. And in a similar case, the Master of the Rolls refused to make any special order as to costs, on the application of the severing trustees: *Wiles v. Cooper*, 9 Beav. 298. Where trustees sever, and one only is charged with misconduct, but one set of costs will be allowed, and the whole to the innocent trustees: *Webb v. Webb*, 16 Sim. 55.

Where trustees have severed in their defence, and only one set of costs is allowed them, the amount allowed for costs will, as a general rule, be apportioned between all the trustees. However, if any one of them be *exclusively* to blame in severing, he will be deprived of any part of the costs, and the whole will be given to the others.(a) And so where *one* of several co-trustees dissents from the opinion of the majority, and acts separately from them in the conduct of his case, but the court is of opinion that there was no sufficient reason for the severance, and allows but one set of costs, the *majority* who act together, will in general be entitled to receive their costs, to the exclusion of the single trustee.(b)

[*554] *A trustee who puts in a full answer to the whole bill, will not be deprived of the costs of the answer, upon its being afterwards objected to as unnecessarily long and vexatious, *if he was required to answer the whole bill*;(c) for it is competent for the plaintiff to limit the extent of the discovery required from the trustee, whom he makes a defendant.(d) However, if a trustee answer fully, *when not required to do so*, he will only be allowed the costs of such an answer as would have been necessary and proper.(e)

The Court of Chancery is the only proper tribunal to which trustees should have recourse for guidance in the execution of their trust; and where the trustees of a charity apply to parliament for an act of their own authority, and without the sanction of the court, they will not be allowed the costs of that application, if it be unsuccessful.(f)

There is another exception to the general right of trustees to their costs, where the suit is occasioned solely by their improper conduct. In such cases the court will either content itself with making no order as to the costs, thereby leaving each party to pay their own; or where the misconduct of the trustees is such as to call for a severer infliction, the decree will be for the payment of the costs of both sides personally by the trustees. We will proceed to consider first those cases in which the court has contented itself with *depriving the trustee of his costs*.

A trustee, who has accepted the trust, must not capriciously and without reason refuse to act: and if by so doing he render necessary

(a) *Young v. Scott*, stated, Lew. Trust. 450.

(b) *Att.-Gen. v. Cuming*, 2 N. C. C. 57.

(c) *Aldridge v. Westbrook*; 4 Beav. 213; but see *Martin v. Perrse*, 1 Moll. 146.

(d) See 16th Order of August, 1841.

(e) See *Martin v. Perrse*, 1 Moll. 146.

(f) *Att.-Gen. v. Earl of Mansfield*, 2 Russ. 501, 519. [*Att.-Gen. v. Mayor of Norwich*, 12 Jur. 424; 16 Simons, 225; see *Att.-Gen. v. Andrews*, 2 Mac. & G. 225; 14 Jur. 905.]

a suit for the appointment of a new trustee, he will be refused his costs.(g)¹

However, where the trust estate becomes involved and embarrassed by unexpected difficulties and complications, which did not exist when the trustee undertook the office, he has a right to come to the court, to be relieved from the trust; as where the trust property had been repeatedly incumbered and put in jeopardy by the act of the tenant for life.(h) And in such a case he will be entitled to his costs, which will be fixed upon the tenant for life, or other party, by whose conduct the suit was occasioned,(i) unless all parties agree that the costs shall be borne by the trust fund.(k) So the age and infirmities of a trustee will be a sufficient reason for his applying to be discharged; as where he is seventy-six years old.(l)

And where a power for the appointment of new trustees is contained in the trust instrument, and that power is made to take effect on the retirement, or refusal to act, of the existing trustees, it is conceived that a trustee might retire from the trust without assigning any reason, inasmuch as the vacancy in the trust might be filled up by exercising the power, without the necessity of any suit; and if a suit became ultimately requisite, in consequence of the refusal of the parties to make the appointment under their power, *that refusal*, and

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| (g) Howard v. Rhodes, 1 Keen. 581; | (i) Coventry v. Coventry, 1 Keen, |
| Greenwood v. Wakeford, 1 Beav. 581. | 760. |
| [Porter v. Watts, 9 Engl. L. & Eq. 161; | (k) Greenwood v. Wakeford, 1 Beav. |
| Cruger v. Halliday, 11 Paige, 314; Re | 582. |
| Molony, 2 J. & Lat. 391; Jones v. | (l) Re Warwick Charities, cor. Lord |
| Stockett, 2 Bland, 409.] | Lyndhurst, Ch., 22d November, 1844, |
| (h) Coventry v. Coventry, 1 Keen, | MS. |
| 758; Greenwood v. Wakeford, 1 Beav. | |
| 576. | |

¹ A party named trustee without his sanction, is authorized to take the opinion of counsel as to his obligation to execute a disclaimer, and is entitled to the costs thereof, and of the deed: *Re Tryon*, 7 Beav. 496. The rule as to costs of disclaimer was laid down in *Gabriel v. Sturges*, 10 Jur. 215, 5 Hare, 97, as follows: Where a party disclaims so as to show that he had no interest in the subject-matter of the suit at the time of its institution, he will be entitled to his costs, as of course. But when the defendant, being properly brought before the court in respect of his interest, afterwards disclaims, it is a matter of discretion, whether the court will direct the plaintiff to pay the defendant his costs, on the ground that he ought not to have filed his bill, without ascertaining whether a suit was necessary. Thus in *Benson v. Davies*, 11 Beav. 369, a trustee put in a disclaimer, and set out a correspondence to show that he had always refused to act; it was held that he was entitled to the whole costs, for the plaintiff ought to have shown by his bill, that a simple disclaimer was sufficient.

Where a bill for the removal of trustees contained allegations of great fraud against them, which all failed, the trustees were held to be entitled to the costs of the whole suit, though they were removed on another ground: *Stanes v. Parker*, 9 Beav. 385.

[*555] not the conduct of the retiring trustee, would *be the real occasion of the suit. The point in question, however, does not appear to have been ever actually decided.

In like manner if a trustee without sufficient reason refuse to convey or make over the trust property at the request of the *cestui que trusts*, he will not be allowed the costs of a suit instituted for the purpose of compelling him to do so.⁽¹⁾ Thus where a person having in his hands a fund, settled for the benefit of an infant, instituted a suit to have it secured for the infant, although there was a trustee of the settlement, to whom it might have been paid, Lord Gifford, M. R., refused the plaintiff his costs out of the fund.^(m) And in another case, where a trustee refused to pay a legacy to the assignees of a bankrupt legatee without the direction of the court, on the ground, that the bankrupt himself had laid claim to it, the trustee was not allowed his costs.⁽ⁿ⁾ So in *Angier v. Stannard*,^(o) where a trustee refused to convey the legal estate, unless certain persons were made parties to the conveyance, and the court decided, that those persons were not necessary parties, the trustee was deprived of his costs of the suit, although he had acted *bonâ fide* under the advice of a conveyancer of character.^(o)

Upon this point, the Master of the Rolls said, “he (the trustee) has acted *bonâ fide* under advice, which has misled him, but upon which he had reason to rely from the experience and character of the advisor. It is for the interest of society, that a trustee under such circumstances should not be fixed with the costs of the suit; *but the adviser, who misled him, being of his own choice, I cannot give him the costs of the suit.*”^(p) However, in a subsequent case where a trustee of a term, acting under the advice of a conveyancing counsel, refused to assign the term without the concurrence of certain parties, and on a bill filed, the court held those parties to be unnecessary, the trustee was, notwithstanding, allowed his costs of the suit, and other charges and expenses.^(q) In this last case the counsel consulted on each side differed in opinion, and an offer by the defendant to refer the question to a third counsel, was declined. The opinion generally prevalent in the profession, and the one most sanctioned by the interests of society, certainly is, that where a trustee in a doubtful case acts *bonâ fide* under the advice of counsel, he will be

(m) *Ellis v. Ellis*, 1 Russ. 368.

(o) *Angier v. Stannard*, 3 M. & K.

(n) *Knight v. Martin*, 1 R. & M. 70; 566; but see *Poole v. Pass*, 1 Beav. 600.

(p) 3 M. & K. 572.

and see *Campbell v. Horne*, 1 N. C. C. 664, 670.

(q) *Poole v. Pass*, 1 Beav. 600.

(1) Such a refusal will very frequently be a sufficient reason for making the trustees pay costs. Vide post, and *Jones v. Lewis*, 1 Cox, 199; *Willis v. Hiscox*, 4 M. & Cr. 197; *Thorby v. Yeats*, 1 N. C. C. 438.

entitled to his costs, although that advice turns out to be erroneous.^(r)¹

And if there be sufficient reason for the refusal of the trustee to make the conveyance or assignment, he will be entitled to his costs, although the decree be made against him. For instance, where the title of the *cestui que trusts* from length of time, or frequent devolution, or the obscurity of the trust, or from other circumstances, is not perfectly clear,^(s) or *the deed under which the plaintiff claims [*556] is not free from suspicion;^(t) or the determination of the trust is not distinctly proved;^(u) or if the trustee might reasonably imagine, that it would be wrong to accede to the request, as where he is required to transfer a trust fund to a married woman, and thus in effect to give it to her husband^(x)—in all these cases the trustee has been held entitled to his costs. And it is settled, that trustees will be justified in refusing to act without a suit, where they are required to convey the trust estate in several parcels, part at one time and part at another,^(y) or where the conveyance tendered for their execution, contains a different description from that by which the estate was conveyed to them.^(z) And a trustee, when called upon to convey, is entitled to take an expense of a legal opinion as to the propriety of the conveyance.^(a)

Again, if a suit be occasioned by a breach of trust on the part of the trustee, he will unquestionably be deprived of his costs, even if he be not decreed to pay them.⁽¹⁾ Thus where a trustee neglected to see a settlement executed on the marriage of a *cestui que trust*, and a suit became necessary to rectify the omission, the trustee was deprived of the costs of the suit.^(b) And if a balance have been im-

(r) See *Vez v. Emery*, 5 Ves. 144;
Hampson v. Bramwood, 1 Mad. 392, 395.

(s) *Goodson v. Ellisson*, 3 Russ. 593—
6; and see *Poole v. Pass*, 1 Beav. 600.

(t) *Whitmarsh v. Robinson*, 1 N. C.
C. 715.

(u) *Holford v. Phipps*, 3 Beav. 434; 1
4 Beav. 475.

(x) *Taylor v. Glanville*, 1 Mad. 176;
but see *Thorby v. Yeats*, 1 N. C. C. 438.

(y) 3 Russ. 594.

(z) *Ibid.*

(a) See *Goodson v. Ellisson*, 3 Russ.
588; *Poole v. Pass*, 1 Beav. 604; *Hol-*
ford v. Phipps, 3 Beav. 434.

(b) *O'Callaghan v. Cooper*, 5 Ves.
29; *Massey v. Banner*, 4 Mad. 413;
and see *Newton v. Bennett*, 1 Bro. C. C.
362; *Mousley v. Carr*, 4 Beav. 49.

(1) The cases in which the misconduct of trustees will be a ground for making them *pay* costs, will be presently considered. (Post, 558–565.)

¹ In *Devey v. Thornton*, 12 Engl. L. & Eq. 204; 9 Hare, 222, where trustees had unnecessarily raised doubts on the title of their *cestui que trusts*, costs were refused them, though they had acted under the advice of counsel. The Vice-Chancellor observed with reference to this, "It does not appear upon what statements such advice was given, nor can I venture to hold that the opinion of counsel will, in all cases, entitle trustees to their costs of suit." No costs, however, were given against the trustees.

properly retained in the hands of the trustee, that will be a ground for refusing him his costs.(c) And where the trustees of a settlement, by which the stock in trade, &c., of a business was limited to the separate use of a married woman, omitted to take a schedule of the articles, and thus occasioned great confusion and difficulty, they were deprived of the costs of the suit.(d)

Trustees may also deprive themselves of their title to costs by their conduct in the suit. As where by their answer they raise and insist upon a claim, which they are unable to support.(e)¹ Although a claim, made by way of *submission* to the court, will not prejudice a trustee with regard to costs.(f) And a trustee has been allowed his costs, notwithstanding an unsuccessful claim, where the claim was made honestly, and through a venial mistake.(g)

Again, it will be a sufficient reason for refusing his costs to a trustee, if he state the trust to be different from what it really is, and this although the statement may not be made with a view to his own benefit. For instance, where a trustee of a settlement insisted, contrary to the fact, that it was the intention to insert a trust for the wife's separate use, Lord Thurlow considered, that a trustee ought not to have his costs of the suit.(h)²

[*557] *However, the court is not eager to punish trustees by depriving them of their costs,(i) and in many instances, where there have been any mitigating circumstances, the trustees have been allowed their costs of a suit, in which the decree has been against them for a breach of trust. Thus, where the misapplication extended only to a small part of the trust fund, and the suit had been instituted for other purposes, and there was no imputation against the trustee, he was allowed his costs of the suit.(k) And if the suit be

(c) Dawson v. Parrot, 3 Bro. C. C. 236. [See post, 559, note (1).] (h) Ball v. Montgomery, 2 Ves. jun. 191.

(d) England v. Downs, 6 Beav. 279. (i) See Hall v. Hallett, 1 Cox, 134,

(e) Att.-Gen. v. Brewers' Company, 1 P. Wms. 376; Dawson v. Parrot, 3 Bro. C. C. 236. (k) Fitzgerald v. Pringle, 2 Moll. 534; and see Sammes v. Rickman, 2 Ves. jun. 36.

(f) Rashley v. Martin, 1 Ves. jun. 205.

(g) Bennett v. Going, 1 Moll. 529.

¹ Where the trustee's litigation is for his own benefit, the costs will be as in ordinary cases. Manning v. Manning, 1 J. C. R. 535; Hartzell v. Brown, 5 Binn. 138; Royer's App., 13 Penn. St. 569; Wham v. Love, Rice's Eq. 51; Ralston v. Telfair, 2 Dev. & Batt. Eq. 414. But in Pell v. Ball, Spear's Eq. 48, it was held to be in the discretion of the court to allow an executor the costs of opposing a claim to a distributive share of the estate, though he is one of the next of kin.

² Where a trustee had been participant in a fraud, he was refused costs. Tarquand v. Knight, 14 Sim. 643. So, where though a bill alleging fraud against an administrator was dismissed, there being reason for believing the charges true. Wade v. Dick, 1 Ired. Eq. 313.

instituted with unnecessary haste, and without any previous application for an account, or for payment of the balance in the trustee's hands, although a small balance be found due from him, he may be allowed to retain the amount of his costs out of it.^(f) So, in a case where the trustees were directed to sell, as soon as conveniently might be after the testator's death, and they refused an offer of 6,600*l.* for the estate, and afterwards sold it for 3,600*l.*, the court held that there was sufficient misconduct on the part of the trustees to charge them with the loss occasioned by the difference, but as their conduct had not been wilful or perverse, they were allowed their costs of the suit.^(g) And a venial mistake of the trustees will meet with the same indulgence.^(h)

And where a college, being trustees for a charity, had committed several errors in the management of the trust, which were rectified by the decree, but the trustees had only followed the course adopted by their predecessors, and had been guilty of no wilful misconduct, and a large fund had been accumulated out of the income of the property by their care and good management, Lord Langdale, M. R., after considerable hesitation, allowed the college their costs of the suit out of the accumulated fund.⁽ⁱ⁾ And where the trustees are a corporation consisting of fluctuating members (as a college), and the breach of trust was committed by the predecessors of the individuals who composed the corporation at the time of the institution of the suit, the court will be reluctant to charge the present members with the costs; for that would be to visit them with the consequences of errors committed by their predecessors, whom they do not in any respect represent.^(k) However, the question of costs is peculiarly within the discretion of the court, which will be governed by the particular circumstances of each case; and it is impossible to lay down any general rules for determining what will or will not amount to an exception to the general doctrine, so as to entitle trustees to their costs of a suit, which is occasioned by their breach of trust.

In extension of the principle, upon which the court acts in depriving trustees of their costs, it will, under certain circumstances, go further, and decree the whole or part of the costs *to be paid personally by them*.^(l) And it may be laid down as a general rule (though subject to many exceptions), that where a suit is occasioned *solely* by the misconduct or neglect of a trustee, the decree against

(f) *Bennett v. Atkins*, 1 Y. & Coll. 249.

(g) *Taylor v. Tabrum*, 6 Sim. 281.

(h) *Bennett v. Going*, 1 Moll. 529.

(i) *Att.-Gen. v. Caius College*, 2 Keen, 150, 170.

(k) *Att.-Gen. v. Caius College*, 2 Keen, 169.

(l) See 3 Dan. Ch. Pr. 51, et seq.

[*558] him will be made with costs to be paid *personally by him.(m) And this rule applies to corporations being trustees, as well as to private individuals.(n)

Thus, if a trustee have acted in a fraudulent manner, either by falsifying, or wilfully concealing, the facts for his own benefit, the court, in making a decree against him, will unquestionably compel him to pay the costs of the suit. For instance, where a trustee has made false statements in his bill or answer(o)—or suppressed a material fact, such as the sufficiency of the personal estate, for the payment of debts(p)—or had made an unfair valuation of the trust property(q)—or concealed evidence relating to the trust(r)—or had refused an offer for the purchase of the estate, unless the purchaser would concede a personal benefit to himself(s)—or where the answer was contradicted(t)—or a false pretence of outstanding claims was set up as a reason for keeping a large balance in the trustee's hands(u)—in all these cases, the court has marked its disapprobation of the conduct of the trustees by decreeing them to pay the costs of the suit. In like manner, where an executor and trustee procured the *cestui que trust* to execute a release of a legacy without any consideration and upon false suggestions, the release was set aside, and the trustee was ordered to pay the costs of the suit.(x) And if a trustee, having a personal interest in the trust estate, file a bill and bring the *cestui que trusts* before the court, merely to have the point relating to his own interest determined at the expense of the trust, he will be decreed to pay the whole costs of the suit for his improper conduct.(y) And so where a trustee for the sale of estates took undue advantage of the confidence reposed in him, in order to purchase them himself at an undervalue, and subsequently resold them at a considerable profit, he was decreed by the Master of the Rolls, to account for the profit made by him, and to pay the costs of the suit; and that decision was affirmed on appeal by the Lord Chancellor

(m) *Fell v. Luthdwide*, Barn. 319; *Caffrey v. Durby*, 6 Ves. 497; *Crackelt v. Bethune*, 1 J. & W. 589; *Tebbs v. Carpenter*, 1 Mad. 308.

(n) *Att.-Gen. v. Haberdashers' Company*, 2 Bro. P. C. 370; *Att.-Gen. v. Drapers' Company*, 4 Beav. 67; *Att.-Gen. v. Christ's Hospital*, Ib. 73; see *Att.-Gen. v. Caius College*, 2 Keen, 169; *Borough of Hertford v. Poor of Hertford*, 2 Bro. P. C. 377; *Att.-Gen. v. East Retford*, 2 M. & K. 35.

(o) *Vaughan v. Thurston, Colle's P. C.* 175; *Mallabar v. Mallabar*, Ca. Temp. Talb. 71; *Shepperd v. Smith*, 2 Bro. P. C. 372.

(p) *Mallabar v. Mallabar*, ubi supra.

(q) *Shepperd v. Smith*, 2 Bro. P. C. 372.

(r) *Borough of Hertford v. Poor of Hertford*, 2 Bro. P. C. 377; *Att.-Gen. v. East Retford*, 2 M. & K. 25.

(s) *Hide v. Haywood*, 2 Atk. 126.

(t) *Reech v. Kennegal*, 1 Ves. 126.

(u) *Crackelt v. Bethune*, 1 J. & W. 586; see *Stackpole v. Stackpole*, 4 Dow. 209.

(x) *Horseley v. Chaloner*, 2 Ves. 83; *S. C.*, Ib., *Belt's Supplement*, 281.

(y) *Henley v. Phillips*, 2 Atk. 48.

(Lord Thurlow), and ultimately by the House of Lords.(z) Indeed, fraud is looked upon with such *odium* in a court of equity, that it may be laid down as an axiom of equitable law, that wherever a case of fraudulent dealing is established against a trustee, the costs will follow against him as a matter of course.(a)

So, wherever the *sole* object of a suit is to rectify a breach of trust committed by a trustee, the decree against him will generally be with costs, although his conduct may have proceeded only from negligence or mistake, and without any fraudulent or improper motive. For instance, where the *trustees of a charity had acted with great negligence, though without corruption, they were de- [*559] creed to pay part of the costs.(b)

And so where a decree was made against trustees, who had neglected to sue for and recover a debt due to the trust estate, which was lost in consequence, the costs of the suit were given against them as a matter of course, although there was no corruption.(c)

And in charging trustees for balances unnecessarily retained in their hands, the decree will in general go on to charge them with the costs.(d)(1)

Again, as a general rule, trustees, who have made an unjustifiable disposition or investment of the trust property, will be charged with

(z) *Fox v. Mackreth*, 2 Bro. C. C. 400, 406.

(a) See *Hardwick v. Vernon*, 14 Ves. 504; *Ayliff v. Murray*, 2 Atk. 61.

(b) *East v. Ryal*, 2 P. Wms. 284.

(c) *Caffrey v. Darby*, 6 Ves. 488; and see *Lowson v. Copeland*, 2 Bro. C. C. 156; *Mucklow v. Fuller*, Jac. 198, 200. [*Byrne v. Norcott*, 13 Beav. 336; *Fenwick v. Greenway*, 10 Beav. 412.]

(d) *Troves v. Townshend*, 1 Bro. C. C. 384; *Littlehales v. Gascoigne*, 3 Bro. C. C. 73; *Franklin v. Frith*, Ib. 433; *Seers v. Hind*, 1 Ves. jun. 294; *Pietry v. Stace*, 4 Ves. 620; *Roche v. Hart*, 11 Ves. 58, 62; *Mosley v. Ward*, Ib. 581; *Ashburnham v. Thompson*, 13 Ves. 402; *Tebbs v. Carpenter*, 1 Mad. 290, 308; *Crackelt v. Bethune*, 1 J. & W. 586.

(1) However, in a case in Ireland, it was said by Sir A. Hart, L. C., that he had often heard it stated as a principle by some of the greatest judges, that an executor, though in the result made answerable for default by reason of loss incurred through his neglect, or charged with interest for retaining money in his hands, yet if there was nothing beyond such negligence, or retention of money against him, was still entitled to the costs of the suit. *Travers v. Townsend*, 1 Moll. 496; and see *Flanagan v. Nolan*, Ib. 84. [In *Fozier v. Andrews*, 2 Jones & Lat. 199, a trustee, who had not misconducted himself, was held entitled to his general costs, though made to pay interest, but his account being greatly reduced in the Master's office, he was not allowed the costs of his account in the office. So in *Cotton v. Clarke*, 13 Eng. L. & Eq. 379, an executor who had retained balances in his hands, was held under the circumstances entitled to his costs of suit, though charged with interest on the balances. In *Dunscombe v. Dunscombe*, 1 J. C. R. 507, though it was stated to be the general rule that an executor pays costs when charged with interest, yet it was decided that where the *cestui que trust* demands more than he is entitled to receive, and the executor submits to the direction of the court, he would not be compelled to pay them.]

the costs of the suit. For instance, where a trustee without a sufficient authority sells out the trust stock, he will be decreed to replace the stock, and pay the costs of the suit.^(e)¹ And so the trustees of a charity who neglect the objects and misapply the fund will be decreed to account with costs.^(f) And if the trustees have made an improper investment of the trust fund, by placing it out on personal security, or in any other mode not authorized by the trust instrument, or warranted by the practice of the court, the decree against them for the restitution of the fund will usually be made with costs.^(g) And if they refuse to render their accounts, they will be charged with the costs of a suit to compel them.^(h)²

So where trustees for sale have purchased the trust estate and resold at a profit, they will be decreed to account for that profit with costs.⁽ⁱ⁾ And if the trust property purchased by the trustees belong to infants, the trustees will be charged with costs, although the sale was made by public action, and was perfectly fair and *bona fide*, and there had been no resale or subsequent profit.^(k)

Formerly, where an account was directed against a trustee *with interest* it was considered, that the costs of the suit must also be

(e) *Earl Powlett v. Herbert*, 1 Ves. Jun. 297; *Whistler v. Newman*, 4 Ves. 129; *Adams v. Clifton*, 1 Russ. 297; *Kellaway v. Johnson*, 5 Beav. 319; *Crackelt v. Bethune*, 1 J. & W. 586; *Pocock v. Reddington*, 5 Ves. 794, 9; *Hosking v. Nicholls*, 11 Law Journ. N. S., Chanc. 230.

(f) *Att.-Gen. v. Haberdashers' Company*, 2 Bro. P. C. 370.

(g) *Pocock v. Reddington*, 5 Ves. 794, 9; *Walker v. Symonds*, 3 Sw. 1, 89; *Bateman v. Davis*, 3 Mad. 98; *Pride*

v. Fooks, 2 Beav. 430; *Kellaway v. Johnson*, 5 Beav. 319, 325; *Challen v. Shippam*, 4 Hare, 555. [*Hall v. Franck*, 13 Jur. 718; *Jones v. Foxhall*, 13 Eng. L. & Eq. 141.]

(h) *Anon.*, 4 Mad. 273; *Collyer v. Dudley, T. & R.* 271. [*Att.-Gen. v. Gibbs*, 1 De G. & S. 156.]

(i) *Fox v. Mackreth*, 2 Bro. C. C. 400; *Whichcote v. Lawrence*, 3 Ves. 740. [See cases cited ante, note to p. 522.]

(k) *Saunderson v. Walker*, 13 Ves. 601.

¹ But where this is due at the request of the *cestui que trust*, a married woman, the court will not give costs, on her bill to replace the stock. *Mant v. Leith*, 10 Eng. L. & Eq. 123.

² But the mere fact that an executor has neglected to render accounts when requested, will not in itself make him liable for costs in an administration suit. *White v. Jackson*, 15 Eng. L. & Eq. 138; see *Robertson v. Wendell*, 6 Paige, 322. And in *Minuse v. Cox*, 5 J. C. R., 451, where the charges in a bill for an account (though rightly brought), which formed the main ground of the suit, were proved false, unjust, and vexatious, the trustee was allowed all his taxable costs, and extra charges and expenses out of the fund. The representative of a defaulting executor, fairly accounting, is entitled to deduct his costs out of the assets, though they may be insufficient to repair the breach of trust. *Haldenby v. Spofforth*, 9 Beav. 195. But an offer by an executor to account, accompanied with a denial that anything was due, will not excuse him from costs. *Rogers v. Rogers*, 3 Wend. 503.

given against him as a matter of course.^(l) However, this never seems to have been adopted *as a general rule;^(m) and in *Ashburnham v. Thompson*,⁽ⁿ⁾ the propriety of such a rule [*560] was expressly denied by Sir Wm. Grant, M. R., who said, that there might be many cases, in which executors might pay interest, which would not be cases for costs. And according to the modern practice it is clear, that the mere fact of interest being given against trustees, will not of itself govern the question of costs.^(o)

Again, where trustees from obstinacy or caprice, refuse to act without a decree of the court, they will in general be ordered to pay the costs.^(p)¹ Thus where a bill for the specific performance of an agreement was occasioned by the refusal of a trustee to join in the conveyance, he was decreed to pay all the costs of the suit.^(q) And so in another case, where the surviving trustee of a will refused to convey the legal estate to the person beneficially entitled, upon some unfounded objections to his title, and a bill was filed to compel him to convey, Lord Cottenham made a decree for a conveyance against the trustee with costs.^(r) And in a very recent case, where a sum of stock was given by a will to trustees, in trust to transfer the same to the plaintiff (then a spinster) upon her attaining twenty-one, for her separate use, and free from the control of any husband she might marry, and the trustees refused to transfer the fund to the plaintiff, who had attained twenty-one, and married without any settlement, they were decreed to pay the costs of a suit instituted to compel a transfer.^(s) In this last case the highest legal advice had been obtained in favor of the right of the plaintiff to require the transfer of the fund. So in an early case, where trustees had kept possession of

(l) *Seers v. Hind*, 1 Ves. Jun. 294; *Mousley v. Carr*, 4 Beav. 49, 53; *MacRoche v. Hart*, 11 Ves. 62; *Mosley v. kenzie v. Taylor*, Rolls, 7 Beav. 467. Ward, lb. 583. [Fozier v. Andrews, 2 J. & Lat. 199;

(m) *Newton v. Bennett*, 1 Bro. C. C. 362; *Forbes v. Ross*, 2 Bro. C. C. 430; *Cotten v. Clarke*, 13 Eng. L. & Eq. 379.]

(n) *Lee v. Brown*, 4 Ves. 369; *Raphael v. (p) Taylor v. Glanville*, 4 Mad. 176; *Boehm*, 11 Ves. 111; *Sammes v. Rickman*, 2 Ves. jun. 36. see *Goodson v. Ellison*, 3 Russ. 589.

(q) *Jones v. Lewis*, 1 Cox, 199.

(r) *Willis v. Hiscox*, 4 M. & Cr. 197.

(o) See *Tebbs v. Carpenter*, 1 Mad. 308; *Fletcher v. Walker*, 3 Mad. 73, 4; (s) *Thorby v. Yeats*, 1 N. C. C. 438.

¹ See *Moore v. Prance*, 7 Eng. L. & Eq. 17; *Hutchins v. Hutchins*, 6 Eng. L. & Eq. 91; *Furmin v. Pulham*, 12 Jur. 410; 2 De G. & Sm. 99; *Carter v. Robinson*, 8 Beav. 242; *Hampshire v. Bradley*, 2 Coll. C. C. 34; *Brinton's Est.*, 10 Barr, 408. In *Lancashire v. Lancashire*, 11 Jur. 1024, which was a suit by the heir-at-law to set aside certain deeds by trustees, the heir had satisfactorily proved his pedigree before the trustee, prior to the suit, but they forced him to prove it under his bill; on a decree in favor of the complainant, the court gave him his costs, including that of the genealogical evidence.

the estate from their *cestui que trust*, whom they considered a lunatic, although he was not so in fact, upon a bill being filed against them by the *cestui que trust*, they were ordered to pay the costs of the suit, although they did not appear to have acted from any corrupt motive, but only for the protection of the property for the benefit of the persons entitled in remainder.(t) And where the trustees of an estate, charged with two annuities, had refused to pay the annuities, upon an insufficient pretence, that the annuitants had incurred a forfeiture under a clause in the will, the decree was made against them with costs.(u) In *Goodson v. Ellisson*,(x) the legal estate had been vested in a trustee by a settlement made in 1767, and in 1822 the purchaser of *part* of the property applied to the co-heiresses at law of the trustee for a conveyance of that part: every offer had been made to them to satisfy them as to the plaintiff's title by the inspection of instruments, or the use of professional assistance at the plaintiff's expense, but the defendants persisted in their refusal to execute the conveyance, and the Master of the Rolls (Lord Gifford) being of opinion that this refusal by the defendants proceeded from caprice and pertinacity, decreed them to execute a conveyance to [561] the plaintiff, and to pay the costs of the *suit.(y) However, this decree as to the costs was reversed on appeal by the Lord Chancellor (Lord Eldon), partly because a trustee could not be required to convey the trust estate in parcels, and partly because the length of time and other circumstances had thrown so much obscurity on the title, that the trustees had a right to insist on the conveyance being settled in the Master's office.(z)

In the very recent case of *Lyse v. Kingdom*,(a) the plaintiff was entitled under a will to a share in a trust fund, in the event of A. having died in the lifetime of the testatrix. A.'s share in the fund was set apart by the two executrixes and trustees, who signed a memorandum, stating that they held the amount in trust for him, but they retained the amount in their own hands, and both died without ever having invested it. The testatrix died in the year 1818, and A. had not been heard of since 1793, when he was supposed to have gone to sea. In 1837, application was made by the plaintiff to the executors of the two trustees for payment of the fund, accompanied by strong circumstantial evidence, showing that A. had died in the lifetime of the testatrix, though that fact was not completely brought home. The executors admitted assets of the two trustees sufficient for the payment of the amount of A.'s share, and the Master having found that A. died in the lifetime of the testatrix,

(t) *Brown v. How*, Barn. 354.

(u) *Lloyd v. Spillett*, 3 P. Wms. 344.

(x) 3 Russ. 583.

(y) 3 Russ. 587.

(z) 3 Russ. 592.

(a) *Lyse v. Kingdom*, 1 Coll. 184.

the only question was, by whom the costs of the suit were to be paid: and Sir K. Bruce, V. C., held, that there was not at any moment any reasonable doubt as to the title of the plaintiff, and his Honor decreed for the plaintiff, with the costs of the suit, to be paid out of the assets of the two trustees.(a) And in another case, where the trustees of a fund belonging to a *feme sole*, refused to transfer it to the trustees of the settlement made on her marriage, and compelled the parties to file a bill to obtain the payment, they were decreed to pay the costs.(b)

But wherever there is sufficient reason for a trustee's refusing to act without the direction of the court, he will unquestionably be entitled to the costs of a suit instituted to obtain that direction.(c) And where his conduct, though erroneous, proceeds from ignorance, and not from any improper motive, the court has contented itself with depriving him of his costs.(d) The cases on this point have already been considered, in discussing the liability of trustees to be deprived of their costs, and these are *à fortiori* authorities on the question of the *payment* of costs by them.(e)

Again, if a suit be occasioned by disputes amongst the trustees,—as where a *cestui que trust* was obliged to file a bill for the appointment of a receiver, in consequence of a quarrel amongst the trustees, as to which of them should receive the rents of the trust estate,—the trustees, or such of them as are in fault, will be decreed to pay the costs of the suit;(f) and if necessary, an inquiry before the Master will be directed to ascertain which of the trustees were in fault.(g)

And so if the trustees have supported an erroneous or improper claim *made by one of the *cestui que trusts* adversely to the other, and have thus driven the injured party to file a bill for [*562] the protection and assertion of his rights, the trustees will be decreed to pay the costs of the suit.(h) And their liability in such a case will be yet more strictly enforced, where the injured *cestui que trust* is a married woman.(i)

If the trustees by their answer raise *and insist* on a claim to the trust estate for their own benefit, they will be considered to have divested themselves of the character and privileges of trustees, and to have placed themselves in the same situation as any other parties, between whom a question is in course of hostile litigation; and if

(a) Lyse v. Kingdom, 1 Coll. 184.

(e) Ibid.

(b) Penfold v. Bouch, V. C. Wigram, [4 Hare, 271.]

(f) Wilson v. Wilson, 2 Keen, 249; and see Bagot v. Bagot, 10 Law Journ.

(c) Goodson v. Ellisson, 3 Russ. 592. [Dustan v. Dustan, 1 Paige, 509; Armstrong v. Zane, 12 Ohio, 287.]

N. S., Chanc. 116.

(g) 2 Keen, 252.

(d) Vide supra. [See Robertson v. Wendell, 6 Paige, 322.]

(h) Baggot v. Baggot, 10 Law. Journ.

N. S., Chanc. 116.

(i) Ibid.

they fail in establishing their claim, the decree against them will be made with costs. Thus where an executor made an unsuccessful claim to be entitled to the surplus of the estate for his own benefit, he was made to pay the costs of the suit.^(k)¹ And in two very recent cases, where a corporation, being trustees for a charity, raised a claim to the surplus arising from the increased value of the property for their own benefit, to the exclusion of the objects of the charity, Lord Langdale, M. R., fixed them with the costs of the information.^(l) However, there has already been occasion to observe, that trustees will not be deprived of their costs, although they make a claim for their own benefit, provided they do so by way of submission to the court.^(m)

And so if a trustee misconduct himself in the course of a suit—as where he sets up an improper defence, by insisting wrongfully on a clause of forfeiture against the *cestui que trusts*;⁽ⁿ⁾² or shows a disposition to obstruct and retard the course of justice, by misstating or refusing to deliver proper accounts;^(o) or making false statements in his answer;^(p) or by stating his ignorance of facts, the truth of which afterwards appears from the documents scheduled in the answer;^(q) or by concealing evidence relating to the trust;^(r) in all these cases the court will punish the trustee, by fixing him with the payment of the costs. Upon this principle, in a recent case, where executors and trustees at the hearing of a cause insisted on an inquiry being directed, to ascertain whether all the children entitled under the will were before the court, and the court was of opinion, that the facts were so clear as to render it improper for the trustees to have required that inquiry, they were ordered to pay the costs of

(k) Bayly v. Powell, Prec. Ch. 92; 372; Avery v. Osborne, Barn. 349; Flanagan v. Nolan, 1 Moll. 86; Norbury v. Calbeck, 2 Moll. 461.
2 Vern. 361; and see Lawson v. Copeland, 2 Bro. C. C. 156; Willis v. Hiscox, 4 M. & Cr. 197.

(l) Att.-Gen. v. Drapers' Company, 4 Beav. 67; Att.-Gen. v. Christ's Hospital, Id. 73.
(p) Vaughan v. Thurston, Colle's P. C. 175; Mallabar v. Mallabar, Ca. T. Talb. 79; Reech v. Kennegal, 1 Ves. 126.

(m) Vide supra; and Rashley v. Martin, 1 Ves. jun. 205.
(q) Att.-Gen. v. East Retford, 2 M. & K. 35.

(n) Lloyd v. Spillett, 3 P. Wms. 346.
(r) Borough of Hertford v. Poor of Hertford, 2 Bro. P. C. 377.

¹ See ante, 556, note.

² Where a trustee denies the trust, and sets up a claim for his own benefit, he will be condemned in costs: Lemmond v. Peoples, 6 Ired. Eq. 37; Waterman v. Cochran, 12 Verm. 699; see Spencer v. Spencer, 11 Paige, 297, where costs were merely refused. Where property has been conveyed on an illegal trust, the trustees will be liable to costs on account of their concurrence, on a bill by those entitled to the resulting trust: Lemmond v. Peoples, *ut supra*; see Tarquand v. Knight, 14 Simons, 643.

it.(s) And so if the conduct of the trustees during the progress of a suit occasions a needless increase of expense, the court will throw upon them the additional expense. For instance, where the trustees had embarrassed the proceedings, and rendered it necessary to have other *parties brought before the court, by appointing new trustees after the institution of the suit, they were ordered to [*563] pay the *extra* costs occasioned by that act.(t)

Where there are several co-trustees, and *some of them only* have been guilty of the misconduct which occasioned the suit, whilst the others have been ready and anxious to discharge their duties properly, the *guilty trustees alone* will be decreed to pay the costs of the suit, including the costs of their innocent co-trustees.(u)¹

However, it has been already shown,(x) that the court in the exercise of its discretionary jurisdiction has frequently refused to *deprive the trustees of their costs* of a suit, though the decree is made against them; and those cases are yet stronger authorities for refusing to make the trustees *pay the costs*. Hence, to recapitulate those instances, an exception will be made to the general rule charging trustees with the costs of a suit occasioned by their breach of trust, and they will even be allowed their costs, where their conduct has proceeded from mistake or accident, without any corrupt or improper motive; as where an erroneous claim for his own benefit had been raised *bonâ fide* by a trustee;(y) or where through a venial mistake, or misapprehension of their duty, there had been an incorrect application, or retention of, or other dealing with, the trust funds,(z) (more especially if the question relates only to a small portion of the property),(a) or where the suit is instituted with unnecessary haste,(b) or after great and unnecessary delay,(c) and where the trustees take the earliest opportunity of correcting their error, after it is brought to their notice,(d) and their accounts are correct and satisfactory in

(s) *Westover v. Chapman*, 1 Coll. 379, 383.

(t) *Att.-Gen. v. Clack*, 1 Beav. 467; *Cafe v. Bent*, 3 Hare, 249; S. C. 13 Law Journ. N. S., Chanc. 169.

(u) *Bagot v. Bagot*, 10 Law Journ. N. S., Chanc. 116. [See *Webb v. Webb*, 16 Sim. 55.]

(x) *Vide supra*.

(y) *Bennett v. Going*, 1 Moll. 529; *vide supra*.

(z) *Parrot v. Treby*, Prec. Ch. 254;

Travers v. Townsend, 1 Moll. 496; *Flanagan v. Nolan*, *ib.* 84; *Taylor v. Tartrum*, 6 Sim. 281; *Mousley v. Carr*, 4 Beav. 49.

(a) *Fitzgerald v. Pringle*, 2 Moll. 534; *Sammes v. Rickman*, 2 Ves. jun. 36.

(b) *Bennet v. Atkins*, 1 Y. & Coll. 249.

(c) *Att.-Gen. v. Dudley*, Coop. 146; *Pearce v. Newlyn*, 3 Mad. 189.

(d) *Att.-Gen. v. Drapers' Company*, 4 Beav. 71.

¹ But where several defendants are involved in a breach of trust, the court gives costs against all, without regard to the degree of culpability, on the principle of giving greater security for their payment. *Lawrence v. Bowles*, 2 Phill. 140.

other respects.(e) And corporations and other trustees for charities appear to be regarded with especial favor in this respect, where the error has been adopted and followed from the long-continued practice of their predecessors.(f)

But trustees will not meet with this indulgence, unless they have given every possible facility to the court to do complete justice, by delivering their accounts, and giving all the information in their power,(g) and if they act in a contrary spirit, that alone will induce the court to visit them with costs.(h)

Where a trustee acts under the advice of counsel, which turns out to be erroneous, he will certainly not be made to *pay* the costs [*564] of the suit:(i) *we have already had occasion to consider how far he would be entitled to receive his costs under such circumstances.(k)

In some cases, as we have already seen, the court has contented itself with depriving the trustees of their costs, leaving each party to pay their own.(l) For instance, where a trustee, who was also tenant for life, through mistake as to her rights had applied part of the trust funds to her own use, she was decreed to account for the money so applied, with interest at four per cent.; but as the construction of the will was doubtful, and she had acted through ignorance, the decree was made against her without costs.(m) And a decree has been made without costs against a trustee, on the ground of the delay on the part of the plaintiffs in prosecuting their claim.(n)

A suit against trustees is frequently rendered necessary by circumstances, independent of, and wholly unconnected with, any breach of trust, and in such cases the court will meet the justice of the case by apportioning the costs of the suit, and will in general give the trustees all the costs not actually occasioned by their breach of trust.¹

(e) *Mackenzie v. Taylor*, [7 Beav. 467.] [Devey v. Thornton, 12 Engl. L. & Eq. 204.]

(f) *Att.-Gen. v. Caius College*, 2

Keen, 169; *Att.-Gen. v. Drapers' Company*, 4 Beav. 71; *Att.-Gen. v. Drummond*, 3 Dr. & W. 162.

(g) See *Parrot v. Treby*, Prec. Ch. 254; *Att.-Gen. v. East Retford*, 2 M. & K. 40.

(h) *Att.-Gen. v. East Retford*, 2 M. & K. 36.

(i) *Angier v. Stannard*, 3 M. & K. 572.

(k) Vide supra.

(l) *O'Callaghan v. Cooper*, 5 Ves. 117; *Raphael v. Boehm*, 13 Ves. 592; *Forbes v. Ross*, 2 Bro. C. C. 431; *Fletcher v. Walker*, 3 Mad. 74; *Mousley v. Carr*, 4 Beav. 49; *Massey v. Banner*, 4 Mad. 413.

(m) *Mousley v. Carr*, 4 Beav. 49.

(n) *Att.-Gen. v. Dudley*, Coop. 146; *Pearce v. Newlyn*, 3 Mad. 189; ante, p. 144.

¹ In *Fozier v. Andrews*, 2 Jones & Lat. 199, a trustee who had not misconducted himself, was allowed his costs of suit, though charged with interest; but his account being greatly reduced, in the Master's office, he was not allowed the

The rule has been thus stated by Sir Thos. Plumer, V. C.: "If a suit would have been proper, and the executor a necessary party, though the executor had not misconducted himself, he ought not to pay *all* the costs of such a suit, though in the course of the suit it appears, that he has misconducted himself; but if the misconduct of the executor was the *sole* occasion of the suit, he ought then to pay the costs." (o) Therefore, where a bill was filed by *cestui que trusts* against their trustee, charging him with misconduct in felling timber, and also with an improper investment of part of the trust funds, and they failed in establishing the first part of their case, which was abandoned, but succeeded in proving the other part, and obtained a decree against the trustee for an account of the trust funds misapplied by him, with interest at five per cent., the Master of the Rolls said, that it would be injustice to make the defendant pay *the whole* of the costs, for one part of the bill had failed; and he was therefore decreed to pay *so much of the costs as related to the breach of trust.* (p) And in *Sanderson v. Walker*, (q) where the trustees for the sale of an infant's estate had themselves purchased the estate at an undervalue, the decree against them for a re-sale was made with costs; but as to other parts of the case, *which concerned accounts, that must have been taken, if the purchase had not been made by the trustees*, the Lord Chancellor considered, that there was no ground for charging the trustees with costs, and they were therefore allowed those costs, as in ordinary cases. (r)

Again, in *Tebbs v. Carpenter*, (s) where a suit had become necessary to determine the construction of a will, but in the course of the suit, *inquiries were directed as to arrears of rent and balances retained by the trustees in breach of their trust, the trustees were allowed their costs of the suit, *with the exception of the costs occasioned by the inquiries as to the breach of trust.* (s) And upon the same principle, where an executor had refused to render his account, but upon a bill filed, set out the account correctly in his answer, and the plaintiff, notwithstanding, took a decree for account, the Vice-Chancellor gave the plaintiff the costs *up to the decree*, but he allowed the defendant the costs of *the subsequent proceedings.* (t) So in the

(o) *Tebbs v. Carpenter*, 1 Mad. 308; *phael v. Boehm*, 13 Ves. 590; *Ayliff v. Murray*, 2 Atk. 61.
589.

(r) See *Campbell v. Walker*, 5 Ves.

(p) *Pocock v. Reddington*, 5 Ves. 678.

794, 800; see *Lowson v. Copeland*, 2 Bro. C. C. 156.

(s) *Tebbs v. Carpenter*, 1 Mad. 290, 309.

(q) 13 Ves. 601, 604; and see *Ra-*

(t) *Anon.*, 4 Mad. 273.

costs of the office. So in Pennsylvania, where the balance in an executor's account, claimed to be in his favor, is turned against him, the expenses of the audit will be put on him. *Sterrett's Appeal*, 2 Pa. R. 419.

recent case of *Pride v. Fooks*,^(u) which was a suit to charge a trustee with the consequences of a particular breach of trust, and also to obtain the directions of the court as to the general administration of the trust, the trustee was allowed *the general costs* of the suit, although he was decreed to pay *so much of the costs as had been caused by his breach of trust*.^(u) And upon this principle, although a suit may have been *originally* occasioned by the breach of trust of the trustees, yet after a decree has been made remedying the breach of trust, and the decree has been acted upon, and the trust property replaced by the trustees, they will not be charged with the costs of any *subsequent* proceedings, that may be taken for the convenience or benefit of the *cestui que trusts*. For instance, in a late case in the Rolls^(x) a bill was filed against a trustee to charge him with a breach of trust in selling out and improperly investing the trust fund, and at the hearing, a decree was made against the trustee, directing him to replace the fund and pay the costs, *which was done*. It was also referred to the Master *to take the account of the estate, and to ascertain certain facts requisite for clearing and distributing the trust fund*, and Lord Langdale, M. R., without hearing counsel for the trustees, held, that they were not liable for the costs of these subsequent proceedings.^(x)

So if the plaintiff, in a suit against trustees enter into any unnecessary evidence, as where he proves a fact which is admitted, or which is not required to be proved—he will be refused the costs thus needlessly incurred, although he succeeds in the suit, and obtains a decree with costs against the defendants.^(y)

In suits between trustees and *cestui que trusts*, where there is a fund under the control of the court, the trustees, as a general rule, are entitled to their costs out of the fund, to be taxed *as between solicitor and client*, and not like ordinary costs, as between *party and party*; ^(z)¹ and these are emphatically termed trustee's costs.^(a) And

(u) *Pride v. Fooks*, 2 Beav. 430, 437. *Whitmarsh v. Robertson*, 1 N. C. C. 717;

(x) *Hewett v. Foster*, 8 Jurist, 759. *Mohun v. Mohun*, 1 Sw. 201.

(y) *Thorby v. Yates*, 1 N. C. C. 469; (a) See *Poole v. Pass*, 1 Beav. 604; and see *Westover v. Chapman*, 1 Coll. *Holford v. Philips*, 4 Beav. 475; *Cough v. Andrews*, 8 Jurist, 307; *York v. Brown*, 1 Coll. N. C. C. 260.

(z) *Amand v. Bradbourne*, 2 Cha. Ca. 138; *Pride v. Fooks*, 2 Beav. 437;

¹ *Hosack v. Rogers*, 9 Paige, 463; *Irving v. De Kay*, 9 Paige, 533; *Minuse v. Cox*, 5 J. C. R. 451. The allowance to executors, in proper cases, of reasonable counsel fees, is general. See *Capeart v. Huey*, 1 Hill's Eq. 405; *Day v. Day*, 2 Green's Ch. 549; *Scott's Est.*, 9 W. & S. 98. *Hester v. Hester*, 3 Ired. Eq. 9; *Jewett v. Woodward*, 1 Edw. Ch. 200; *Glass v. Ramsey*, 9 Gill, 459; *Townshend v. Brooke*, 9 Gill, 90; *Burr v. McEwen*, 1 Baldw. C. C. 154; *Morton v. Barrett*, 22 Maine, 257; *Stephens v. Lord Newborough*, 11 Beav. 403; 12 Jur. 319.

in addition to their costs of the suit, they will also be allowed their charges and expenses, if properly incurred.(b) But costs as between solicitor and client will not include every charge which a party's own solicitor would be entitled to make against him in his bill; or any charges or expenses which are not **strictly costs*. Therefore, the decree should always go on to allow the trustee his *charges and expenses*.(c) The distinction between costs taxed as between party and party, and those as between solicitor and client, is peculiar to courts of equity, and does not exist at law. [*566]

Where there is the usual direction in the decree for *just allowances*, the trustee will be entitled to his *charges and expenses*, as well as his *costs*, under that head, without any special mention of them.(d)

And although there may be no fund in court which is applicable in the payment of costs, yet if a trustee be brought before the court by his *cestui que trusts*, and a decree obtained by them for their own benefit, and without any default on the part of the trustee, he will be equally entitled to his costs as between solicitor and client, to be paid to him personally by the plaintiffs.(e) And it is immaterial that the trustee, who is made a defendant to a suit, is a *solicitor*.(f) However, the decree, or order, must contain an express direction to tax the costs of the trustee as *between solicitor and client*; for, otherwise, the taxation will be made in the ordinary way, as between *party and party*;(g) although if the decree contain the usual direction for just allowances, he would be entitled to his *extra* expenses under that head.(h)

But in suits between trustees *and strangers to the trust*, it has been already stated, that trustees are on precisely the same footing as any other parties suing or defending in the court; and, therefore, *as against the strangers*, they will be entitled to costs only on the ordinary scale, as between *party and party*.(i) Therefore, where a bill

(b) *Hall v. Laver*, 1 Hare, 577; *Amand v. Bradbourne*, 2 Ch. Ca. 138; et vide post; and *Worrall v. Harford*, 8 Ves. 8.

(c) See *Fearn v. Young*, 10 Ves. 184; et post, 570, Ch. [Allowances.]

(d) *Ibid.*

(e) *Poole v. Pass*, 1 Beav. 604; *Holford v. Phipps*, 3 Beav. 442; 4 Beav. 475; *Hampson v. Branwood*, 1 Mad. 392, 395.

(f) *York v. Brown*, 8 Jurist, 567; 1 Coll. N. C. C. 260. [See post, p. 575, note.]

(g) *Fearn v. Young*, 10 Ves. 184.

(h) *Ibid.*

(i) *Dunlop v. Hubbard*, 19 Ves. 205; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 94, 112.

But see in New York, in the Surrogate's Court, where there is a fixed fee bill; *Halsey v. Van Amringe*, 6 Paige, 12. A Master, before decree, cannot allow counsel fees in the particular suit, unless directed to do so in the order of reference. *Hosack v. Rogers*, ut supr. As to what costs may be allowed, see *Stephens v. Lord Newborough*, ut supr.; *Ex parte Croxton*, 13 Engl. L. & Eq. 402.

had been filed against the trustees named in a will, to establish the will and ascertain the rights of the parties, and the bill was dismissed, on the ground that the will was void, the trustees were not allowed their costs as between *solicitor and client*, for they were trustees of a nullity.^(k) However, in a late case, it was held by Lord Langdale, M. R., that a trustee, acting *bonâ fide* under a will, which turned out to be invalid, was entitled to be indemnified out of the testator's personal estate.^(l)

Again, where a person who has been named a trustee in an instrument is made a party to a suit respecting the trust, and he disclaims by his answer, and the bill is then dismissed against him, he is entitled only to the ordinary costs, as between *party and party*; for his own answer shows, that he does not fill the character of a trustee, but only that of an ordinary party.^(m) And it is immaterial, that the person so disclaiming is continued as a party up to the hearing of the cause.⁽ⁿ⁾⁽¹⁾

[*567] *However, where a trustee in a suit with strangers has obtained his costs as usual between *party and party only*, he will be entitled to reimbursement out of the trust fund for all *extra* costs properly incurred, and such a claim may be allowed him under the head of just allowances.^(o) And on the same principle, where a trustee fails in a suit with a stranger, and is consequently cast in costs, yet if the suit, or the defence to it, were reasonable and proper, and not occasioned by the misconduct of the trustee, he will be entitled to retain the amount of the costs so paid out of the trust funds in his hands; ^(p) although, if there be no available funds in his hands, or under the control of the court, the trustee will have no personal remedy against the *cestui que trusts* to recover the costs which he may have paid.^(q)

The costs, as well as the charges and expenses of trustees, when properly incurred, constitute a charge or lien on the trust estate in

(k) *Mohun v. Mohun*, 1 Sw. 201.

(o) *Amand v. Bradburne*, 2 Ch. Ca.

(l) *Edgecombe v. Carpenter*, 1 Beav. 171.

138; *Ramsden v. Langley*, 2 Vern. 536; see *Fearn v. Young*, 10 Ves. 184; *Hill v. Magan*, 2 Moll. 460; *Edgecombe v. Carpenter*, 1 Beav. 171.

(m) *Norway v. Norway*, 2 M. & K. 278; *Bray v. West*, 9 Sim. 429; overruling *Sherratt v. Bentley*, 1 R. & M. 655.

(p) See *Edgecombe v. Carpenter*, 1 Beav. 174.

(n) *Bray v. West*, 9 Sim. 429.

(q) *Mohun v. Mohun*, 1 Sw. 201; *Adair v. Shaw*, 1 Sch. & Lef. 280.

(1) A consignee, or agent, who receives and holds property for the benefit of others, *but who is not appointed a trustee by deed*, cannot have his costs, as between solicitor and client of a suit brought by parties having conflicting claims to the property in his hands; but he is in the same situation as a plaintiff in a bill of interpleader, who is entitled to costs only as between party and party. *Dunlop v. Hubbard*, 19 Ves. 205.

their favor;¹ and they will not be compelled to part with the legal estate, until their claim is discharged.(r) But this privilege does not in general extend to solicitors, or other persons, employed by the trustees; and such persons will be confined to their personal remedy against the trustee, by whom they were employed.(s) However, any part of the trust estate which may be actually realized or recovered by the suit in which the solicitor was employed, will be subject to his lien for the costs of the suit.(t)

Where a bill of costs is paid by a trustee out of his own pocket, he will not be allowed to charge interest on the amount paid.(u)

Where at the hearing the costs of a party, or class of parties, have been ordered to be taxed as between solicitor and client, the same principle of taxation will in general be followed in the subsequent proceedings, although a different state of circumstances may then exist.(x) And a different principle of taxation will never be adopted upon a subsequent application by *petition*.(y) It may be observed, however, that the court will not consider itself bound by a previous order for the taxation of costs as between solicitor and client, where that order was obtained *upon petition and by consent*.(z)

If the suit be occasioned by any doubt or difficulty as to the general construction of a will, the rule is that the costs shall be defrayed out of *the testator's general residuary personal estate.(a)² [*568]

(r) Worrall v. Harford, 8 Ves. 4, 8; Pr. 971; Massie v. Drake, 4 Beav. 433; Hall v. Laver, 1 Hare, 577; see Ex parte James, 1 D. & Ch. 272. [Jones v. Dawson, 19 Alab. 675.] (y) Massie v. Drake, 4 Beav. 433. (z) 2 Dan. Ch. Pr. 971; 3 Id. 76.

(s) Ibid.; and see Lawless v. Shaw, 1 Ll. & G. 154; 5 Cl. & Fin. 129. [Jones v. Dawson, 19 Alab. 678.] (a) Studholme v. Hodgson, 3 P.Wms. 303; Joliffe v. East, 3 Bro. C. C. 27; Nisbet v. Murray, 5 Ves. 158; Commissioners of Char. Donations v. Cotter, 1 Dr. & W. 498; Fergusson v. Ogilvy, 2 Dr. & W. 555; Shuttleworth v. Howarth, Cr. & Ph. 228; Thomason v. Moses, 5 Beav. 77.

(t) Bozon v. Bolland, 4 M. & Cr. 354; Hall v. Laver, 1 Hare, 578.

(u) Gordon v. Trail, 8 Price, 416.

(x) Trevevant v. Frazer, 2 Dan. Ch.

¹ Jones v. Dawson, 19 Alab. 675; Cecil v. Korbman, stated 1 Binn. 134; Barker v. Parkenham, 2 Wash. C. C. 142. Not where their estate has terminated: Belling v. Shafer, 2 Sandf. Ch. 293. In Malins v. Greenway, 7 Hare, 391, where trustees had severed in pleading, it seems properly, and there were charges against one not in his character of trustee, from which costs arose, and he afterwards died, it was held that, whatever might be the general rule, he had not acquired any lien on the fund for the costs; and a petition of his representatives, that his costs might be taxed, was refused. In Carow v. Morell, 2 Edw. Ch. 56, the costs of an administrator, who was removed after a suit commenced against him, were allowed out of the estate.

² Floyd v. Barker, 1 Paige, 480; Bryant v. Blackwall, 15 Engl. L. & Eq. 76; Butts v. Genung, 5 Paige, 254. See under the Trustee Relief Acts (ante, p. 543, note), Re Harris's Will, 8 Engl. L. & Eq. 99. It has been held under those acts

And the same rule applies, although the difficulty concerns the real estate only.(b)

But if the question affect solely a *particular trust fund*, which has been separated from the general residue, the costs must then be borne by the fund respecting which the question has arisen.(c)

Where the trustees are indebted to the trust estate, the amount of the costs to be paid to them by the *cestui que trusts* may be set off *pro tanto* against the debt.(d) But as we have already seen, the bankruptcy of a trustee will not disentitle him to his costs as against the *cestui que trusts*.(e) And where a trustee, who is indebted to the estate, is made a party to a suit, and he then becomes bankrupt, and obtains his certificate, the costs incurred *before the bankruptcy* will be set off against the debt due from him, but he will be entitled to receive his costs *subsequently to the bankruptcy*, without any deduction or set-off in respect of the debt, for the debt was extinguished by the proof under the bankruptcy and the certificate.(f)

The costs of trustees, who are brought before the court by petition, under the summary jurisdiction conferred by statute, will be given them out of the trust estate; as in the case of applications with respect to charities, or for a conveyance or the appointment of new trustees on the bankruptcy, infancy, or lunacy, &c., of the existing trustees.(g) But the court in such cases has no jurisdiction to award costs out of the trust estate to any other parties than the trustees;(h) and the power to give the trustees their costs, exists only where expressly provided by the statute,(i) although a summary application,

(b) *Ripley v. Moysey*, 1 Keen, 579.

(c) *Jenour v. Jenour*, 10 Ves. 562; and see *Shaw v. Pickthall*, Dan. 92; *Duke of Manchester v. Bonham*, 3 Ves. 61; *King v. Tayler*, 5 Ves. 809.

(d) *Harmer v. Harris*, 1 Russ. 155; *Samuel v. Jones*, 2 Hare, 246; *Gibbons v. Hawley*, Id. note.

(e) *Samuel v. Jones*, 2 Hare, 246; *Gibbons v. Hawley*, Id. note; Ex parte

Gibbs, 8 Jurist, 266; ante [Bankruptcy of Trustees], p. 533.

(f) Ibid. [*Cotten v. Clarke*, 13 Engl. L. & Eq. 377.]

(g) Ex parte Cant, 10 Ves. 554; Re Bedford Charity, 2 Sw. 532; Ex parte Pearce, T. & R. 225; Ex parte Whitley, 1 Deac. 478; Re King, 10 Sim. 605; vide supra, p. 187, 290.

(h) Re Bedford Charity, 2 Sw. 532.

(i) Re Isaac, 4 M. & Cr. 14.

that the costs of an application by the tenant for life, come out of the *corpus*. *Ross's Trust*, 2 Engl. L. & Eq. 148; *Fields' Settlement*, 13 Engl. L. & Eq. 11. *Contra*: *Bangley's Trust*, 13 Engl. L. & Eq. 28. The general rule does not, however, apply to a suit under an appointment, so as to throw the costs on the unappointed share; they are to be apportioned between the two: *Trollope v. Routledge*, 1 De G. & Sm. 662; 11 Jur. 1002.

Costs will not be allowed out of the fund to other parties, to the exclusion of the executor's commissions and expenses: *Halsey v. Van Amringe*, 6 Paige, 18. The trustees are always, in doubtful cases, entitled to their costs on a bill for the construction of a will: *Irving v. De Kay*, 9 Paige, 521; *Rogers v. Ross*, 4 J. C. R. 608; see ante, note to page 543.

which the court has no jurisdiction to entertain, may be *refused* with costs.^(k)

The payment of a bill of costs by a trustee, will not preclude the *cestui que trust* from subsequently applying to the court for an order for the taxation of the bill, wherever the right to make that application would exist, if the payment of the bill had been made by the *cestui que trust* himself.^(l) But after the *cestui que trust* has acquiesced for a considerable period in the payment of a bill of costs by his trustee, he will not be allowed to question the propriety of the payment, or to apply for a taxation, at all events as against the solicitor, whatever may be his rights as against the trustee.^(m) And now, the recent act 6 & 7 Vict. c. 73, s. 41, precludes the court in any case whatever from ordering the *taxation of a bill of costs, *which has been paid for twelve months*.⁽ⁿ⁾ And it has [*569] been decided, that this section applies to the payment of a bill of costs *by a trustee*, so as to preclude any subsequent taxation of the costs as against *the solicitor*.^(o) However, if a trustee pay a solicitor's bill improperly, and neglect to have the bill taxed in due time, there is nothing in the act to prevent the Court of Chancery from disallowing to *the trustee* the whole or part of the payment so made by him, and from ascertaining by taxation, if necessary, what is a proper sum to be allowed to the trustee for the payment.^(p) And this leads to the observation, that a trustee is not at liberty to pay the amount of bills of costs without question or consideration. But where the bills contain taxable items, and it is the ordinary course to have them taxed, it is his duty to have the taxation made, at the risk of having the payment of the costs disallowed him in passing his accounts.^(q) And where the payment of a bill of costs by a trustee is made the subject of complaint, it will be referred to the Master in the first instance, to inquire into the propriety of the payment, and the point may be ultimately brought before the court, by exceptions to the Master's report.^(r) However, in some cases, the Master, without proceeding to a regular taxation of the bills of costs paid by the trustee, will hand them over to the proper officer to be moderated, and the difference between the amount of the bills thus moderated, and those actually paid by the trustees, will be disallowed.^(s)

(k) Ibid.

(p) Per Lord Langdale, M. R., 5

(l) Hayard v. Lane, 3 Mer. 291; Beav. 429.

Groves v. Sansom, 1 Beav. 297; and see 6 & 7 Vict. c. 73, s. 39.

(q) Fountaine v. Pellet, 1 Ves. jun. 337, 343; Johnson v. Telford, 3 Russ.

(m) Groves v. Sansom, 1 Beav. 297; 477. see Johnson v. Telford, 3 Russ. 477.

(r) Ibid.

(n) Binns v. Hey, 5 Beav. 429, stated.

(s) Johnson v. Telford, 3 Russ. 477.

(o) Re Downes, 5 Beav. 427.

The application for the taxation of a bill of costs may be made by one of two executors or trustees.(t)

A trustee, against whom a decree is made for breach of trust, will be charged with only *one set of costs*. And, therefore, where the bill was filed on behalf of some of the *cestui que trusts* only, and the others were made *defendants*, the trustee was ordered to pay the plaintiff's costs only, and those of the other defendants were directed to be paid out of the trust fund.(u)

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*CHAPTER V.

OF ALLOWANCES TO TRUSTEES.

TRUSTEES have an inherent right to be reimbursed all expenses properly incurred in the execution of the trust, and no express declaration in the trust instrument is requisite to create that right.¹ Lord Eldon has said, that "it is in the nature of the office of trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust."(a) And in a modern case,(b) Lord Cottingham stated it "to be quite clear, according to the rule, which applies to all cases of trust, that if necessary expenses are incurred in

- (t) Hayard v. Lane, 3 Mer. 285; see (a) Worrall v. Harford, 8 Ves. 8.
 Lockhart v. Hardy, 4 Beav. 224. (b) Att.-Gen. v. Mayor of Norwich, 2
 (u) Hosking v. Nicholls, 11 Law M. & Cr. 406, 424.
 Journ. N. S., Chanc. 230.

¹ Burr v. McEwen, Baldwin C. C. 154; Pennell's App., 2 Barr, 216; Hutton v. Weems, 12 Gill & John. 83; Myers v. Myers, 2 McCord's Ch. 43; Perkins v. Cranshaw, 1 Hill's Eq. 350; Morton v. Adams, 1 Strobb. Eq. 76; Miller v. Beverleys, 4 Henn. & Munf. 415; Miles v. Bacon, 4 J. J. Marsh, 457; Ames v. Downing, Bradf. Surr. R. 321; Egbert v. Brooks, 3 Harrington, 310; Morton v. Barrett, 23 Maine, 257. So though the trust be subsequently declared void, if they have acted in good faith. Hawley v. James, 16 Wend. 61; Re Wilson, 4 Barr, 430; Stewart v. McMinn, 5 Watts & Serg. 100. So advances for the benefit of the trust fund will be reimbursed; Altimus v. Elliott, 2 Barr, 62; and even, it seems, as against creditors, advances made to the *cestui que trust* on the faith of the funds. Iredell v. Langston, 2 Devereux' Eq. 594. See as to allowances for costs and expenses in suits, with regard to the trust estate, ante, p. 551, 565, and notes.

Where a trustee, however, neglects to keep proper accounts of his expenditures, the lowest estimate will be put on them in remunerating him therefor, McDowell v. Caldwell, 2 McCord's Ch. 43. Every intendment of fact, indeed, is to be made against a trustee who keeps none, or very imperfect accounts. Ex parte Cassel, 3 Watts, 442; and see Green v. Winter, 1 J. C. R. 27.

the execution of a trust, or in the performance of duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, *without any express provision for that purpose*, to make the payments required to meet those expenses, out of the funds in their hands belonging to the trust. Such is the rule of courts of equity, and such also is the rule at common law.”(c) And it was laid down by Sir J. Leach, V. C., in an earlier case, that a trustee is, of course, entitled to all reasonable expenses which he may have incurred in the conduct of the trust, and he requires no order for that purpose.(d)

It is clear, therefore, that trustees will be justified in retaining out of the trust estate all expenses properly incurred in the discharge of the trust; and no order or direction of the court is requisite to sanction that step, and the absence of the clause, usually inserted in the trust instrument for the reimbursement and indemnity of the trustees, is also perfectly immaterial.

However, where a decree for an account is made against trustees, they should take care that the usual direction to the Master to make just allowances, is not omitted in drawing up the decree, for the Master cannot make such allowances without that direction.(e) But under a direction to make just allowances, the Master may consider and allow all *extra* costs, charges, and expenses incurred by a trustee. And money expended by trustees in taking legal opinions, and procuring directions for the due execution of the trust,(f) as also the expenses of effecting sales,(g) may be allowed by the Master under this head. And although a trustee under a will is allowed a commission of five per cent. on the rents and profits, or an annuity for his trouble, he will not, for that reason, lose the right to his charges and expenses under the head of just allowances.(h)

In all cases, the propriety or impropriety of particular payments made, or expenses incurred, by a trustee, will depend on the extent of his powers of management, the nature of the trust property, and the relative position *of the *cestui que trusts*; these, and a [*571] variety of other circumstances, which necessarily vary in every case, will all be taken into consideration in determining the question; and it is extremely difficult to lay down any general rules upon this point.

Where a trustee is expressly authorized to incur certain specified expenses, no question can of course arise as to his right to have such

(c) See *Rex v. Inhabitants of Essex*, 4 T. R. 591; *Rex v. Commissioners of Sewers*, 1 B. & Adolph. 232.

(d) *Brocksope v. Barnes*, 5 Mad. 90.

(e) *Howell v. Howell*, 2 M. & Cr. 478.

(f) *Fearn v. Young*, 10 Ves. 184.

(g) *Crump v. Baker*, 18 Ves. 285.

(h) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Wilkinson v. Wilkinson*, 2 S. & St. 237; *Fontaine v. Pellet*, 1 Ves. jun. 337.

payments allowed. And where no such special power is conferred by the trust instrument, a trustee under a will of real estate, *who has general discretionary powers to let and manage or superintend*, will be entitled to all the ordinary expenses requisite for keeping up the estate, such as wages, and salaries to servants, and audit dinners to the tenants, as well as for the requisite repairs to the house and other buildings, and for rates and taxes.⁽ⁱ⁾¹ And sums expended in building farm-houses, and in draining and manuring, and other improvements of that nature, will also be allowed to a trustee, who is invested with similar general powers of management.^(k)

However, we have already seen, that the *cestui que trust* for life, who is in possession of the trust estate, is liable to all the current expenses attending the enjoyment of the property—such as the rates and taxes, and all necessary repairs, and the trustees will not be justified in defraying those expenses out of the general trust fund; and if they do so, it will be at the risk of having the payments disallowed.^(l)²

Where a trustee resides in the mansion-house by the testator's direction, he will be allowed the rates and taxes, although he has the benefit of residing in the house.^(m) However, a trustee who employs a park-keeper, or other servant, for his own purposes, must pay him himself, and will not be allowed his wages out of the estate.⁽ⁿ⁾ And so a trustee, with the most ample powers of management, cannot of his own authority keep up a mere pleasure establishment, such as gamekeepers, &c.; and before such expenses are allowed him, it will be referred to the Master to ascertain whether such an establishment be necessary.^(o) A trustee acting without an express authority will not be allowed the expense of pulling down and rebuilding a house.^(p)

A payment made by a trustee upon his own responsibility will be allowed to him in his accounts, although it was of a doubtful character, if it be ultimately approved of by the court. And this is in accordance with the general rule, that what the court would allow upon

(i) *Fountaine v. Pellet*, 1 Ves. jun. 337; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Bridge v. Brown*, 2 N. C. C. 181, 191.

(k) *Bowes v. Earl of Strathmore*, 8 Jurist, 92.

(l) *Fountaine v. Pellet*, 1 Ves. jun. 342; *Bostock v. Blakeney*, 2 Bro. C. C. 653; *Hibbert v. Cooke*, 1 S. & St. 552;

Nairn v. Majoribanks, 3 Russ. 582; *Caldecott v. Brown*, 2 Hare, 144; ante, p. 394, 395, and notes. [*Jones v. Dawson*, 19 Alab. 673.]

(m) *Fountaine v. Pellet*, ubi supra.

(n) 1 Ves. jun. 343.

(o) *Webb v. Earl of Shaftesbury*, 7 Ves. 480, 488.

(p) *Bridge v. Brown*, 2 N. C. C. 191.

¹ Ante, 395, 429, and notes.

² See ante, 394, 395, and notes.

a suit, shall be good without suit.(q) For instance, where a trustee had paid a sum of money to relieve the estate from a liability on a lease, which was a burden to the estate, the court considered this a necessary expense, and allowed the payment.(r)¹ And a payment by trustees of their own authority for the *maintenance of an infant will be allowed, if afterwards approved of by the court.(s)² [*572]

And so it seems, that a payment, made by trustees *upon the opinion of their legal adviser*, will be allowed them in their accounts, although the court may afterwards decide against the validity of the claim, in satisfaction of which the payment was made. Thus in a case, where an executor without due inquiry had paid the whole amount secured by a promissory note of his testator, when 200*l.* of the amount had in fact been paid off, he was disallowed this 200*l.* in passing his accounts; but the Master of the Rolls in the course of his judgment said, that if the executor had taken advice, and been advised by any gentleman of the law in this country, that he was bound to make the payment, *he would not have held him liable.*(t)

All payments, properly made by trustees out of their own pockets in discharging the duties of their office, will unquestionably be allowed them,—such as postage, travelling expenses, &c.,(u) and the usual expenses attending a sale required by the trust.(x)

And where the fines, and other necessary expenses attending the renewal of leaseholds or copyholds, have been paid by the trustees, they will of course be entitled to a repayment,(y) and they will have

(q) See *Balsh v. Higham*, 2 P. Wms. 453. [*Hutton v. Weems*, 12 G. & J. 83; *Gray v. Lynch*, 8 Gill, 403.]

(r) 1 Ves. jun. 343.

(s) *Barlow v. Grant*, 1 Vern. 255; *Franklin v. Green*, 2 Vern. 137; ante, p. [395, note; 399, note, 2.]

(t) *Veaz v. Emery*, 5 Ves. 141, 144.

(u) *Webb v. Earl of Shaftesbury*, 7 Ves. 484; *Brocksopp v. Barnes*, 5 Mad. 90; see *Ex parte Lovegrove*, 3 Deac. & Ch. 763.

(x) *Crump v. Baker*, 18 Ves. 285.

(y) *James v. Dean*, 11 Ves. 396; *Randall v. Russell*, 3 Mer. 196.

¹ So a trustee will be allowed in his account for the discharge of incumbrances on the estate. *Murray v. De Rottenham*, 6 J. C. R. 62; *Mathew v. Dragaud*, 3 Desaus. 25; *Pennell's App.*, 2 Barr, 216; *Freeman v. Tompkins*, 1 Strobh. Eq. 53.

² In *Nelson v. Dunscombe*, 9 Beav. 211, 10 Jur. 399, it was held that where a trustee had properly expended moneys for the protection and safety of an adult *cestui que trust*, at a time when the latter was incapable of taking care of himself, though before a commission *de lunatico inquirendo* had issued, they should be allowed in his account; as also the expenses of the removal of the *cestui que trust* to an asylum and the expenses of a commission.

It is no objection to the allowances and disbursement of a trustee, that they were made without the consent of his co-trustee. *Miller v. Beverleys*, 4 Henn. & Munf. 415.

a lien on the trust estate for the amount, and will not be compelled to convey to the *cestui que trusts*, until that repayment is made.^(z) And so where a trustee has advanced money out of his own pocket, in order to relieve the trust estate from charges bearing heavy interest, he will be repaid the amount out of the estate.^(a) And in these cases trustees will also usually be entitled to interest at four per cent. on the money advanced by them.^(b) Although it is contrary to the practice to allow interest on bills of costs paid by a trustee pending a suit respecting the trust estate.^(c)

The duty of trustees, with regard to the payment of bills of costs for legal proceedings relating to the trust estate, has been considered in the preceding chapter, as well as the extent to which such payments by them will be allowed.^(d)

And we have also seen, that a trustee under the head of "just allowances" will be entitled to retain out of the trust fund his *extra* costs of a suit beyond the taxed costs, and also the costs, which he may have been compelled to pay in any suit or action, provided the proceedings have been necessary or proper.^(e)

Trustees are unquestionably entitled to employ a solicitor for their assistance and guidance in the administration of the trust.^(f) And [*573] also *in case of any doubt or difficulty to take the opinion of counsel;^(g) and they will be allowed those expenses out of the trust estate.

And where the accounts are of an intricate and complicated character, the trustees will be entitled to the assistance of an accountant, and to charge the expense of employing him upon the trust estate.^(h) And if there must necessarily be considerable difficulty and trouble in realizing or collecting the trust property, they will be justified in employing a collector or agent for that purpose—as where part of the trust property consisted of fifty houses, thirty-four of which were let at weekly rents:⁽ⁱ⁾ or where there were outstanding debts to a large amount to be got in,^(k) or the trustee resided at a considerable

(z) *Trott v. Dawson*, 1 P. Wms. 780; 7 Bro. P. C. 266; see *Fearn v. Young*, 10 Ves. 184; *supra*, p. 439.

(a) *Small v. King*, 5 Bro. P. C. 72. [See note to the preceding page.]

(b) *Small v. King*, 5 Bro. P. C. 72.

(c) *Gordon v. Trail*, 8 Price, 416.

(d) See preceding Chapter, Sect. [Costs] p. 568.

(e) *Ibid.*; *Amand v. Bradbourne*, 2 Ch. Ca. 138; *Ramsden v. Langley*, 2 Vern. 536; *Hill v. Magan*, 2 Moll. 460; see *Fearn v. Young*, 10 Ves. 184; 3 Dan. Ch. Pr. 58.

(f) *Macnamara v. Jones*, Dick. 587; *Johnson v. Telford*, 3 Russ. 477; see *Burge v. Brutton*, 2 Hare, 373, 378.

(g) *Fearn v. Young*, 10 Ves. 184; *Poole v. Pass*, 1 Beav. 604. [See ante, p. 565, note.]

(h) *Henderson v. M'Iver*, 3 Mad. 275.

(i) *Wilkinson v. Wilkinson*, 2 S. & St. 237; see *Davis v. Dendy*, 3 Mad. 170.

(k) *Hopkinson v. Roe*, 1 Beav. 180; *Weiss v. Dill*, 3 M. & K. 26; see *Turner v. Corney*, 5 Beav. 515.

distance from the trust property,^(l) and trustees have been allowed the expense of an agent and collector, although an annuity was given them for their trouble in executing the trust.^(m)

However, it seems that they will not be allowed any payment for commission to an accountant or collector, exceeding two and a half per cent.:⁽ⁿ⁾ and in the case alluded to, Sir J. Leach, M. R., had some doubts whether any allowance *at all* ought to have been made.^(o) Indeed, as a general rule, the collection and realization of the trust property is a duty which the trustees take upon themselves on their acceptance of the trust, and which they will not, except under special circumstances, be allowed to put upon another.^(p)

The usual brokerage charges for the necessary transfer of stock, &c., to the *cestui que trusts*, will also be allowed to the trustees;^(q) but not a charge for a transfer which is not required.^(r) And where the trust fund is ordered to be transferred into court, the broker who is employed by the Accountant-General, and whose charge is 1*l.* 1*s.*, should be employed to make the transfer, and any larger amount paid by the trustees for brokerage on the transfer, will not in general be allowed.^(s)

Where from necessity or convenience a trustee is justified in keeping any part of the trust property in his possession, and without any negligence on his part, it is lost by robbery, he will not be held responsible for the loss, but will be allowed the amount in passing his accounts, and this amount may be proved by the trustee's own affidavit, for it would frequently be difficult to obtain any other proof.^(t)¹ And so where the trust funds are properly deposited with a banker

(l) *Davis v. Dendy*, 3 *Mad.* 170; *Godfrey v. Watson*, 3 *Atk.* 518.

(m) *Wilkinson v. Wilkinson*, 2 *S. & St.* 237. [*Kennedy's App.*, 4 *Barr.* 150; *Cairns v. Chabert*, 9 *Paige*, 164; *Whit- ted v. Webb*, 2 *Dev. & Batt. Eq.* 442.]

(n) *Weiss v. Dill*, 3 *M. & K.* 26.

(o) 3 *M. & K.* 27; and see *Stack- poole v. Stackpoole*, 4 *Dow. P. C.* 226.

(p) See *Weiss v. Dill*, 3 *M. & K.* 26.

(q) *Jones v. Powell*, 6 *Beav.* 488.

(r) *Hopkinson v. Roe*, 1 *Beav.* 183.

(s) *Hopkinson v. Roe*, *ubi supra*.

(t) *Morley v. Morley*, 2 *Ch. Ca.* 2; *Knight v. Earl of Plymouth*, 3 *Atk.* 480; *Jones v. Lewis*, 2 *Ves.* 240; 2 *Fonbl. Eq. B.* 2, *Ch. 7, S. 4*; 2 *Story's Eq. Jur.* § 1269. [*Furman v. Coe*, 1 *Caines, C. E.* 96. If the trustee be dead, his represen- tative may set up the defence, though it want the corroboration of the trustee's oath. *Ibid.*]

¹ So a trustee is not responsible for the escape of slaves, unless negligence is shown. *Chaplin v. Givens*, *Rice's Eq.* 132. In Pennsylvania, it has been held that where a trust has been accepted on the terms of receiving a stipulated reward, the trustee is liable in the same manner as an ordinary bailee for hire. *Ex parte Cassel*, 3 *Watts*, 442. But in *Twaddell's Appeal*, 5 *Barr.* 15, and *Nyce's Estate*, 5 *Watts & Serg.* 254, a more liberal doctrine was held; and see *Gray v. Lynch*, 8 *Gill*, 403. So in *Bryant v. Russel*, 23 *Pickering*, 546, the rule was said to be, that trustees acting in good faith, and making an honest mistake, were not answerable personally for a loss accruing therefrom.

or agent, who fails, the trustee will be allowed the sum so lost.(u) [*574] More especially if the *author of the trust himself directs the trustees to employ the person by whose failure the loss is occasioned.(x)

Every payment by a trustee out of the trust funds, which is not expressly authorized by the trust instrument, or sanctioned by necessary construction in order to the due performance of the trust, amounts in effect to a breach of trust, and will be disallowed to the trustee in passing his accounts; and repeated instances of this will be found in the preceding pages of this work. Thus an unauthorized payment for the maintenance or advancement of infants,(y) or the application of the trust funds on an improper investment,(z) or a payment to a person not authorized to receive,(a) or incapable of giving a discharge,(b) or a distribution to one or more of several *cestui que trusts* (as a tenant for life), of a greater share than he is strictly entitled to,(c) or in short any other misapplication or disposition of the trust funds, will, as a general rule, be disallowed to the trustees.

Again, it has been already stated to be one of the first principles of the court in dealing with trustees, that they shall not derive any personal profit out of the trust estate. And on this principle, a trustee will not be permitted to make any charge for his trouble or loss of time, or for his services in the administration of the trust, unless the trust instrument expressly empowers him to make such a charge.(d)(1)¹

(u) *Knight v. Earl of Plymouth*, 3 Atk. 480; *Jones v. Lewis*, 2 Ves. 240; *Routh v. Howell*, 3 Ves. 564; *Belcher v. Parsons*, Amb. 219; *Massey v. Banner*, 4 Mad. 416; see *Clough v. Bond*, 3 M. & Cr. 490, 6; *Adams v. Claxton*, 6 Ves. 626; *Freme v. Woods*, 1 Tam. 172.

(x) *Kilbee v. Sneyd*, 2 Moll. 199; see *Doyle v. Blake*, 2 Sch. & Lef. 239, 245.

(y) *Davies v. Austen*, 3 Bro. C. C. 178; *Lee v. Brown*, 4 Ves. 362; *Walker v. Wetherell*, 6 Ves. 473; *Andrews v. Partington*, 3 Bro. C. C. 60. [Ante, 395, 399, notes; *Bredin v. Dwen*, 2 Watts. 95.]

(z) *Earl of Winchelsea v. Norcliffe*, 1 Vern. 434.

(a) *Hodgson v. Hodgson*, 2 Keen, 704.

(b) *Dagley v. Tolferry*, 1 P. Wms. 285; *Phillips v. Paget*, 2 Atk. 80; *Davies v. Austen*, 3 Bro. C. C. 178; *Lee v. Brown*, 4 Ves. 369.

(c) *Howe v. Earl of Dartmouth*, 7 Ves. 151; *Dimes v. Scott*, 4 Russ. 195, 206.

(d) *Robinson v. Pett*, 3 P. Wms. 249; *Brooksopp v. Barnes*, 5 Mad. 90; *Re Ormsby*, 1 Ball & B. 189.

(1) Trustees of real estate in the West Indies, who reside there for the management of the estate, are an exception to this general rule: for they will be entitled to charge a commission for their services, if personally resident there. *Chambers v. Goldwin*, 5 Ves. 834; 9 Ves. 254. And so an executor and trustee in India

¹ In the United States, in general, commissions are allowed to trustees, executors, guardians, &c., either by statute, or under the decisions of the courts. The cases on this subject are so carefully and ably collected and discussed in Mr.

And where he is in any business or profession, he will not without a similar authority be allowed any charge or remuneration for his professional services or advice, or for loss of time, but only such costs, charges, and expenses, as he has actually and properly paid out of his own pocket.^(e) For instance, a factor^(f) or commission agent,^(g) acting as executor, cannot charge the estate for anything done by him in the way of business. And it makes no difference, that he acted as factor or agent for the testator up to the time of his death, and was in the habit of charging the testator with the usual commission in that character. Although he will of course be entitled to receive and retain what may be due to him by way of commission for services *performed in the testator's lifetime.*^(h) And so a surviving partner being executor, is not entitled, *without express stipu- [*575] lation, to any allowance for carrying on the business for the benefit of the estate.⁽ⁱ⁾ And the same rule applies with equal force to attorneys and solicitors, being trustees, and it has repeatedly been determined, that such persons can only charge the trust estate with the sums actually paid by them out of pocket.^(k)(1) And it is im-

(e) Scattergood v. Harrison, Mos. 128; Sheriffe v. Axe, 4 Russ. 33; New v. Jones, 9 Jarm. Byth. Conv. 338; Moore v. Frowd, 3 M. & Cr. 45; Re Sherwood, 3 Beav. 338; Collis v. Carey, 2 Beav. 128.

(f) Scattergood v. Harrison, Mos. 128.

(g) Sheriffe v. Axe, 4 Russ. 33; Hovey v. Blakeman, 4 Ves. 596. [So of an auctioneer, Kirkman v. Booth, 11 Beav. 273.]

(h) Sheriffe v. Axe, 4 Russ. 33.

(i) Burden v. Burden, 1 Ves. & B. 170; Stocken v. Dawson, 6 Beav. 371.

(k) New v. Jones, 9 Jarm. Byth. Conv. 338; Moore v. Frowd, 3 M. & Cr. 45; Re Sherwood, 3 Beav. 338; Burge v. Brutton, 2 Hare, 373; Fraser v. Palmer, 4 Y. & Coll. 515. [Re Wyche, 11 Beav. 209; Christophers v. White, 10 Beav. 523; Todd v. Wilson, 9 Beav. 486.]

will be allowed a commission of five per cent. on his receipts and payments, Chetton v. Lord Audley, 4 Ves. 72, unless the testator has given him an ample legacy for his trouble. Freeman v. Fairlee, 3 Mer. 24. But trustees in these cases are regarded rather in the light of agents.

(1) S. P. Bainbrigge v. Blair, [8 Beav. 588]; 9 Jurist, 765, before Lord Langdale. In this case, a solicitor, being trustee, had acted as solicitor, for himself and his co-trustees, and his *cestui que trusts*, in various suits relating to the trust estate; but the court refused to direct an inquiry as to whether the services of the solicitor had been beneficial to the trust estate, with a view to awarding him compensation; and a petition, presented (after a decree directing just allowances), for that purpose, was dismissed with costs. [But in Cradock v. Piper, 1 Mac. & G. 668; 14 Jur. 97, a solicitor, who was also trustee, made a party to a suit respecting the trust property, was allowed his usual professional costs, he having acted as solicitor for himself and his co-trustees, and the costs not being increased thereby. But it was held in Lincoln v. Windsor, 5 Eng. L. & Eq. 230, that the rule in Cra-

Rawle's note to Robinson v. Pett, 2 Lead. Cas. Eq. pt. i. 333 (1st Am. ed.), that it will be sufficient here to refer the reader thereto, for a full statement of the law on the subject.

material, that the trustee is only one of a partnership or firm of solicitors, but the costs out of pocket only will be allowed, although the bill be made out in the name of the firm.^(l) However, where the trustees, being solicitors, are resident and practice in the country, and employ their London agent in professional business relating to the trust, and the moiety of the costs has been paid by them as usual to the town agent, they will be allowed those payments as sums actually out of their pockets.^(m) Moreover, the rule in question does not apply to a solicitor, who is a trustee, and who is made a defendant to a suit as a trustee; and a person in that situation will be entitled to the usual trustees' costs of the suit, to be taxed as between solicitor and client, although being a solicitor he had not actually expended all those costs, and he will not be restricted to such costs, &c., only, as he had actually paid out of his pocket.⁽ⁿ⁾

But trustees are unquestionably entitled to any benefit or profit, which is *expressly given to them* by the testator; as where a commission of five per cent.,^(o) or an annuity,^(p) or legacy,^(q) is given to the trustees for their trouble.⁽¹⁾ And so a trustee, who was directed by the testator to reside in the mansion-house, was allowed the use of the garden for his own benefit, but not to sell the produce.^(r) And an allowance given to a trustee will not cease upon the institution of a suit by him for the administration of the trust, for his services as a ministerial person are still necessary.^(s)

And where the testator expressly declares, that the trustees shall be entitled to their charges, and remuneration for professional services, or trouble, and loss of time, the general rule of the court will

(l) *Collis v. Carey*, 2 Beav. 128.

(p) *Fountaine v. Pellet*, 1 Ves. jun.

(m) *Burge v. Brutton*, 2 Hare, 373, 337; *Wilkinson v. Wilkinson*, 2 S. & 378. St. 337.

(n) *York v. Brown*, 1 Coll. N. C. C. 260. (q) *Robinson v. Pett*, 3 P. Wms. 249.

(r) *Fountaine v. Pellet*, 1 Ves. jun.

(o) *Webb v. Earl of Shaftesbury*, 7 Ves. 480.

(s) *Baker v. Martin*, 8 Sim. 25.

dock v. Piper, was confined to suits respecting the trust property, and did not apply to the case of a solicitor acting for himself and his co-trustees in the general administration of the trust, without the intervention of the court. Though there be an express agreement that professional charges shall be allowed between the solicitor trustee and his *cestui que trust*, yet it will not be sustained, unless it appears that the *cestui que trust* had clear knowledge of the ordinary rule, and proper protection in the way of professional advice; even though there has been a release: *Stanes v. Parker*, 9 Beav. 385; *Todd v. Wilson*, Id. 486; *Re Wyche*, 11 Beav. 209. See, on this subject, articles in 14 Jur. pt. ii. p. 45; 14 Law Mag. N. S. 297. It is to be observed that this doctrine, being founded on that which refuses compensation to trustees in general, is of little applicability in the United States.]

(1) The effect of a legacy to a trustee for his trouble, has already been considered. Ante, Ch. [Disabilities of Trustees, p. 535.]

be excluded, and those charges will be allowed the trustees in their accounts: for such a direction amounts to a legacy to the trustees.(t) Thus, in a recent case, a testator devised his real and leasehold estates to trustees, and declared that his trustees respectively should be entitled to have and receive out of the trust-moneys all costs, charges, and expenses, fees to counsel, and for professional assistance, *and loss of time*, that might be paid, incurred, *sustained, or occasioned in the execution of the trusts. One of the trus- [*576] tees was a land agent and surveyor, who took upon himself the active management and sale of the trust estates, and he presented a petition, praying an allowance for his services at two guineas a day; Lord Langdale, M. R., held, that upon the terms of the will he was entitled to remuneration for his loss of time, and his Lordship referred it to the Master to settle the amount.(u) And the same rule applies to solicitors, who are made trustees of a will, and who are empowered by the testator to charge for their professional services.(x)

So, where the trust is created by *deed*, the trustees may, by express contract, entitle themselves to remuneration for trouble, &c., as well as to their professional charges.(y) Thus, where the trust deed declared that the trustee was thereby authorized and empowered to retain and receive out of the trust-moneys his usual professional costs and expenses, which might arise or be incurred in carrying into execution the trusts, or in prosecuting or defending any suits, as if he had not been the trustee thereof, Lord Langdale, M. R., held, that the trustee, by virtue of the special contract, was entitled to be paid his bill of costs as a solicitor in a suit respecting the trust.(z)

However, the court will regard with great suspicion a contract between a trustee and his *cestui que trust*, by which the former secures any benefit to himself; and if it be obtained by fraud or any improper means, it will undoubtedly be set aside. Thus, where executors and trustees under a will refused to prove the will, or to suffer the *cestui que trust* to take out administration, until he had executed a deed binding himself to pay 100*l.* to one of the trustees, and 200*l.* to the other, in addition to their legacies, Lord Hardwicke declared the deed to be unduly obtained, and refused to allow those sums to the trustees.(a)

And the contract must be fully performed on the part of the trustee by the execution of the trust, or he will not be suffered to take any benefit from it. As where an executor and trustee consented to act on payment of 100*l.*, and he died before the trust was

(t) *Ellison v. Airey*, 1 Ves. 115.

(y) *Moore v. Frowd*, 3 M. & Cr. 48;

(u) *Willis v. Kibble*, 1 Beav. 559; *Ayliff v. Murray*, 2 Atk. 60.

and see *Ellison v. Airey*, 1 Ves. 115.

(z) *Re Sherwood*, 3 Beav. 338.

(x) See *Re Sherwood*, 3 Beav. 341.

(a) *Ayliff v. Murray*, 2 Atk. 58, 60.

completely executed, his executors were not allowed the 100*l.* out of the trust-moneys in their hands.(b)

And where the trustee is the solicitor of the *cestui que trust*, an agreement between them, that the trustee shall be entitled to his professional charges or any other benefit, is looked upon with equal or even greater suspicion.(c) And the circumstance of the client being a woman would be an additional argument against the validity of such an agreement.(d) Indeed, a solicitor could scarcely hope to support a claim founded on such a contract, unless he could satisfy the court, that the client had been made aware of his rights, and of the rule of law respecting such allowances to trustees, and of the effect of the contract; and the burden of proving these facts will rest with the solicitor.(e) Moreover, it is very desirable that the [577] agreement itself should, in its terms, explain all those *circumstances, and that it should be approved of by counsel, or some other professional adviser, on behalf of the client,(f) as was done in the case referred to above before the Master of the Rolls.(g) Upon this subject, Lord Cottenham, in a late case, said, "the agreement must be distinct, and in its terms explain to the client the effect of the arrangement; and the more particularly when the solicitor for the client, becoming himself a trustee, has an interest personal to himself, adverse to that of the client. It is not easy, in such a case, to conceive how, consistently with the established rules respecting contracts between solicitors and their clients, a solicitor could maintain such a contract, made with his client, for his own benefit, the client having no other professional advice, and in the absence of all evidence, and of any probability of the client (a woman too) having been aware of her rights, or of the rule of law, or of the effect of the contract."(h)

Moreover, the terms of the instrument must clearly and unequivocally authorize the trustee to charge for his professional services, or the claim will otherwise be rejected. Thus where the trust deed provided that all expenses, disbursements, and charges, already or hereafter to be *incurred, sustained, or borne* by the trustees, or any of them, either in professional business, journeys, or otherwise, in the discharge of the trusts, should be paid in the first place out of the produce of the intended sales, and there was a subsequent provision, that each trustee should be at liberty to retain and reimburse himself all such reasonable costs, charges, and expenses, as he might *sustain or be put unto*, as between solicitor and client, it was held by Lord

(b) *Gould v. Fleetwood*, 3 P. Wms. 251, n.

(c) See *Ayliff v. Murray*, 2 Atk. 60.

(d) See 3 M. & Cr. 48.

(e) 3 M. & Cr. 48.

(f) *Ibid.*

(g) *Re Sherwood*, 3 Beav. 339.

(h) *Moore v. Frowd*, 3 M. & Cr. 48.

Cottenham, that these provisions applied merely to expenses *actually paid by the trustees*, and that they did not authorize any charge or remuneration to the trustees for their professional services as solicitors.⁽ⁱ⁾

A claim for allowances of this special nature should be raised by *the answer* of the trustee; and if he omits to do this, and afterwards brings forward the claim *by petition*, he will be decreed to pay the costs of the petition, although the court allows the claim.^(k)

However, the rule of equity, which prohibits trustees from deriving profit, or receiving remuneration for the performance of the trust, may be relaxed at the discretion of the court.^(l) And wherever circumstances render it proper, and for the benefit of the trust, that a trustee should have an allowance for his care and trouble, he may obtain an order for such an allowance by an application to the court, *before he accepts the trust*.^(m) And the practice upon such an application is to refer it to the Master, to inquire whether it will be for the benefit of the trust estate to make any allowance to the trustee, and if so, to fix the amount.⁽ⁿ⁾

Thus in a case where the trustee named in a will was peculiarly fitted for the office from his intimate acquaintance with the testator's affairs, but he refused to act without an allowance for his trouble, Lord Eldon, in his decree, referred it to the Master to fix the proper amount of allowance to *the trustee for past and future services*.^(o) And in a recent case where, by a previous decree, ^[*578] an executor and trustee had been appointed consignee of the trust estate with the usual profits, Lord Cottenham refused to disturb the appointment.^(p)

However, the application for an allowance must be made by the trustee *before his acceptance of the trust*, for after he has once accepted, the court will refuse to allow him any compensation, however arduous the duties may be.^(q)

Where an account is decreed against a trustee, the court will not determine in the first instance, what payments are to be allowed; but it will leave that to be settled by the Master, who will have that power under the usual direction in the decree to make all just allowances.¹ However, it is open to any of the parties to take the opinion of the court on this question, by excepting to the Master's report.^(r)

(i) *Moore v. Frowd*, 3 M. & Cr. 45.

(k) *Willis v. Kibble*, 1 Beav. 560.

(l) *Morison v. Morison*, 4 M. & Cr. 224.

(m) *Brocksopp v. Barnes*, 5 Mad. 90.

(n) *Marshall v. Holloway*, 2 Sw. 453.

(o) *Marshall v. Holloway*, ubi supra; see *Brown v. De Tastet*, Jac. 284.

(p) *Morison v. Morison*, 4 M. & Cr. 216.

(q) *Brocksopp v. Barnes*, 5 Mad. 90.

(r) 2 Dan. Ch. Pr. 887.

¹ Though the usual course in a suit by a *cestui que trust* against his trustee, for

It is of course incumbent on trustees to keep a regular account of their payments, in order that the amount may be allowed them.¹ However, in an early case, where a trustee had incurred large expenses in the management of the estate and conduct of the trust, but instead of giving in a regular account, he made a general claim for 2,500*l.* to cover these expenses, the court, under these circumstances, allowed him 2,000*l.*, although it was of opinion, that he might well have deserved the whole 2,500*l.*(s)

A trustee may have a personal remedy against the *cestui que trust* to recover payment of any sums properly expended by him in the performance of the trust. And this remedy may be enforced by a suit in equity.(t)

[*579]

*CHAPTER VI.

OF THE DISCHARGE AND RELEASE OF TRUSTEES.

THE last subject for our consideration naturally is—the termination of the office of trustee. To effect this to the complete security of the trustee, two objects must be kept in view: 1st. The discharge of the trustee from the office, with its attendant duties and liabilities for the future; and 2d. His release from all responsibility for the past.

And first.—Of the discharge of a trustee from future duties and liabilities.

There seem to be five methods by which this discharge may be effected. The first of these is,—the expiration or full performance of all the trusts, and the conveyance or transfer of the trust property unto, or according to the direction of, the *cestui que trusts*. This mode of putting an end to a trustee's office is so simple and obvious, that it calls for no particular observations, except that the termination of the trusts must of course be satisfactorily proved,(a) and the *cestui que trusts* must also be all *sui juris*, and must have a clear beneficial title to the property. However, in some cases which have

(s) *Hethersell v. Hales*, 2 Ch. Rep. 158.

(t) See *Balsh v. Higham*, 2 P. Wms. 453.

(a) *Goodson v. Ellisson*, 3 Russ. 593; *Holford v. Phipps*, 3 Beav. 434; [ante, p. 229, &c.; 236, 278, 279, and notes; *Taverner v. Robinson*, 2 Rob. Va. 280.]

an account of the trust fund, is to order a reference, yet such reference will not be ordered, where it satisfactorily appears on the hearing that there is nothing due: *Nail v. Martin*, 4 Ired. Eq. 159.

¹ See ante, 570, note.

been already considered, the reconveyance or surrender of a dry legal estate, which has remained unnoticed in a trustee after the determination of the trusts, will be presumed in aid of the title after a sufficient lapse of time.(b)¹

Where a conveyance or transfer of the legal estate is taken from a trustee on the termination of the trust, it is usually accompanied by a release to him from the *cestui que trusts* in respect of all past liability, although we shall see presently that the trustee cannot insist on having such a release.(c)

Again, although the trusts may not be determined, a trustee may be discharged from his office with the concurrence of all the *cestui que trusts* (provided that they are all *in esse* and competent to bind themselves by contract), and the appointment of a new trustee in his place, is not essential to give validity to such a discharge. This, however, is a case that rarely occurs in practice, for reasons that are at once sufficiently obvious.

The third mode of discharging an existing trustee is, by the appointment of another in his place, under a power contained in the trust instrument. The appointment of new trustees under a power is a subject which has been already considered at some length in a previous chapter,(d) and it is unnecessary to pursue it further on the present occasion.

*The death of one of several co-trustees also operates as a discharge from the trust. We have already seen that the whole trust estate, with its attendant powers and duties, will pass to the surviving trustee or trustees on the death of one of their number;(e) and therefore the estate of the deceased trustee will thenceforth be relieved from any *future* responsibility respecting the trust, although, until properly released, it will remain liable for *past* acts done in his lifetime.

Lastly, a trustee may be discharged from his office by the decree of the court, which will either appoint another in his place, or in certain cases will itself undertake the superintendence and discharge

(b) Ante, Pt. II. Ch. II. Sect. 4; [p. 253, &c., and notes.] (d) Ante, Pt. I. Div. III. Chap. I. [p. 175.]

(c) Vide post, [p. 580.]

(e) Ante, [p. 303.]

¹ A sale on a decree, under a prior incumbrance, puts an end to the duties and responsibility of the trustee: *De Bevoise v. Sandford*, 1 Hoff. Ch. 195. A deed of relinquishment of the trust by the trustee, not purporting to convey the estate to any one, is merely inoperative: *Dick v. Pitchford*, 1 Dev. & Batt. Eq. 480. So a deed by a trustee for a *feme covert* to her, will not put an end to the trust; see ante, p. 278, &c., and notes. An authorized purchase by the trustee of the *cestui que trust* will be a merger: *Johnson v. Johnson*, 5 Alab. 90. See ante, 252, note.

of the trust. This is a subject which has undergone discussion in a previous chapter.(f) The effect of a decree of the court, in releasing a trustee *from liability for past transactions*, will be presently considered.

It is obvious, that the discharge of a trustee from his office upon the termination of the trusts, or the appointment of a person to succeed him, will not of itself extinguish the right of the *cestui que trusts* to inquire into the past conduct and transactions of the trustee. Hence, when a trustee is called upon to relinquish the trust, and part with the trust estate, it is usual for him to require a retrospective release from the *cestui que trusts*, or such of them as are capable of binding themselves by contract. And wherever the whole of the *cestui que trusts* are *sui juris*, and the precautions, which will presently be suggested, are observed in the preparation and execution of the release, it may be safely affirmed, that such a release will secure the trustees from any further molestation or question respecting the trust.

However, where the right of the *cestui que trust* to have a conveyance or transfer of the property is perfectly clear and certain, the trustee cannot refuse to make a conveyance or transfer, until a general release from all demands be given to him by the *cestui que trust*. In a late case, a testator gave his residuary estate to trustees in trust to divide it amongst his five children, of whom the plaintiff was one. The plaintiff, upon attaining twenty-one, required payment of her share from the trustees, but they refused to make the payment, except upon her executing a general release. The bill was then filed against the trustees to obtain payment, and Lord Langdale, M. R., held that the plaintiff was not bound to give any such release, or to submit to any such conditions; and upon the refusal of the trustees to pay the money without such a release, she was justified in taking proceedings to obtain payment.(g) (1)¹

(f) Ante, Pt. I. Div. III. Chap. II.
[p. 190.]

(g) *Fulton v. Gilmour*, Rolls, 15th
Feb., 1845. MS. [8 Beav. 154.]

(1) Although a surviving trustee and executor of a will is entitled to such release or acquittance, on paying over to his *cestui que trust* the balance due to him, as will show that the latter is satisfied with the account (subject, only, to the right to surcharge and falsify), such trustee and executor is not entitled to insist on a release by deed. *Chadwick v. Heatley*, [2 Coll. C. C. 137.] If, in a suit by the *cestui que trust* for the payment of the balance, he refuses to execute a release, or to accept the balance in full of all demands, in respect of the estate of which the defendant is executor and trustee, the Chancellor will order the money into court, and direct the accounts to be taken of the testator's estate. *Ibid.*

¹ A trustee paying the trust-money in strict accordance with the tenor of the trusts is not entitled to a release by deed; otherwise, if he is called upon to depart

But wherever the title of the *cestui que trusts* is not perfectly clear, or there is the possibility of any future question arising as to the propriety of *the conveyance or transfer by the trustee, [*581] he will doubtless be justified in requiring a sufficient indemnity from the *cestui que trusts* in respect of any future claims; or in case that were refused, he might insist on having the question determined by the decision of the Court of Chancery.^(h) But it would doubtless be considered unreasonable and vexatious on the part of the trustee to insist on an indemnity for which there was no such probable cause.

The old trustees are frequently required to make over the trust property to other trustees, upon trusts subsequently created by the act of the *cestui que trusts*, and in such cases the old trustees are naturally desirous of having a release, which the new trustees are probably equally reluctant to give. Where the release is confined to the present and future claims of the new trustees upon the old trustees in respect of the trust property made over to them (which amounts in fact merely to an ample receipt), and there is no doubt as to the nature or exact amount of the property transferred, there seems to be no reason why the new trustees should object to execute the release. But they would of course decline to give any release, which extended to past transactions and accounts reaching over a period anterior to the commencement of their interests in the property. Still less would they be justified in putting their hands to any such instrument, where from the dealings of the old trustees with the property, or otherwise, there can be any question or suspicion of the existence of a claim against the old trustees for a breach of trust.

It is almost superfluous to observe, that the parties to a release to a trustee must be competent to bind themselves by deed.⁽ⁱ⁾ And where it is made by the parties immediately on coming of age, the court will require satisfaction, that the trustee has taken no advantage of his influence, acquired during the infancy of the *cestui que trusts*; for the protection of the court to infants does not necessarily cease upon their attaining twenty-one.^(k) Thus in *Wedderburn v. Wedderburn*,^(l) an infant *cestui que trust*, on the third day after his

(h) See *Goodson v. Ellisson*, 3 Russ. 583. to fraud on the part of the infant, ante, p. 144, note (1).]

(i) A release by an infant is merely void. *Overton v. Banister*, 8 Jurist, 996; S. C., 3 Hare, 503. [But see as

(k) *Walker v. Symonds*, 2 Sw. 69.

(l) *Wedderburn v. Wedderburn*, 4 M. & Cr. 50.

from it. Thus where a trust was created by parol for A. for life, and to provide for her funeral expenses, remainder to her two children, and the tenant for life, and remaindermen called for payment, it was held by Vice-Chancellor Kindersley, that the trustee might lawfully insist on a release under seal: *King v. Mullin*, 1 Drewry, 308.

coming of age, executed a release to his trustees, which was based on the result of a complicated account, embracing the transactions of many years, and unsupported by any evidence; and under these circumstances the release, although most ample and conclusive in its terms, was held not to be binding on the infant.(l)

It has been already stated,(m) that a release of this description will not be conclusive, unless the releasing parties were made fully acquainted, both with their own rights, and also with the nature and extent of the liabilities of the trustee.(n) And it would unquestionably be vitiated by any concealment, or withholding of information, or other fraudulent conduct, on the part of the trustee.(o)

Therefore, a full statement of all the accounts and other transactions of the trustee should unquestionably be furnished to the *cestui que trusts*, together with all the information requisite for explaining and understanding them. And it is peculiarly desirable, that those [*582] and all the other material *facts should be distinctly stated or referred to in the instrument itself;(p) and this precaution should more especially be observed, wherever the release is intended to apply to any transaction which amounts to a breach of trust.(q)

Again, although the accounts are clearly stated or referred to on the face of the release, which is founded on the result of those accounts, yet if the basis, on which the accounts proceed, is erroneous and improper, the release will not preclude the *cestui que trust* from enforcing a claim against the trustee. For instance, in *Wedderburn v. Wedderburn*,(r) executors and trustees, who were also partners of the testator, accounted with one of the residuary legatees for his share of the property, and took a release from him on his reaching twenty-one; a valuation of the testator's share in the partnership property had been made under the direction of the trustees, *who credited themselves with the amount of that valuation*, and thus became themselves the purchasers of the testator's share; it was held, that this valuation, and the account founded on it, was open to question by the *cestui que trust*, and consequently that the release, which depended on the account, was not binding on him.(r)

And so if the release in its terms is not final, but is expressed to apply to the claims of the releasing party in respect of *part only* of

(l) *Wedderburn v. Wedderburn*, 4 M. & Cr. 50.

(m) Ante, p. 525, and notes. [Discharge of Breach of Trust.]

(n) 3 Sw. 68; *Wedderburn v. Wedderburn*, 2 Keen, 722; S. C. 4 M. & Cr. 41; see *Charter v. Trevelyan*, Dom. Proc. 8 Jurist, 1015; [1 H. L. Cas. 714.]

(o) *Walker v. Symonds*, 3 Sw. 73; *Wedderburn v. Wedderburn*, ubi supra.

(p) See *Wedderburn v. Wedderburn*, 4 M. & Cr. 41, 50.

(q) *Walker v. Symonds*, 3 Sw. 69; ante, p. 525. [Discharge of Breach of Trust.]

(r) *Wedderburn v. Wedderburn*, 4 M. & Cr. 41, 49.

the property, or of *some* of the transactions of the trustees respecting the estate, the *cestui que trust* will not be precluded from advancing claims not included in the release.(s)

It may be added, that it is very desirable for the *cestui que trusts* to have a separate legal adviser on executing a release to their trustees.¹

A release, taken without the observance of all the preliminary circumstances, and precautions above stated, cannot be relied upon by a trustee as a discharge from the claims of the *cestui que trusts*.² And where a proper case is made out for the interference of the court, relief has been decreed in favor of the *cestui que trusts*, notwithstanding the execution of the release, and after a delay of forty years in instituting the suit.(t)

But where a release has been executed by the *cestui que trusts*, with full knowledge of all the circumstances, after sufficient deliberation, and having had ample opportunity of investigating all the accounts and transactions connected with the trust, it will not be set aside hastily, or upon slight grounds; and some improper circumstances, or considerable errors, must be shown to exist, in order to induce the court to interfere.(u)

And a deed of release properly executed is *prima facie* valid and binding on the parties executing it, and it will rest with them to establish in evidence the facts upon which it may be set aside; especially where many years have been suffered to elapse without questioning its validity.(x)

It has been already stated,(y) that a trustee, who has been compelled to make good to the *cestui que trust* a loss occasioned by the act of his *co-trustee, is entitled to stand in the place of the *cestui que trust* as against his co-trustee, and to claim from [*583] him the amount which he has thus been compelled to pay. If, therefore, the *cestui que trust*, with full knowledge of all the circumstances, and of the relative rights and liabilities of himself and the trustees, makes a compromise or release of his claim against the defaulting trustee, this will operate as a release to all the trustees: for the remedy of the other trustees against the defaulting trustee, will thus have been materially affected by the act of the *cestui que trust*.(z)

(s) 2 Keen, 740; 4 M. & Cr. 48.

(x) Portlock v. Gardner, 1 Hare, 594.

(t) 2 Keen, 742; 4 M. & Cr. 41; ante, p. 527. [Discharge of Breach of Trust.]

(y) Ante, p. 306.

(u) Re Sherwood, 3 Beav. 338; see 77.

(z) See Walker v. Symonds, 1 Sw. 1,

Portlock v. Gardner, 1 Hare, 594; and see Millar v. Craig, 6 Beav. 433.

¹ See ante p. 575 note (1) *ad fin*.

² See ante, p. 525, note.

The case is very analogous to that of a creditor who releases a surety by making a compromise with the principal debtor without the surety's consent.

Although a trustee may have obtained no express release in writing from the *cestui que trust*, the conduct of the latter may amount to such a release; as where the *cestui que trust* suffers a considerable time to elapse without requiring any account or explanation from his trustees after the determination of the trust.

And where the trust has determined, and the property has been made over to the party beneficially entitled, a much shorter period of acquiescence or delay on the part of the *cestui que trust* will preclude him from bringing forward a claim against the trustee for past acts of maladministration, than where the trust is still subsisting, and a running account as it were, open between the parties.^(a) But the length of time which will amount to a bar to a claim against trustees for past transactions, will depend materially on the nature and foundation of the relief sought. If it be simply for an account, without suggesting any cause of fraud or breach of trust, it is conceived that a very few years would suffice to protect the trustee; and probably six years from analogy to the statutory period of limitation to actions at law, would be considered sufficient for this purpose. But where any positive breach of trust is suggested, or *à fortiori*, any case of fraud, a much longer period will be required to operate as a bar; and we have already seen, that in general the period of acquiescence in such cases will commence only from the time when the party is made acquainted with his rights.^(b) The actual number of years which will operate as a bar, will materially depend on the relative circumstances of the parties, and the particular features in every case, it being a matter peculiarly in the discretion of the particular judge to grant or withhold the assistance of the court in these cases. However, the subject of delay and acquiescence, and the extent to which it will operate as a bar to relief in a court of equity, has been already necessarily anticipated in previous chapters.^(c)¹

The last and most effectual method by which trustees may obtain a release from past liability, on the determination or relinquishment of the trust, is a decree of a court of equity. And when a trustee's accounts have been passed in the Master's office, and a decree discharging him from the trust duly obtained in a suit, to which all

(a) See *Wedderburn v. Wedderburn*, 2 Keen, 722, 749; 4 M. & Cr. 52. *Wedderburn v. Wedderburn*, 2 Keen, 722; S. C. 4 M. & Cr. 41, 50.

(b) Ante, Pt. I. Div. II. Ch. II. Sect. 1; and Ch. I. Sect. 3, of this Division; *March v. Russell*, 3 M. & Cr. 31, 42; (c) Ante, Pt. I. Div. II. Ch. II. Sect. 1; and Ch. I. Sect. 3, of this Division.

¹ See ante, 168, 169, notes.

persons interested are made parties, the court will not allow any future claim to be made against him for his conduct in the trust.(d)¹

*From what has been already said in considering the effect of a release from the *cestui que trusts*, it will have been seen [*584] that such an instrument (however apparently ample and conclusive), can rarely be relied upon as an absolute protection against a future claim by the *cestui que trusts*, more especially when the trust has been one of a complicated description, and extending over a long period of years. And it may be safely affirmed, that a decree of the court will be the only valid discharge to a trustee, who has accepted a trust of that nature. And the protection of the court is yet more essential, where the circumstances of the parties—as the existence of a partnership, or other similar communion of interest between them—affords any reason for treating the relation of trustee and *cestui que trust* as still subsisting, and the account still open between them.(e)

We have already seen that the court will recognise the right of trustees to place themselves under its guidance and protection;(f) and that they will be allowed the costs of a suit instituted by them for that purpose.(g)

(d) *Knatchbull v. Fearnhead*, 3 M. 1, this Division; *Coventry v. Coventry*, & Cr. 122; *Low v. Carter*, 1 Beav. 426. 1 Keen, 758; *Greenwood v. Wakeford*,
(e) See *Wedderburn v. Wedderburn*, 1 Beav. 576.

2 Keen, 722; 4 M. & Cr. 41. (g) *Low v. Carter*, 1 Beav. 426.

(f) Ante, p. 543 notes, Ch. IV. Sect. [Ante, pp. 543, 568, and notes.]

¹ See Moore's App., 10 Barr, 435.

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[N. B. THE REFERENCES ARE TO THE STAR PAGING IN BRACKETS.]

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